

The Business *of* Television



Updated and Expanded
SECOND EDITION

KEN BASIN

A **Focal Press** Book

ROUTLEDGE


“Ken knows where the money is hiding in Hollywood, and this book teaches you how to find it. It’s an indispensable resource and a fascinating read for insiders and lookie-loos alike.”

—**Matthew Belloni**, Founding Partner of Puck; former Editorial Director of *The Hollywood Reporter*

“Ken Basin is equal parts lawyer, historian, and oracle. The second edition of *The Business of Television* is a skillful summary of the history of the TV business and an insightful map of its future: a definitive resource on how to understand the industry we work in today, and prepare ourselves for whatever happens tomorrow.”

—**Chris Corabi**, President of Business & Legal Affairs of Annapurna

“Ken Basin’s book is a brilliantly written encyclopedic treatise on every aspect of the television business, and a valuable asset to both seasoned professionals and newcomers to the field.”

—**Jim Gianopulos**, Former Chairman & CEO of Paramount Pictures and 20th Century Fox

“Ken’s masterful new edition is destined to become the touchstone for anybody who wants a thorough, thoughtful, and expert explanation of the current state of the scripted U.S. TV business. Accessible and clear, it’s a pleasure to read.”

—**Cliff Gilbert-Lurie**, Co-Managing Partner of Ziffren Brittenham LLP

“Ken Basin is the professor of television, and *The Business of Television* is the go-to resource trusted by professionals across the industry. This new edition is both history and how-to for the streaming era, reflecting Ken’s particular knack for understanding and respecting the perspectives of companies and creatives alike.”

—**Tara Kole**, Founding Partner of Johnson Shapiro Slewett & Kole, LLP

“This second book by Ken Basin is a Herculean effort and result. It provides a remarkable in depth but very understandable overview and analysis of deal making and related issues in the US television industry. I highly recommend the book for both those looking to work in this industry in any capacity, as well as those who already are so engaged.”

—**Jared Levine**, Partner at Yorn Levine Barnes Krintzman Rubenstein Kohner Endlich, Goodell & Gellman

“An illuminating journey through the ever-evolving landscape of television and streaming, written by a true insider. This newly updated edition is a must-read for anyone seeking to navigate this dynamic industry with clarity and foresight.”

—**Philip Matthys**, Head of Business Affairs of Apple TV+

“This book is on the desk of every respected television executive in the business. Ken has written the definitive guide to the ever-changing TV business, a must-read for anyone that wants to work in any aspect of the television industry.”

—**Jenna Santoianni**, President of MRC Television

“The second edition of *The Business of Television* again offers great insights and up-to-date detail on the inner working of the television industry, but it also ranges beyond conventional updates in its ambition to predict, and even prescribe, intriguing pathways for the healthy future of our industry.”

—**Dan Scharf**, Global Head of Business Operations of Amazon Studios

“There is no better guide to navigate the rapidly changing TV business with than Ken’s newest edition here—an opportunity to look back, observe the current, and chart the next course. Not many people in the TV business go beyond the layer of information needed to be competent; with this primer, Ken offers you an opportunity to innovate and thrive!”

—**Jesse Sisgold**, President & Chief Operating Officer of Skydance Media and Chairman of Skydance Sports

“The second edition of Ken Basin’s *The Business of Television* is an essential resource for everyone from the industry newbie to the seasoned pro. Deeply researched and eloquently delivered, Ken offers a practical guide to navigating today’s evolving world of television and media with insight into industry trends and practices, the nuts and bolts of entertainment finance, and a crib sheet for pragmatic dealmaking. Every single executive, representative, and creative person has something to gain from this book!”

—**David W. Stone**, Co-Founder of TFC Management and TFC Productions

“It’s no small feat for Ken Basin to keep up with the rapid changes in TV dealmaking, but this second edition proves he’s more than up to the task. Which is good, because it’s going to take many more editions to chronicle an industry far from done evolving.”

—**Andrew Wallenstein**, President & Chief Media Analyst of Variety Intelligence Platform; former Co-Editor-in-Chief of *Variety*

“Ken Basin is the mad genius of the TV business—the man who knows how to make the deals that make television. And his book is just like him—brilliant, perceptive, forthright, thoughtful, innovative, and deeply human. Anyone working in television, from the fresh-faced assistant to the flighty creative (hi!) to the seasoned exec, will find it useful, insightful, revelatory, inspiring.”

—**Brian Yorkey**, Creator and Showrunner of *13 Reasons Why* and Pulitzer Prize-winning playwright of *Next to Normal*

“Ken has once again contributed a valuable tool to our industry, written with insight, experience and humor. Everyone from industry newcomers to experienced executives, inside and outside the realm of business affairs, will find something new and valuable to take away from this book.”

—**Carmi Zlotnik**, President of Television of Legendary Entertainment

Praise for the First Edition

“Ken Basin has a talent for explaining the TV industry in a way that makes sense to lawyers and laypeople alike. *The Business of Television* is the essential reference guide for creative professionals.”

—**Josh Berman**, Writer and Executive Producer; Creator, *Notorious*, *Drop Dead Diva*, *The Mob Doctor*, and others

“As a practicing lawyer, producer and now professor teaching film artists, this book is a wonderful combination of real workplace knowledge with an understanding of how the television industry functions; an accessible and brilliant book.”

—**Barbara Boyle**, Associate Dean, Entrepreneurship and Special Initiatives, UCLA School of Theatre, Film, and Television

“Ken Basin has created a timely and unique book that perfectly balances a big-picture view of the dynamic television industry with practical details about its business and legal processes. This is an essential reference source for anyone studying or engaging in professional activities related to television production and distribution for all media platforms.”

—**Stuart Brotman**, Alvin and Sally Beaman Professor of Journalism and Media Law, Enterprise, and Leadership; Nonresident Senior Fellow in the Government Studies Program, Center for Technology Innovation, The Brookings Institution

“I never knew how much of the television business I didn’t know until I read this book! This is THE comprehensive how-to manual on the business.”

—**Jamie Erlicht**, Head of Worldwide Video Programming, Apple TV+

“A masterful job! Basin provides a readable and comprehensive guide to the uninitiated, while offering knowledgeable insiders a valuable and incisive analysis of this ever-evolving industry.”

—**Bert Fields** (1929–2022), Entertainment Attorney; Partner, Greenberg Glusker Fields Claman & Machtinger LLP

“In *The Business of Television*, Ken has found a way to encapsulate the knowledge that has taken me 40 years in the industry to learn. If every producer, manager, agent and lawyer in our industry took the time to read Ken’s book and really invest in understanding each step in the process of making a great TV show, we could all save a lot of time and pain.”

—**Steve Golin** (1955–2019), Founder and CEO, Anonymous Content LLP

“This book would not make a good TV show. It is, however, about as comprehensive and readable a guide to how television gets made as you can find. I’ll admit, after over a quarter of a century in the business, there are things in here I didn’t know. With an insider’s perspective and a lawyer’s clarity, Ken Basin lays it all out (even the technical stuff). It is an essential reference book, both dictionary and encyclopedia, for anyone interested in the serious business of television.”

—**Chris Keyser**, Writer and Executive Producer; Creator/Showrunner, *Party of Five*, *The Society*

“This is the book I have been waiting for . . . highly readable and forward looking, providing a coherent overview with enough specifics to be of genuine practical value, delivered from the inside perspective of a scholarly television executive currently working at the highest level.”

—**Nick La Terza**, Adjunct Professor and Lecturer in Law,
UCLA School of Law, University of Miami Law School, and
UCI Law School; Partner with law firm The Point Media;
Former Senior Legal/Business Executive for Largo Entertainment,
New World Pictures, and Alliance Atlantis Entertainment

“With *The Business of Television*, Ken Basin has created a powerful tool for people of all levels of experience in the television business. In an industry where the rules are being re-written daily, Ken has found a clear through-line that delivers a foundation of knowledge that you can use to jump in and begin to re-write the rules yourself.”

—**Chris Parnell**, Senior TV Programming Executive,
Apple TV+; former Co-President, Sony Pictures Television Studios

“In the fast-changing environment of the television business, it’s never been more important to understand how things are, how they used to be, and where they are going next. This book covers all you need to truly grasp the business of making great TV.”

—**Amy Powell**, Head of Entertainment Marketing, Amazon Studios;
former President, Paramount Television Studios

“EVERYONE hates Business Affairs people—but NO ONE hates Ken Basin. That’s because he’s smart, honest, and helpful, and because he behaves with honor. Turns out he writes that way, too. I thank him for explaining the future to me.”

—**Billy Ray**, Writer, Director, and Executive Producer; screenwriter of
The Hunger Games, *Captain Phillips*, *Shattered Glass*, and others

“Ken Basin has given us a great primer in the nuts and bolts of the rapidly evolving television business—told with insight, brevity, and wit. Basin’s experience on both sides of the buyer/seller equation really shows through, and makes this book a valuable tool for anyone who wants to understand the business side of the shows we love to watch.”

—**Dan Scharf**, Global Head of Business Operations, Amazon Studios

“It takes a keen analytic mind and experienced dealmaker like Ken Basin to craft this indispensable guide to anyone looking to navigate the increasingly complicated world of TV production.”

—**Andrew Wallenstein**, President & Chief Media Analyst,
Variety Intelligence Platform; former Co-Editor-in-Chief of *Variety*

THE BUSINESS OF TELEVISION

In this expanded and updated second edition, esteemed television executive and Harvard lecturer Ken Basin offers a comprehensive and readable overview of the business, financial, and legal structure of the U.S. television industry, as well as its deal-making norms.

The Business of Television explores the basic structure and recent history of the television and streaming business, rights and talent negotiations, intellectual property, backend deals, licensing, international production, and much more. This expanded and updated second edition also features an in-depth exploration of the evolution of the streaming business, offers valuable new insights about negotiation, reflects the historic impacts of the 2020 Covid-19 pandemic and 2023 WGA and SAG-AFTRA strikes, addresses the intersection of artificial intelligence technology and intellectual property law, and provides a greater breadth and depth of technical material about a wide variety of common television deals. The book also includes breakdowns after each chapter summarizing major deal terms and points of negotiation, a significantly expanded glossary, an extensive list of referenced articles and cases, and a wealth of real-world examples to help readers put the material into context.

Written for a diverse audience of working or aspiring creative professionals, executives, agents, managers, lawyers, and students, *The Business of Television* is the definitive reference guide for the ever-changing television industry.

Ken Basin is a long-time executive leader in the television industry, innovating new models in content licensing and production management across head and senior business affairs roles at Paramount Television Studios, Sony Pictures Television, and Amazon Studios. Recognized by *Variety* as one of “Hollywood’s New Leaders” and by *The Hollywood Reporter* in its annual “Next Gen Executives” (“35 Under 35”) feature, Ken most recently served as Global Head of Business Operations (Film/TV) at Riot Games, where he also executive produced the second season of the Emmy Award-winning *Arcane*.



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Ken Basin

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DISCLAIMER

The information in this book concerns an industry that is changing so quickly. Much of the material it discusses may have evolved significantly between the time the author submitted the manuscript to his publisher (in May 2024) and the time you picked it up off the shelves. Therefore, now might be a good moment to see whether a more current edition of the book is available. Go ahead, we'll wait right here.

Also, while the information contained in this book is intended to inform (and perhaps even entertain), it is not intended to be, and should not be relied upon as, legal advice. The information is all of a general nature, and how it applies to any particular individual or situation may vary significantly depending on the facts. The author is a lawyer, but the author is not *your* lawyer, and nothing about this book creates an attorney-client relationship between you and the author. If you need advice about a specific situation, you should probably go hire a qualified, experienced entertainment lawyer of your own. There are many fine ones out there.

This book takes great care to avoid making sweeping and absolute generalizations, and is peppered liberally with qualifiers like “usually,” “typically,” “generally,” and “as of this writing.” The only reason it is not even more densely packed with such qualifiers is because it would eventually make the whole thing an unreadable slog. Unless the text says “always” or “never”—and “almost always” and “almost never” don't count—no unqualified absolutes are intended.

Finally, while this work is largely based on the author's years of experience as a practicing attorney and business executive, it was created by the author entirely in his capacity as an individual scholar and observer of the entertainment and media industries. Although the author has received valuable input

from many sources (for which he is most grateful), ultimately, all of the observations, opinions, and predictions set out in this book belong to the author alone and should not be understood to represent the positions or interests of any of the author's past or present employers, colleagues, clients, or academic institutions.

Sorry for that. Again, this book was written by a lawyer. What did you expect?

HOW TO USE THIS BOOK

This book is written to provide information and insights of value to a variety of audiences, including law students, business students, film and television students, lawyers, agents, managers, entertainment executives, and active and aspiring creative professionals. While any reader is invited and welcome to start on page one and read all the way through to the end, different sections of this book are likely to provide particular value to you, depending on your specific position, interests, and level of prior understanding.

Chapters 1–3 (respectively, “A Beginner’s Guide to the Television Industry,” “Streaming: The End, Present, and Future of Television,” and “How Television Is Developed, Produced, and Distributed (and How Streaming Broke Television Distribution)”) are designed to provide a broad introduction to television *as an industry*. In other words, they look to answer questions like: what is television, as an industry and a medium, and what are its defining characteristics? Who are the major players in the television industry, and how do they interact? What is the relationship between television and streaming, and how does streaming both reflect and challenge traditional assumptions about television? How has streaming changed during the medium’s short history, and how is it poised to evolve further? How does a television series move from a one-line idea to a fully produced series, and how is that process different for traditional versus streaming series? How do tax incentives work, and how have they impacted the creative and business landscape of television? How does a company maximize the value of, and derive profits from, the distribution of a television series (and how did streaming fundamentally upend that paradigm)? These chapters examine the television industry from an altitude of 30,000 feet and provide an important foundation for the information that follows—but one which may be less critical for readers who have prior direct experience within the industry.

Chapter 4 (“The Intellectual Property Context of Television (or, When Do You Need to Acquire Underlying Rights?)”) is a miniature legal treatise. It provides a foundation in the basic elements of copyright, trademark, defamation, rights of privacy and publicity, and First Amendment law that shape the market for television adaptation of existing intellectual property. It is by far the most legally technical section of the book. Lawyers with particular knowledge and experience in these areas may find this chapter unnecessary, although it can serve as a helpful refresher even for practicing attorneys who have not recently revisited these legal concepts. Non-lawyers may find this chapter to be a helpful window into the world of law . . . or they may want to avoid it altogether.

Chapters 5–10 (respectively, “Underlying Rights Deals,” “Writing and Non-Writing Producing Deals,” “Directing and Production Management Deals,” “Acting and Casting Deals,” “Backend,” and “Overall and First Look Deals”) offer detailed point-by-point breakdowns of the key substantive terms of a variety of agreements entered into between studios on the one hand, and talent (i.e., writers, producers, directors, and actors) and rightsholders on the other hand, in connection with the development and production of original scripted television series. If Chapters 1–3 examine the industry from an altitude of 30,000 feet, Chapters 5–10 do so at ground level, discussing not just the critical areas of negotiation in these deals, but also the typical ranges of outcomes, as well as some variations in approaches and policies. These chapters are likely of greatest use to individuals who may need to negotiate or personally enter into these types of agreements (although, to reiterate from the disclaimer, they are no substitute for experienced, high-quality representation). Once a reader has familiarized themselves with these sections, a series of “Quick Reference Guides” offers simple bullet-point summaries for several of the key deal categories. These Quick Reference Guides may be of particular use to young practitioners and negotiators.

Chapter 11 (“Network and Streaming Licenses and Studio Co-Production Deals”) continues the ground-level examination of the industry, but with a focus on the licensing and distribution (rather than development and production) of original scripted television series. In addition to providing information on historical license models (which persist in broadcast television), Chapter 11 explores streaming’s unique issues and practices, identifying the critical areas of negotiation and ranges of typical outcomes in deals between major corporate studio and network entities. This chapter is of greatest interest to individuals who work (or are interested in working) at a studio or network-type organization, as well as to those who have an interest in the large-scale economics of television production and licensing.

Chapter 12 (“Unscripted Television”) attempts to encapsulate the same types of topics covered in Chapters 5 through 11 but with focus on the unscripted television business (which is otherwise largely excluded from the balance of the book). This chapter may not be a substitute for a dedicated full-length book

about the unscripted television business, but it provides a useful introduction. It does so, however, primarily by comparison and contrast with corresponding concepts in the world of scripted television, and so this chapter should ideally be read after Chapters 5 through 11.

Finally, Chapter 13 (“On Negotiation”) is a departure in tone and substance from the rest of the book, embracing a less scholarly and more personal voice to offer direct advice for young negotiators (and for young professionals of all types) about how to be a good negotiator. In a book that is almost entirely dedicated to offering objective information and describing the industry at it was, is, and is going to be, Chapter 13 is transparent about presenting the author’s subjective perspective (and with it, a vision of how the industry could, or perhaps should, be in the future).

Throughout its text, this book works hard to describe not only the “what” of the television business, but also the “why.” The two most common misconceptions about the extremely specific, unintuitive, and jargonistic patchwork of deals that holds the television industry together are (1) that these deals reflect great underlying wisdom and insight and are exactly as they should be, and (2) that these deals are semi-arbitrary and are a jumble of custom and practice that is divorced from basic reason and sense. The messier reality is that both statements are partially true. This book therefore seeks to address not only what the prevailing structures and norms are (and, at times, to predict what they will be in the future), but also to explain the practical impacts and implications of these structures and norms for the day-to-day reality of the business, and to offer a historical perspective on how they came to be—one subtle iterative change (and one occasional debilitating strike) at a time. For those who aspire to do their jobs with as much nuance and sophistication as possible, the “why” is every bit as important as the “what,” and the “what was” is every bit as important as the “what is.”

The Introduction gives readers a crash course in the “Streaming Wars” (including how and why Netflix “won”), while the Conclusion makes predictions for the industry’s post-“Peak TV” era and offers suggestions about the business models, programming strategies, and deal structures that may help set the industry on a course toward a more vibrant and sustainable future.

Finally, the glossary offers a helpful and detailed introduction to, or refresher on, the language of the business.

At various times, the book will mention or discuss facts, trends, events, and transactions that are so current that they remain(ed) unresolved as of the time this second edition’s manuscript was submitted to the publisher. These usually include a reference like “as of this writing,” which can be understood to mean in the months immediately leading up to May 2024.

One last note: for a true industry deep dive, read the footnotes, which are chock full of explanatory material, additional defined terms, historical lessons, self-indulgent jokes, and occasional lawyerly hedges.

PREAMBLE

Making television entertainment is a team sport. The process of developing, producing, and distributing original television programming is a collaboration among literally hundreds of individuals—producers, directors, writers, actors, artisans, craftspeople, drivers, and more. And behind those individuals are a series of executive teams employed by the studios and networks behind those shows—development executives who help craft the story and creative direction of a proposed series; “current” executives who foster the show’s creative direction once in production; production executives who help set and manage budgets and translate a creative vision into a physical production plan; lawyers who help document agreements and identify and manage risks; accountants and finance executives who measure and manage money flows; research, marketing, and programming executives who help the show find an audience; distribution executives who monetize the produced show in other markets; and a network of assistants (administrative and otherwise) working tirelessly to join their ranks. Entire books can be (and have been) written about the issues facing any one of these roleplayers.

This book is written primarily from the perspective of the U.S. television studio business affairs executive.¹ To understand the significance of and

¹ In addition, unless otherwise noted, this book also primarily represents the perspective of a *scripted* television business affairs executive. While there is naturally some overlap between scripted and unscripted television, unscripted television presents a host of distinct business and legal issues—a small sample of which is discussed in Chapter 12. Outside of that chapter, while much of the information contained in this book may be instructive, in part or by analogy, for unscripted television, it should not be considered a directly adaptable guide. News and sports programming are also subject to unique legal issues and norms around dealmaking, production, and distribution, and are not covered at all in this book.

reasons for that particular point of view—beyond the fact that, self-servingly, the author has spent most of his career as a U.S. television studio business affairs executive—it is helpful to break down each part of the phrase (albeit out of order).

The “television studio” is the entity responsible for the financing, development, production, and distribution of television productions, and the core rightsholder for such productions, traditionally controlling every facet of their worldwide exploitation. Through a mix of relationships with talented, independent freelance creative service providers and salaried full-time employees, the studio is the factory that churns out television product (for the most part, well outside the view or understanding of the general public). The studio is uniquely at the crux of television dealmaking, both up the chain of development (with rightsholders and service providers) and down the other side (with co-producing studios and network licensees). Hence the focus on the unique role of the *studio* business affairs executive, rather than the network executive or talent representative. The studio’s key “hub” position in the industry’s dealmaking chain makes it an ideal perspective from which to evaluate the industry overall.

A “business affairs executive” is an individual, usually (but not always) a lawyer with years of dealmaking experience, who negotiates the substantive terms of all of the agreements to engage, acquire, or otherwise incorporate the major elements that transform a show from a nascent idea to a produced series debuting on a television network or streaming platform. In the simplest terms, when a creative executive points at something—a book to adapt, a script to develop, an actor to hire, a network to sell to—and says, “I want that,” the business affairs executive’s job is to get it for them on commercially sensible terms. Yet this description understates the role of the business affairs executive who, in successful practice, is not only a dealmaker but also a problem solver, who must use a combination of business and legal acumen to reconcile the needs and desires of competing (and sometimes single-minded) constituencies into something resembling a feasible course of action.

While business affairs, as a function, is sometimes combined with an explicitly legal role (i.e., “business and legal affairs”), the “business affairs” viewpoint is conceptually distinct from that of “legal affairs” (which is concerned primarily with the drafting and negotiation of paperwork reflecting previously negotiated substantive terms) or of “counsel” (which, to the extent separate and distinct from “legal affairs,” concerns itself with other risk management and legal compliance issues). Taking the “business affairs” perspective here is valuable for a variety of reasons. The essential legal principles of contracts, tort, intellectual property, and other blackletter legal areas apply consistently in television as they do in other fields. The business context of the industry, however, is defined more by custom and practice than by abstract legal principles, and the industry’s key substantive deal structures reflect the characteristics of the medium. This drives this book’s focus on conventionally “business affairs,”

rather than “legal affairs,” issues. The one exception here is Chapter 4, which provides an overview of key legal issues informing the dealmaking context for underlying rights.

Finally, it is important to emphasize the “U.S.” portion of the phrase “U.S. television studio business affairs executive.” The television industry in the United States is characterized by a number of extremely particular customs and practices, not all of which are applicable in other markets. For example, television production outside the United States is often characterized by shorter production runs (both in terms of the number of episodes produced per “season” of programming, and the total number of seasons a successful series will run); increased reliance on a single writer to provide most or all of the scripts for a given series; and substantially less control, in the form of options and exclusivity, exercised by studios over talent. In addition, many international television industries are defined in large part by the dominant influence of government-owned or subsidized national broadcasting services (such as the British Broadcasting Corporation (“BBC”) in the United Kingdom, the Australian Broadcasting Corporation (“ABC (Australia)”), and comparable organizations worldwide). By contrast, the U.S. television industry is a federally regulated but essentially private market. The distinct cultures and histories in these territories give rise to different economic models and dealmaking norms, which are not discussed in detail in this book.

The first edition of *The Business of Television* was intended as a gift from the author to his 25-year-old self. It is the book the author wished had existed when he was just starting in his career, a one-stop resource for answers to the basic questions he was afraid to look stupid by asking (starting with “what’s the difference between a studio and a network?”). The second edition still strives to be that resource, and to continue to serve that core audience of young professionals, but it has also broadened its ambitions.

This second edition is significantly broader and deeper in its technical content, hoping to also offer a valuable resource to mid-career (or later) professionals who are faced with more complex dealmaking scenarios, or who do not always enjoy the support they need from their own bosses and employers to fully develop themselves as professionals. It aims to help these mid-career professionals develop a more robust toolkit from which they can fashion new solutions to novel problems. It is also more narrative, attempting to memorialize a brief and incomplete history of some of the key trends and milestones that have shaped this one-of-a-kind era of disruption.² It is sometimes more personal and prescriptive, occasionally (but always thoughtfully and transparently) crossing the line between “describing things how they are” and “describing things as the author thinks they could or should be.” But it also always strives to offer a

² But only to the extent the author feels qualified to discuss them, which is probably the answer anytime a reader asks, “But why didn’t you talk about X?”

nuanced and balanced perspective, and to present the world of television deal-making as one in which there are many ways to “do it right.”

At its heart, this second edition is an idealistic gambit. It is an effort to help us all save some time and misery by getting us all on the same page, at least on a few basics. It is a bet that, armed with a deeper, more sophisticated and nuanced understanding of their work, professionals can go about that work with the kind of confidence it takes to be creative, practical, thoughtful, generous of spirit, and comfortable with responsible risk. Those qualities are essential both to the long-term economic success of the industry, and to recapturing the sense of joyfulness that those who work in it seem to have largely lost over the recent turbulent years.³

3 It also hopes to persuade owners of the first edition that it is very much worth their while to buy the second. No promises are made for a third.

INTRODUCTION

The Streaming Wars are over. Netflix won.¹ Let's just get that out of the way up front.

The phrase “Streaming Wars” was coined by the entertainment industry trade press (and eventually begrudgingly adopted by executives and artists) to describe the period of intense competition in the media and technology sectors to dominate the streaming video market, particularly following the emergence of Netflix and Amazon as major exhibits of premium original content, and the subsequent efforts made by most of the entertainment industry's major powers to compete with these streamers head-on by launching their own subscription video on-demand services.

Based on Google Trends, “Streaming Wars” seems to have entered the industry lexicon during the fall of 2015, peaking in prominence in December 2015. During that mid-to-late 2015 period: (1) multiple online news sources began regularly reporting on major additions and removals for original and licensed content streaming on Netflix and Amazon; (2) the most-watched show in streaming was the third season of Netflix's *Orange is the New Black*, a thirteen-episode binge drop in June; (3) Netflix made its first deal for premiere global distribution rights for an original feature, *Beasts of No Nation*, which debuted in October; (4) Netflix expanded into several additional major territories, including Italy, Portugal, Spain, and Australia; and (5) Amazon debuted its inaugural slate of premium dramas (including *Bosch*, its first true commercial hit). But just as quickly as the term caught fire, it faded back into relative obscurity, with brief mini-spikes of interest in December 2016 (when Amazon

1 The concept of “winning” to be defined later.

2 Introduction

unexpectedly announced that it was expanding its Prime Video service nearly worldwide effective immediately), December 2017 (when Disney announced its acquisition of the majority of Fox, a few months after having announced its plans to launch what became Disney+ and ESPN+), and December 2019 (the month after the launch of Disney+, and just as press ramped up for Warner Bros.'s May 2020 launch of HBO Max).² The phrase “Streaming Wars” never appears in the first edition of *The Business of Television*.

There is no universally accepted start date for the Streaming Wars era, but one could reasonably argue for June 6, 2015—the date on which Netflix announced plans to expand its service into Italy, Portugal, and Spain later that year, and its anticipated availability around the world by the end of 2016. Netflix went on to achieve that goal almost a year ahead of schedule, when it announced at the January 2016 Consumer Electronics Show (“CES”) that it was immediately launching its service in another 130 countries, thus expanding its reach worldwide.³ Netflix’s June 2015 announcement left no doubt that the battle for dominance in streaming would be waged all around the world. *Orange Is the New Black*’s third season debuted just six days later, and the arms race that would lead to the coining of the phrase “Streaming Wars” a few months later was on.

Even if the world could not yet recognize it, however, the Streaming Wars era arguably began over two and a half years before it was christened as such—on February 1, 2013, when Netflix debuted its second original series, *House of Cards*. The groundbreaking and cinematic drama quickly distinguished itself as the first original streaming series on any platform to achieve widespread viewership, critical acclaim, and cultural impact.⁴

Nor is there any universally accepted end date for the Streaming Wars era,⁵ but a good candidate is July 20, 2023—the date on which Nielsen published its weekly ratings report for the June 19–25 viewing window, with *Suits* unexpectedly claiming the #1 slot with *2.3 billion minutes watched* during that one-week period.⁶ A week later, *Suits* held onto the #1 position in Nielsen’s rankings with

2 And then one more time, bigger than ever, in June 2022, when Paramount+ released a “television special” on Paramount+ called *South Park: The Streaming Wars*. It was, for all intents and purposes, an ordinary episode of *South Park*, but it was seemingly characterized by Paramount Global as a “television special” to get around the requirements of its \$500 million deal giving Max exclusive streaming rights to “all episodes” of the series. Warner Bros. Discovery sued Paramount over the maneuver in February 2023; the litigation is ongoing as of this writing.

3 “Worldwide” here excludes Mainland China (where no U.S. streamer has successfully launched a local service), and countries and regions subject to U.S. sanctions, such as Crimea, North Korea, Syria, and (more recently) Russia.

4 *House of Cards*’ immediate and dramatic impact on the television business is discussed at length throughout Chapters 1 (pg. 13), 2 (pg. 53), and 3 (pg. 101).

5 Nor even a consensus that it has ended, though this Introduction will make its case for that later.

6 Thus, this book’s frequent mentions of “the Streaming Wars era” can generally be understood to refer to roughly the period from mid-2015 through mid-2023.

3.14 billion minutes watched during its second week of availability on Netflix, shattering the prior one-week streaming viewership record of 2.49 billion minutes.⁷ Within its first four weeks of dropping on Netflix, the show tallied over 12.8 billion minutes viewed, and eventually secured the title of “most-streamed show of 2023.”⁸ The explosive success of *Suits* was remarkable not only because the show had completed its original series run on USA almost four years earlier (in September 2019), but because it had already been available for streaming on Peacock before—and in fact remained available there even after—its debut on Netflix on June 17, 2023.⁹ By that time, Netflix had already established itself as the place where good shows that had failed to thrive on struggling linear networks could be “discovered” by wider audiences, finding major success with—and eventually taking over as the premiere network for new seasons of—Lifetime’s *You*, YouTube’s *Cobra Kai*, and NBC’s *Manifest*. But *Suits* was a cultural phenomenon of a higher order, and its renaissance highlighted Netflix’s unique ability to leverage its unparalleled global scale and industry-leading recommendation algorithm to make megahits out of shows that could never achieve the same kind of success on any other platform.¹⁰

But counterintuitively, the beginning of the end for Netflix’s victory was arguably what seemed like the company’s greatest moment of weakness—on April 19, 2022, when Netflix issued its earnings report for the first quarter of 2022, revealing it had, for the first time in its history, *lost* subscribers. Netflix’s stock price and market capitalization had peaked only a few months earlier, at over \$305 billion in October 2021. By the time it released its 1Q23 earnings report in April 2022, its market capitalization had already declined by about half, to around \$152 billion. By the close of trading the next day, it had lost another 35% of its value. The stock eventually bottomed out in May 2022, having declined in value by over 75% from its October 2021 peak. As of this writing, it sits at about \$250 billion.

A confluence of factors had contributed to what the trade press has since dubbed the “Great Netflix Correction” (or alternatively, the “Great Netflix Freakout”). After decades of unusually low inflation rates in the United

7 That prior record had been set on Netflix by NBC’s *Manifest* in June 2021, right around the time that NBC canceled the series after its third seasons due to persistently low ratings for its exhibitions on the network. Netflix picked up the show for a fourth and final season, which was released in two batches (in November 2022 and June 2023).

8 It is important to recognize that Nielsen’s streaming ratings are based on total minutes viewed, without any adjustment for total number of available minutes or the number of distinct viewing individuals or households. Consequently, its ratings systematically favor shows with deep libraries of many episodes that can be binged for hours and hours—in the case of *Suits*, 134 episodes over nine seasons. Also, the viewership figures for *Suits* during this period reflect total consumption across both Netflix and Peacock, though the vast majority of those minutes viewed came from Netflix.

9 Peacock is owned by NBCUniversal, the same Comcast-owned conglomerate that owns Universal Content Productions, the studio that produced *Suits* for USA (an NBCU-owned network).

10 See Chapter 3, Section C.i.a (pg. 129).

States, inflation began to climb in late spring 2021 (following major supply chain disruptions and massive government stimulus spending due to the 2020 Covid-19 pandemic). After almost a decade of unusually low interest rates, the Federal Reserve was forced to respond to this new inflationary pressure with rapid, substantial, and sustained interest rate hikes. This spike in interest rates, together with the general economic turbulence, also ground private capital markets to nearly a halt, suddenly choking off the industry's longstanding easy access to both debt and equity financing. As the pandemic abated, viewers pried themselves away from their television sets and started going back out into the world (just as the suddenly high rate of inflation forced many consumers to re-evaluate their discretionary spending).

But as traumatic as it was in the moment, the Great Netflix Correction also helped secure Netflix's place at the pinnacle of streaming. In hindsight, the market's immediate and dramatic reaction to the bad news in Netflix's 1Q22 earnings report did not represent the investor class's reappraisal of Netflix as much as it represented its reappraisal of the streaming business in general. Most of the major content companies saw significant growth in their stock prices after the onset of the Covid-19 pandemic in March 2020 forced people into their homes, where they largely passed the time by signing up for more streaming services and dramatically increasing their content consumption. Like Netflix, most had begun to steadily shed those gains once inflation began to ramp up in mid-2021, and each also saw its own precipitous decline in the months after the Great Netflix Correction.¹¹ The sudden decline in these companies' fortunes

11 Disney's market capitalization peaked in March 2021 at nearly \$360 billion. When the Great Netflix Correction hit in April 2022, it had already fallen to \$203 billion, and continued to slide from there, reaching \$172 billion (a roughly 50% decline from its peak) in June 2022, and a low point of \$145 billion in October 2023 (a roughly 60% decline from its peak). As of this writing, it sits just over \$200 billion.

Paramount Global's market capitalization also peaked in March 2021, at about \$62 billion. By the start of the Great Netflix Correction, it had dropped to about \$21 billion (a decline of over 65%), and has continued to decline steadily ever since. As of this writing, it sits at about \$8 billion (down over 85% from its March 2021 high).

The market capitalization of Comcast (owner of NBCUniversal) peaked in September 2021 at nearly \$285 billion, had already declined to about \$215 billion (a decline of about 25%) when the Great Netflix Correction hit in April 2022, and bottomed out in October 2022 at about \$124 billion (a drop of over 55% from its peak). As of this writing, it sits at just over \$150 billion.

Even the mighty Apple and Amazon felt the pain around this time. In the two months after the start of the Great Netflix Correction, Apple lost nearly \$500 billion in market capitalization (from just over \$2.6 trillion to a bit over \$2.1 trillion, a loss of nearly 20%). It has since recovered tremendously, briefly crossing the \$3 trillion mark in July 2023. As of this writing, it sits at about \$2.8 trillion. The market capitalization of Amazon (whose retail business was another big beneficiary of the pandemic) peaked in July 2021 at nearly \$1.9 trillion, had already declined to under \$1.5 trillion (a drop of over 20%) when the Great Netflix Correction hit, fell below \$1.1 trillion in June 2022, and continued to drop through December 2022, when it bottomed out at just under \$870 billion (down over 45% from its peak). It too has recovered mightily, and currently sits near its all-time high at about \$1.9 trillion. (Thanks to MacroTrends.net and YCharts.com for this data.)

brought a swift end to the irrationally exuberant spending, relentless pursuit of subscriber growth, and endlessly expanding content supply of the prior decade. In their place came a renewed focus on old-fashioned business fundamentals like gross profit, free cash flow, debt service, and reducing overhead to expand margins. This put a swift end to the companies' ability to wage the Streaming Wars with the same intensity (and profligacy) as they had up to that point.

No one was better positioned to weather the sudden change in the business climate than Netflix, which had by that time already run up a huge lead in subscriber count, achieved sustained profitability, and already begun to ask hard questions about whether it was approaching the limits of the total addressable market for its service. Just as importantly, up to that point, Netflix had arguably been waging the Streaming Wars with one hand tied behind its back, rejecting advertising wholesale and tolerating extensive password sharing among its users. The collapse of its stock price caused Netflix to quickly unshackle itself and, as the market now clearly demanded, make an aggressive turn toward maximizing revenue and profit.¹² Almost immediately, it abandoned its long-standing aversion to advertising, announcing an upcoming lower-cost "ad tier" offering. Netflix's ad-supported service option launched in November 2022, and quickly overtook its classic ad-free offering in Average Revenue Per User ("ARPU"), one of the core metrics used to evaluate streaming businesses. It also began cracking down on password sharing, and managed to do so in a way that avoided the wave of account cancellations that many feared would accompany such a crackdown. Netflix's market capitalization overtook Disney's at the beginning of June 2023 and the company has never looked back; its value currently exceeds Disney's by about \$50 billion.

But what does it mean to say that Netflix has "won" the Streaming Wars? To answer that question, it helps to consider the main arguments and potential definitions offered by one of the most prominent analysts who disputes the idea, the anonymous executive/Substack writer and Ankler contributor Entertainment Strategy Guy ("ESG").¹³

In a January 2024 post, ESG declared that his "Most Important Question of 2024" was "Has Netflix already 'won' the streaming wars?" (and that he would return to that question throughout the year).¹⁴ His initial answer was "not yet," principally citing (1) YouTube's ongoing dominance in total digital video

12 See Chapter 2, Section B.i (pg. 72).

13 Despite his anonymity, ESG has won significant respect as an industry analyst, and his pieces (especially those published in the Ankler) are widely read by high-level entertainment executives.

14 ESG's annual "Most Important Questions" offer an interesting rolling snapshot of the ebbs and flows of the Streaming Wars and the ongoing disruption of the entertainment industry in general, and the television business in particular. For 2019, he says the question (had it been asked) would have been "*Can the new streamers succeed in streaming?*" In 2020, it was "*What is the same and what is different between streaming and traditional entertainment?*" There was also a bonus question for 2019/2020, "*Who will win the battle between aggregators (streamers) and bundlers (devices/*

consumption; (2) the fact that Netflix still commands less than a 10% total share of “TV living room viewership” (well short of the 20%–25% that would represent an “equal share” of a theoretical future market with five survivors);¹⁵ (3) hope expressed by several studio streamers to achieve sustainable profitability by the end of 2024; (4) the role still to be played by device manufacturers and other “bundlers” of streaming services; and (5) ongoing competition for consumer time and attention from FAST channels,¹⁶ vMVPDs,¹⁷ and social media-based content platforms like TikTok. These arguments suggest a few critical threshold questions to consider.

First, passing judgment on the end of the Streaming Wars and/or Netflix’s victory herein substantially depends on what types of companies one views as being among the combatants in the Streaming Wars in the first place. YouTube represents perhaps the best argument that they have not yet been decided, as it perennially leads all platforms in the battle for the time and attention of digital video consumers. However, this second edition of *The Business of Television* adopts as its foundation a definition of “television” that intentionally excludes YouTube (and other purveyors of mostly short-form, user-generated, and—the Mr. Beasts of the world aside—modestly budgeted content, including in social media).¹⁸ Correspondingly, this book treats the “Streaming Wars” conflict as being among unbundled consumer-facing content platforms, and thus includes all major and minor subscription video-on-demand (“SVOD”) services¹⁹ and FAST channels, but excludes YouTube (and other short-form/user-generated content-oriented platforms), social media platforms like TikTok, and platform aggregators/bundlers (including device manufacturers and vMVPDs). Therefore, when ESG argues that Netflix has not yet won the Streaming Wars, he defines that conflict in much broader terms than this book does.

Second, as ESG also acknowledges in his analysis, it is also important to define what it means to “win” the Streaming Wars. ESG offers at least six potential answers: (1) “*Yes, Netflix has already won, and no one else can catch up*”; (2) “*Netflix has already won, but ‘Big Tech’ will also win*”; (3) “*Netflix is leading and has a ‘seat’ at the table*”;²⁰ (4) “*Netflix hasn’t won, because the*

operating systems)?” In 2021, it was “*Is streaming ‘winner-take-all’/will streaming become more competitive?*” In 2022, “*What does the next generation of cord cutters look like?*” And, in 2023, “*How do entertainment companies (both traditional and tech) change their strategies in 2023 (and beyond)?*”

15 Though YouTube does not appear on the chart that ESG uses to illustrate this point, it appears to be accounted for in the calculation of Netflix’s sub-10% share of TV living room viewership.

16 See Chapter 2, Section A.vii (pg. 60).

17 See Chapter 2, Section A.ix (pg. 64).

18 See Chapter 1, Section A.i (pg. 14).

19 See Chapter 2, Section A.vii (pg. 60).

20 ESG actually presents this as two variations on a theme—Netflix is leading and has a “seat” at the table and “*there are only one or two seats left at the table*,” or Netflix is leading and has a “seat”

battle for viewership is still in the air (FASTs, AVOD, Social and vMVPDs)”; (5) “Netflix hasn’t won, because Aggreddon²¹ is still in play”; and (6) “Netflix may win, but it could take a while.”

ESG dismisses Answer #2—and with it, the general perspective that we can partially or entirely disregard Amazon and Apple when assessing the Streaming Wars because they “are playing a different game”—as cheating. The author acknowledges that this is a reasonable position, but still contends that Amazon and Apple must be evaluated on at least somewhat different terms, because of their overwhelming scale and the ancillary position of their content operations within their broader businesses. Because this book’s framing excludes bundlers and aggregators from the Streaming Wars, Answers #4 and #5 are not viable options for its analysis.²² And Answer #6 does not sound like much of a definition of “winning” at all (and concerns itself more with when Netflix will be able to fully reap the benefits of its victory than whether it has “won”).

Using ESG’s framework, this leaves us with a definition of “winning the Streaming Wars” as either Answer #1 (“Yes, Netflix has already won, and no one else can catch up”) or Answer #3 (“Netflix is leading and has a ‘seat’ at the table”). This book views either or both answers as being true based on the following observations, which both speak to how far ahead of its rivals Netflix is today, and to how poised it is to maintain and expand upon its already dominant position.

First, Netflix continues to dominate its rivals in subscriber count, with about 270 million subscribers worldwide as of this writing. Its closest rival, Amazon, has 230 million subscribers worldwide, but this figure reflects total Amazon Prime subscriptions, and thus overstates the number of subscribers meaningfully engaging with the company’s Prime Video service. Disney reports about 150 million subscribers for Disney+, 50 million subscribers for Hulu, and 25 million subscribers for ESPN+; but these numbers are also misleading, because many consumers subscribe to two or three of Disney’s streaming

at the table and “there are several seats left.” Both of these statements could be true at the same time, depending on how one defines the “table.” In the author’s view, there are only one or two seats left at the table for premium SVOD platforms, and several more at the “kids’ table” for a crop of free, ad-supported platforms. The latter might be considered analogous to smaller countries that participated in combat during the first and second World Wars, and in some cases finished the wars without ever having been “conquered,” but which did not meaningfully participate in determining the post-war world orders and are not commonly thought of as among the “winners,” as that title is usually used to describe the major powers like the United States, United Kingdom, and Russia.

21 ESG’s favored coinage for the structural dominance of device and operating system companies like Roku, Amazon, Apple, Samsung, Google, and others.

22 This book does include FAST channels in its analysis, and believes there is a sustainable place in the content market for such services, but none shows any indication that it poses a real challenge to Netflix in revenue, scale, or longevity. Outside of YouTube and social media, pure AVOD is, at least for the moment, functionally dead, and therefore does not impact the analysis. See Chapter 1, Section A.ii (pg. 17).

services via a discounted bundle, and Disney treats each such bundle as an individual subscription for each service.²³ All other competitors currently sit well below 100 million subscribers.

Second, despite being the youngest company with the least diversified business among the major competitors in the Streaming Wars, Netflix seems to have cemented its long-term place as the most valuable company among them (excluding Amazon and Apple, whose streaming businesses would account for only a small portion of their enormous revenues, expenses, and market capitalizations).

Third, thanks in no small part to its superior scale and market value, quarter after quarter, Netflix consistently delivers the best results in terms of revenue, profit, and free cash flow. And because it has only the one product, Netflix can continue to aggressively invest in that product's growth without any concern about the adverse impact on (already declining) legacy businesses (which complicates the decision-making of the traditional entertainment companies). That structurally puts Netflix, whose single product is wholly self-sustaining, in a much stronger position than the studio streamers, most of whom are still funding their investments in streaming with revenue from the pay TV and theatrical distribution businesses that are slowly but steadily being killed by streaming.²⁴

Fourth, the market's post-Great Netflix Correction reorientation has fundamentally changed how the streamers are approaching their competition with one another. It is axiomatic in business that a focus on profit and free cash flow comes at the expense of growth (and vice versa), and within the new norms and expectations set for the market by Wall Street investors, it seems doubtful that any of Netflix's rivals can reasonably hope to overtake it in scale. Indeed, the goals and tactics of nearly every streamer have changed so dramatically due to the combined impact of the mid-2022 market correction and the 2023 WGA and SAG-AFTRA strikes that one could reasonably argue the Streaming Wars are over simply because the terms of engagement among the competitors are so radically different from what they had been since the dawn of the conflict. (By that logic, Netflix can be declared the winner not because it vanquished its rivals, but simply because it was in such a strong leading position when the clock on the Streaming Wars suddenly ran out due to broader market forces.)

Fifth, among all major streaming services, Netflix enjoys strong and sustained leads in two of the most essential metrics used to measure the health and success of these businesses—ARPU (described earlier) and “churn” (the

23 Moreover, as of this writing, Disney is in the process of more fully integrating Hulu into the Disney+ product, although it continues to offer standalone subscriptions to Hulu (at least for the time being).

24 Notably, Warner Bros. Discovery recently reported that its streaming business had broken into profitability, though the company continues to struggle overall, and its claim of profitability relies on including subscriber fees for HBO shared by MVPD partners as “streaming revenue.”

percentage of subscribers who cancel or let their subscriptions lapse each month).²⁵ While Netflix's competitors' push toward profitability will almost certainly entail raising prices and reducing content spends, which will boost their ARPUs, they will be hard-pressed to catch up with Netflix's dominant position on that metric. Moreover, the conventional wisdom is that the same tactics that would boost ARPU will cause at least some increase in these streamers' average churn rates.

Sixth, the legacy studios are finally facing a potentially serious backlash from their MVPD partners in pay TV, which have lost their patience with the studios' extraction of value from the pay TV business to fund new ventures for which their MVPD partners do not share in the benefits (and which, in fact, are actively harmful to the MVPDs' businesses). The pivotal moment here was the most recent carriage dispute between Disney and Charter Communications, which resulted in Disney channels (including the ABC broadcast network) being pulled from Charter's Spectrum cable television service for almost two weeks in September 2023. Carriage disputes between network owners and MVPDs are very common, and they have long been known for highly adversarial hardball negotiations and aggressive public-facing mutual recriminations when negotiations break down and a content provider's networks temporarily go dark on the MVPD's service. But the September 2023 dispute between Disney and Charter was unique for the way that Charter openly characterized its firm position as a response to Disney's activities in streaming, and its suggestion that it no longer viewed its declining cable television service as a core asset and that its dispute with Disney could therefore accelerate the company's exit from that business altogether. Disney and Charter eventually struck a deal,²⁶ and the conflict quickly faded from the news. Nevertheless, this carriage dispute was the first to be contextualized explicitly in reference to the structural changes overtaking the television business, and Charter's open speculation about exiting the MVPD business altogether was a shot across the bow that will likely echo in carriage disputes in the years ahead. This will put significant additional pressure on the studio streamers, further hampering their ability to compete with and "catch up to" Netflix.

And seventh, Netflix is only beginning to unlock its own full potential, and it is well-positioned to expand significantly on its recent successes. There

25 Disclaimer: by some measures, Hulu dominates all competitors in ARPU, but those figures reflect significantly higher monthly revenue (\$70 per month or more) from its Hulu with Live TV vMVPD offering.

26 An interesting and important component of that deal was Charter securing the right to offer its own customers discounted subscriptions to Disney's streaming services (while retaining a share of that subscription revenue). This arrangement recalls the traditional relationship between MVPDs and premium pay networks like HBO (in the years before HBO's own expansion into streaming), whereby the MVPDs aggressively marketed HBO's service on its behalf, while taking a substantial cut of the HBO-specific subscription revenue that they generated from their customers.

remains significant untapped value in Netflix's advertising business to be unlocked as more new subscribers opt for its ad tier and more existing subscribers "downgrade" to it in response to rising prices for Netflix's ad-free tier (thus increasing the number of captive eyeballs that Netflix can monetize with advertisers), and as Netflix leverages its technology to develop more powerful and sophisticated ways to target and serve ads than its rivals can offer (which will increase the "CPM," or price per thousand impressions, that it can charge to advertisers). At the same time, over the last two years, longstanding industry-wide norms about maintaining exclusivity over the availability of streaming content have been broken,²⁷ just as the runaway success of *Suits* has illustrated Netflix's singular capacity to find (or manufacture) hits in unexpected places. Netflix thrived in its early years on content licensed from traditional studios that eventually recognized that they were essentially feeding a monster that could someday consume them, but they carried on because they needed the money. It looks poised to thrive that way once again.²⁸

If we can agree (at least for the moment) that Netflix has indeed won the Streaming Wars, how did it achieve that victory?

Much of Netflix's success can be attributed to good luck, good macroeconomic circumstances, and Netflix's savviness in capitalizing on both. As the first major streaming service, Netflix enjoyed a tremendous first-mover advantage. It built up its service on major movies and TV series that studios were initially willing to license to it very inexpensively, because those suppliers simply had no concept of their content's value in the unfamiliar streaming market. In time, the studios were able to command higher license fees in such deals, and they came to recognize Netflix as a dangerous competitor (and not simply an exciting new source of free money). But even once that realization set in, it was still months (if not years) before the studios meaningfully acted upon it (by cutting off Netflix's access to most of their best content), because they had become so addicted to the revenue they were still extracting from Netflix. Moreover, as the first major streaming service in the market, Netflix was able to largely define the medium's distinct characteristics according to its own business practices, while making its name virtually synonymous with streaming in the public consciousness.

Netflix also came of age in an era of virtually unprecedentedly favorable macroeconomic conditions for a company of its type. Low interest rates and robust capital markets allowed Netflix to inexpensively fund much of its rapid global expansion without reliance upon cash on hand. At the same time, the investor

27 See Chapter 2, Section B.vi (pg. 89).

28 Beyond giving Netflix many more opportunities to discover its "next *Suits*," the regrowth of its second-run licensing business may allow Netflix to reduce its spending on much costlier original content (which Netflix had embraced in part because it anticipated the studios pulling back on licensing their own content to Netflix).

class's phase of preoccupation with tech-style growth, its surprising temporary indifference to bedrock business principles like revenue and profit, and its willingness to treat Netflix as a technology company rather than as a media company for purposes of corporate valuation metrics, all combined to give the company tremendous latitude to spend wildly and ignore free cash flow for years as it aggressively expanded.

With its roots as a Silicon Valley technology company, Netflix was much better equipped than the studio streamers to master the engineering of its user interface (generally acknowledged by both consumers and industry insiders as the best among the streamers) and recommendation algorithm (which is widely viewed as best-in-class²⁹). And, because of its singular focus on its pure-play streaming business, Netflix was even able to do so with greater speed and success than its native technology company rivals at Amazon and Apple (for which access to engineering resources for their digital video products always had to be balanced against competing demands for the same resources from other divisions). Netflix's technological achievements provided its subscribers with the best user experience available in the market, while helping to make those subscribers the most engaged and brand-loyal in the industry.

Finally, having taken a huge lead over its rivals in scaling up its streaming business, Netflix has effectively leveraged and capitalized on that scale to drive further growth and continue to outcompete its rivals. The success of *You*, *Manifest*, and *Cobra Kai* on Netflix demonstrated the platform's ability to make hits out of original series that struggled to find audiences elsewhere, while the success of *Suits* has now shown its unique capacity to do the same even with library series that have never previously enjoyed widespread popularity. In short, literally any show, new or old, has a better chance of succeeding on Netflix, simply because it is on Netflix and not some other service. That is a powerful message, which will further increase Netflix's desirability to (and therefore potentially further decrease its costs for) talent and studio partners alike. Netflix's superior scale has also made it easier and less risky for the company to evolve beyond certain policies and philosophies, like its institutional aversion to advertising, that had previously limited the company's revenue and growth.³⁰ That scale allows Netflix to safely take positions and adopt practices that others cannot, such as its recent dramatic pivot toward data transparency (putting Netflix far ahead of all of its rivals on that topic, which is of vital interest and importance to the talent and studio communities).³¹

29 See Chapter 2, Section B.ii (pg. 75).

30 If only it would also reconsider its strident positions in favor of binge release and against theatrical exhibition. See Chapter 2, Sections B.iii (pg. 80) and B.viii (pg. 95).

31 See Chapter 2, Sections B.iv (pg. 84).

Why did Netflix win, then? In part, because it was lucky. But just as importantly, because it made the most of the advantages afforded to it by that early luck.

So, what does Netflix's victory mean for its streaming rivals? To answer that question, it helps to first look back at the two potential definitions of Netflix's "winning the Streaming Wars" that this Introduction settles upon: "*Yes, Netflix has already won, and no one else can catch up,*" and "*Netflix is leading and has a 'seat' at the table.*" Neither of these definitions suggest that Netflix's victory means that all of the other streamers should pack up their balls and go home.³² The concept of the Streaming Wars never demanded that there be a sole surviving victor. Most of these companies still have futures to fight for and more "seats at the table" to secure.³³ But Netflix has not only claimed its seat at the table; it has firmly planted that seat at the head of the table. At this point, everyone else is at best fighting for "second place."

Of course, the entertainment industry also has a way of keeping those at the head of the table in the hot seat. The mantle of "America's most-watched network" has been held, at various times, by each of the four major broadcast networks. Time and time again, once seemingly invincible industry powerhouses, such as MGM (under Louis B. Mayer) and RKO (under Howard Hughes) have fallen from grace, gone through painful bankruptcies, been taken apart for scrap, or disappeared from existence altogether. Just because Netflix (or any other company) "wins" does not mean its fight is truly over—or that it will ever be.³⁴

32 This echoes one of ESG's pragmatic arguments for rejecting the declaration of Netflix as winner of the Streaming Wars: that such narratives, once widely embraced as reality, can have major effects on companies' strategies, and that broad acceptance of Netflix's coronation could therefore significantly impact final outcomes. Think of it as Schrodinger's Streaming War.

33 The author pointedly declines to identify which companies he believes do have futures to fight for and which do not.

34 If Netflix itself has any doubt about this (which the author suspects it does not), it can just ask Blockbuster.

1

A BEGINNER'S GUIDE TO THE TELEVISION INDUSTRY

A What Is Television?

What is television?

As a threshold matter, understanding the business and law of television requires a working definition of the term. And while the general notion of “television” is no doubt familiar to everybody, a functional definition can prove surprisingly elusive.

Is television a technological medium? In its earliest form, television could be understood in essentially technological terms—a telecommunications medium for transmitting audiovisual information via radio frequency electromagnetic waves, typically in the “very high frequency” (VHF) or “ultra-high frequency” (UHF) spectrum ranges. Yet from very early in the history of the television industry, alternative transmission media, starting with “community access television” (CATV) systems and later developing into cable and satellite systems (which rely on coaxial cable and microwave transmissions, respectively), challenged the completeness of this purely technical understanding of the term.

Is television definable as a creative medium with certain specific, consistent elements? Certainly, there are creative and production trends which are common to television programming, yet these trends vary and evolve across television platforms and over time, with lines that tend to blur. Television has therefore proven unsusceptible to an all-encompassing creative definition that is responsive to the medium’s evolution over the years. Program lengths vary. The line between comedy and drama is fluid. Shows may be serialized or episodic. Unscripted television both adopts and challenges traditional notions of television storytelling, while some ambitious creators have experimented with formats that merge scripted and unscripted elements into a single hybrid

production. The early internet age brought with it “second screen” experiences delivered via viewers’ smartphones and tablets. These technologies gave rise to an explosive new market for user-generated short-form content distributed via freely accessible social media and video distribution platforms, eventually supplanting large-screen televisions as the primary content consumption device for many younger viewers. More recent technological developments have brought with them creative experimentation in interactivity, branched narratives, and virtual and augmented reality experiences. In time, these technological advancements, along with the rapid expansion of consumer access to broadband internet, attracted to the business a group of powerful technology companies that quickly supplanted traditional broadcast and cable companies as the dominant suppliers of television content. In so doing, these deep-pocketed challengers disrupted virtually every traditional norm of television production, distribution, and exhibition—as well as the fundamental economics of the industry—in ways that the entire television ecosystem is still struggling to reckon with.

When commercial television broadcasting began in the early to mid-twentieth century, it was an ephemeral, unrecordable experience; broadcast over the airwaves; covered only a few hours a day;¹ featured three principal sources of original content; displayed low-resolution, black-and-white images; and relied on boxes half the size of a refrigerator with screens barely larger than an iPad boasts today. Today, consumers take for granted virtually unlimited viewing options from virtually unlimited sources of content; recording, time shifting, and on-demand consumption; high-definition images sharp enough to see the pores on an actor’s nose; and viewing devices ranging from pocket-sized smartphones to 85-inch high-definition screens with theater-quality sound. How does one unify these wildly different experiences in a single working definition?

i Defining (and Re-Defining) “Television”

The first edition of this book, published in 2018, proposed as its foundation a brief but broad definition of “television”: “the distribution of audiovisual content to individual consumers, at times and locations and on devices of their own choosing.”

This definition was designed to incorporate streaming platforms delivering content directly over the internet to a variety of devices, while distinguishing television from, for example, theatrical feature film distribution, which essentially requires viewers to go from where they are to the content, rather than the other way around. At the same time, it was deliberately drafted broadly enough to capture short-form videos on internet platforms like YouTube as a

1 Anyone remember test patterns?

species of television, which largely retained the key hallmarks of the television medium (as described later in this section). But the experience of intervening years demands a reconsideration of this expansive conception of the term.

In the years leading up to 2018, traditional media and cable companies were investing heavily in short-form content as a cornerstone of the future of their businesses. The preceding years had seen the emergence of a series of multi-channel networks (or “MCNs”), such as Maker Studios, Fullscreen, AwesomenessTV, and Machinima, that functioned as creatively coherent “networks” that cultivated close relationships with talent and developed distinct audiences on YouTube’s massive (but otherwise largely undifferentiated) platform. Their early success attracted aggressive investment from traditional media and entertainment companies, who also viewed them as incubators for talent that would eventually transition to more conventional careers in film, television, and music. In 2014 alone, Disney acquired Maker Studios for a reported \$500 million; the AT&T-backed Otter Media acquired a controlling stake in Fullscreen in a deal valued between \$200 million and \$300 million; and AwesomenessTV was acquired by DreamWorks Animation (“DWA”), which soon sold stakes to Hearst Corporation (in 2014) and Verizon (in 2016) that valued the company as high as \$695 million. In 2016, Machinima was sold to Warner Bros. Digital Networks for nearly \$100 million. Over the same period, these companies and their partners/investors launched ambitious new ventures that competed more directly in traditional film and television markets. AwesomenessTV began producing full-length, low-budget features and scored a major hit with 2018’s *To All the Boys I’ve Loved Before* on Netflix. Meanwhile, several ambitious new subscription streaming services launched, offering “premium” short-form content that would compete for young eyeballs with long-form premium streaming services like Netflix and Hulu. In 2015, Comcast and Verizon launched Watchable and Go90, respectively (with Verizon affiliate AwesomenessTV as a major content supplier for both), while Fullscreen launched its own SVOD offering in 2016. But by 2018, these businesses were all showing signs of strain, and the first edition of this book—which covered them only in passing—noted:

This ecosystem of short-form content, which was largely born and nurtured on YouTube before expanding to a number of proprietary services with major investment from conglomerates like Verizon, AT&T, and Comcast, may warrant its own book—if it survives at all.

It did not. Fullscreen abandoned its SVOD service in 2017, while Watchable and Go90 shuttered in 2018. The same year, Comcast (which had since acquired DWA) sold AwesomenessTV to Viacom for roughly 1/14th of its peak valuation. By 2019, Maker and Machinima were both defunct, with Fullscreen following in 2021. The reasons ranged from gross mismanagement during these MCNs’ chaotic early years, to cultural incompatibility between these youthful start-ups

and their older corporate backers, to their simple inability to come up with sustainably profitable business models.

As these businesses failed, it also became increasingly clear how different both the talent and the audiences of the short-form world were from those of the broader television ecosystem (including the major long-form streamers). Short-form content viewers demonstrated little willingness to pay for the kind of content they had long enjoyed on YouTube for free. Except for the ever-durable YouTube, video services largely gave way to social media services (especially Snapchat and TikTok) as the primary platforms for short-form content exhibition; and on these platforms, improvised and/or transparently commercial content easily performed as well as more “creative” productions. “Stars” of film and television who dipped their toes into short-form content frequently proved to have little cultural cachet with young viewers, while the “stars” of YouTube similarly struggled to “cross over” to mainstream success. Perhaps more importantly, they also showed increasingly little interest in doing so, instead embracing the personal freedom, direct audience engagement, and—at least at the highest levels—staggering financial prospects of “being their own bosses,” owning their own content, and working independently on these platforms. The notion of short-form content as a “minor league” for talent on their way to the “big leagues” of film and television lost salience, and by 2022, one widely-reported survey indicated that one in four “Zoomers”—members of Generation Z (or “Gen Z”), born roughly between 1997 and 2012—aspired to become not actors or musicians, but “influencers” (a word that wasn’t even added to some dictionaries until 2019). By 2022, the financial and operational investment of traditional entertainment companies in short-form content production and distribution was a tiny fraction of what it had been only five years before.

Perhaps the apotheosis—and the death knell—of the conception of short-form online content as “television” was the staggeringly fast rise and fall of Quibi. Founded as “NewTV” in August 2018 by former Walt Disney Studios and DWA chief Jeffrey Katzenberg and former eBay CEO Meg Whitman, the company quickly attracted \$1.75 billion in investment, including contributions from virtually every major American entertainment company, all of which committed to produce original content for the service. Billing itself as the first true “premium short-form streaming service” (Watchable, Go90, and Fullscreen notwithstanding), Quibi explicitly targeted “digital-native” Millennial and Gen Z audiences with unprecedentedly high-budget (up to \$25,000 per minute) short-form content, featuring high-level stars and creators from traditional film and television, all available to customers exclusively via smartphones and tablets. Quibi invested heavily in designing an inviting and innovative app, which leveraged its focus on mobile devices to offer the first-of-its-kind ability to view content in both portrait and landscape aspect ratios. The Quibi service launched with a bang in April 2020, and collapsed with a whimper in October of the same year.

Katzenberg defiantly ascribed the company's failure to the coronavirus pandemic and the resulting shutdowns, which effectively eliminated a critical use case for Quibi as mobile entertainment for commuters. Mandatory quarantines also rendered catastrophic the company's initial decision not to offer its service on smart televisions or set-top boxes (on which it first became available in October 2020, only weeks before Quibi shut down altogether). But most industry observers regarded Quibi's demise as a failure of concept rather than circumstances, a product for Millennials and Gen Zers that was designed and delivered by well-meaning but ultimately clueless Baby Boomers. The featuring of Hollywood stars like Kevin Hart, Laurence Fishbourne, and Christoph Waltz, involvement of powerhouse filmmakers like Antoine Fuqua and Sam Raimi, and adaptation of classic formats like *The Fugitive* failed to attract and retain young subscribers, many of whom were unfamiliar with these "stars" and unmoved by Quibi's uniquely high production values for short-form. In winding up its business, Quibi sold its library of 75 original programs to Roku, which rebranded them as Roku Originals on its Roku Channel, where viewership by Roku's older-skewing audience promptly surpassed the total viewership of the same content over Quibi's roughly six months in existence.

In light of these developments—the inability of “premium” short-form content to out-compete low-budget, user-generated alternatives; the failure of subscription and other conventional business models in short-form; the retreat of traditional entertainment and media companies from short-form (and resulting lack of overlap in the major corporate players active in the short- vs. long-form spaces); and the apparent non-interchangeability of both talent and audiences in short- vs. long-form—it now seems more appropriate to regard short-form and user-generated content (and the individuals and businesses that produce and deliver it) as independent and distinct from television content and industry.

Consequently, this second edition has revisited its working definition of “television” to maintain this distinction, and now uses the following revised definition instead: **The distribution of professionally produced audiovisual content, to individual consumers at times and locations of their own choosing, which is principally (but not necessarily exclusively) intended for consumption on non-mobile devices.**

ii What Makes Television Television?

Beyond the foregoing definition, television programming has long been built around three key, enduring characteristics. While these features—like most everything else about television—have been substantially challenged and destabilized by the rapidly evolving environment of the “Streaming Wars”

era (roughly 2015–23), they remain essential to understanding the web of deal structures that bind the television industry together.²

First, television is a writer-driven medium. To understand the meaning of this statement, it is helpful to compare the role of the writer in television to that of the writer in the theatrical feature film industry. In television, for the vast majority of cases, a writer is the lead creative force behind a series, known as the “showrunner.” This is in contrast to feature films, where the director is typically the “auteur” creative force behind a production. In television, most of the credited producers of a series are writers, who shepherd the project throughout its life cycle. In feature films, on the other hand, the writer’s role is generally performed entirely during the pre-production phase and, although writers may be employed during production to help with on-set rewrites, they have little control over (and may have little or no ongoing role altogether in) the actual production of their scripts. In television, a pilot script is usually (though not always) written by a single individual or writing team, who conceptualizes the world of the series and takes the studio and network’s notes throughout the series development process. This, too, is at odds with the feature world, particularly that of big-budget studio films, where writing is often effectively done by committee, with new writers commonly being hired to rewrite the work of previous writers without working in direct collaboration with one another. Finally, in television, a pilot³—and sometimes even a series—has traditionally been greenlit to production on the strength of a pilot script and the reliability of the writers and producers, with actors and directors being hired after the threshold decision to proceed to production has been made. This has also long been a major difference from feature films, where the attachment of one or more key actors (and typically a director as well) has long been essential to pushing a film project from development into production. The decline of pilots and the need to break through the crowded marketplace of the Streaming Wars era has made networks (especially streamers) increasingly likely to emphasize casting in making greenlight decisions, while the migration of filmmakers from the feature world into television has raised the stature and creative influence of directors in the medium. Nevertheless, the “writer/script-only” decision-making model for greenlights largely persists in the broadcast space, and writers have generally

2 The term “Streaming Wars” is widely used to describe the fierce competition among the current crop of premium subscription streaming platforms to lure subscribers and achieve sufficient scale to survive a widely expected (and seemingly inevitable) pruning in the number of streamers in the market. There is no universally acknowledged start or end date for the “Streaming Wars” (and some might reasonably argue that they are still raging on). This book will occasionally use the phrase “Streaming Wars era” to describe this distinct competitive era, in each instance referring to this rough period from 2015 to 2023.

3 A “pilot” (sometimes also referred to as a “prototype”) is a standalone episode of a television series that is used to establish and demonstrate the style and content of a proposed television series, and to persuade a network to order production of a full season’s worth of episodes for that series.

retained their dominant role in the creative leadership of television productions across all platforms. That dominance continues to manifest itself in the process, and the deals, that bring a series to life.

Second, television is a serialized medium. This may or may not be the case in a creative sense—some dramas, such as FX's *The Americans* or HBO's *Succession*, involve complex, arced storylines which unfurl over a period of years (and require that the viewer watch from the beginning of the series to truly follow along), while other types of shows, such as multi-camera comedies (e.g., CBS's *The Big Bang Theory*) and procedural dramas (e.g., “cop shows” such as NBC's *Law and Order* and CBS's *CSI* franchises), integrate some serialized character or situational development, but can generally be understood and enjoyed in single-episode viewings. But from a production perspective, a successful television series is always an ongoing project, which requires creative and production continuity over a period of years (as distinct from a theatrical feature film, in which cast and crew together come together once, usually over a continuous or semi-continuous period of time, to produce a single closed-ended project). Again, the Streaming Wars era has challenged this norm, with streamers often featuring single-season “limited series”⁴ and generally favoring the launch of buzzy new shows over the long-term continuation of existing hits with degrading audiences. Nevertheless, the standard dealmaking framework of television still protects the studio and network's ability to maintain continuity of production and distribution over a period of years.⁵

4 “Limited series” are creatively designed and intended to run for a single season from inception, and usually feature story arcs that wrap up neatly by the end of their final episode. In earlier eras, such programs were usually referred to as “mini-series,” although a true “mini-series” (as that term was long used in broadcast and cable television) also comprised fewer episodes than a standard full-length season of a standard ongoing series (which is frequently not the case for contemporary “limited series”). That said, some networks that hope for a series to run for multiple years nevertheless advertise it as “limited” for marketing and/or awards purposes. This is often the case for anthology series (such as FX's *American Horror Story*), which are intended to persist over multiple seasons, but which feature new storylines, characters, and performers (or past performers in totally new roles) in each season. Each such season is typically submitted for consideration in the (usually) less competitive “limited series” categories for the Emmys, Golden Globes, and other major awards.

5 This is often true even for bona fide limited series, to provide the studio and network with the opportunity to convert the series from “limited” to “ongoing” if the initial production is creatively and commercially successful enough to warrant the effort. This can be achieved by continuing the story from the first season (as with HBO's *Big Little Lies*) or by anthologizing the series and developing a totally new story under the same title (as with HBO's *True Detective* and *The White Lotus*, or FX's *Fargo*). Indeed, one might reasonably argue that a “limited series” is, at least in some cases, simply an ordinary television series for which no one has yet figured out where to take the show after its first season. Unfortunately, however, subsequent seasons of shows that began as bona fide limited series often generate diminishing returns both creatively and commercially, as illustrated by the aforementioned *Big Little Lies* and *True Detective* on HBO (although *True Detective* was eventually revived with a better-received third season, which led HBO to title and market another new limited series under the *True Detective* brand).

Third, television as a business relies on a dual revenue model. In general, entertainment economics can be divided into two categories—"direct pay" and "advertiser-supported." The classic "direct pay" system is the theatrical feature film, in which viewers go to a movie theater and pay for a ticket to gain access to the product, with a one-to-one relationship between viewers and tickets. The classic "advertiser-supported" model is exemplified by terrestrial radio, in which entertainment is made freely available over the airwaves and collecting user fees is virtually impossible, so the money that makes the industry run comes from advertisers, who pay for the opportunity to convey their messages to customers.⁶ The modern television ecosystem, however, features a combination of "direct pay" (in the form of transaction and subscription fees from viewers) and "ad support" (with advertising remaining a dominant presence on most television platforms). In the long term (and as explained in greater detail in the chapters that follow), virtually every piece of television content produced today is made viable through a combination of "direct pay" and "ad-supported" revenues, regardless of its initial distribution platform.

B Who Are the Players (and How Do They Interact)?

Who made *House of Cards*, the show that launched the Streaming Wars era?

If you answered "Netflix," you would be wrong. Netflix exhibits *House of Cards* throughout most of the world, but the show was actually produced (and is owned) by a company called Media Rights Capital ("MRC"), which was then known primarily for its feature films such as the raunchy talking-bear comedy *Ted* (2012) and science fiction epic *Elysium* (2013), and has since produced major streaming series such as *Ozark* (Netflix) and *The Terminal List* (Amazon). For *House of Cards*, Netflix acts in the role of a "network," while MRC functions as a "studio" and "production company." This distinction is one of the centerpieces to understanding how television is created and monetized.

Like many other industries, the television industry comprises a series of specialized, independent roleplayers who engage in transactions by which they collectively develop, produce, market, and distribute a product to consumers around the world. And, as in many other industries, the precise role played by all of the players is sometimes opaque to the consuming public. The following chart visualizes the major categories of entities in the television industry and the essential types of agreements that bind them to one another:

6 The classic, pre-cable broadcast television industry of the mid-twentieth century United States was similarly a fully advertiser-supported business. An alternative model can be found in the United Kingdom, where the government taxes television owners to support public broadcasting services. However, this public taxation system does not amount to a traditional "direct pay" system, in that television owners are taxed equally based on television ownership, without regard for the specific programming (or volume of programming) actually consumed by those device owners.

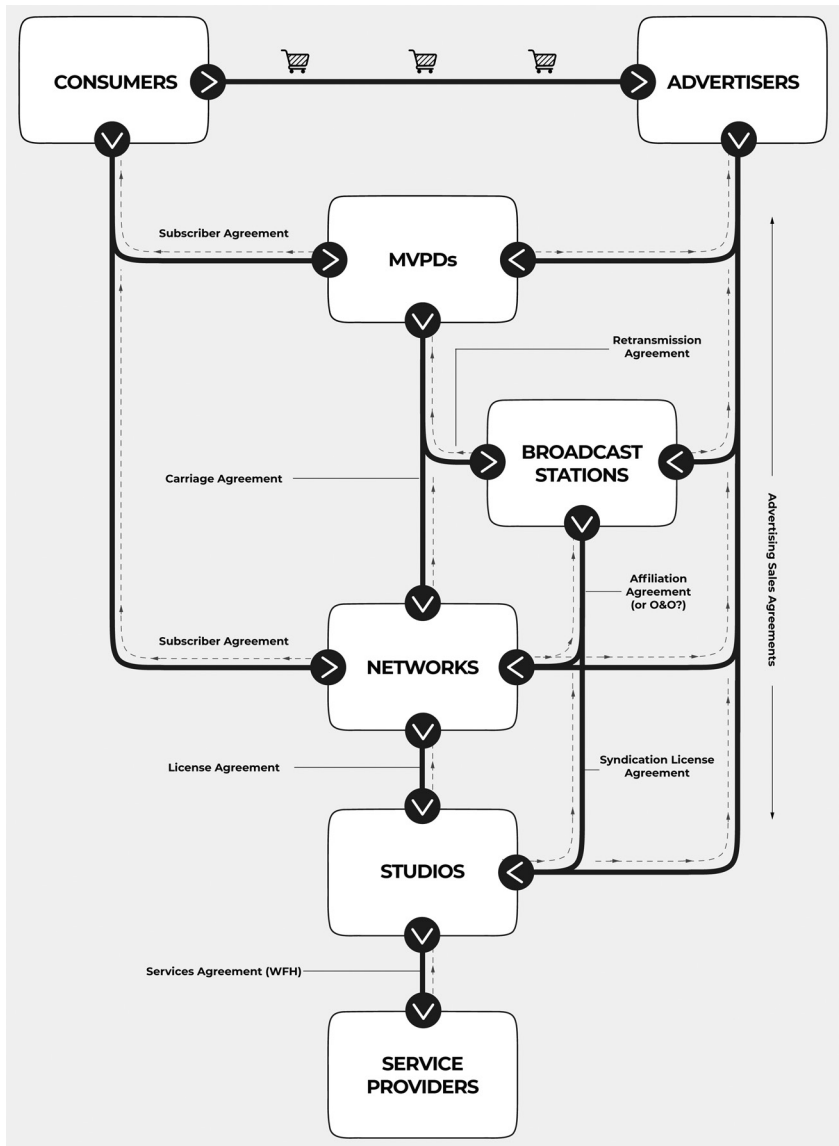


CHART 1 Structure of the Television Industry

(Note: All aspects of this chart will be explained in the sections that follow.)

In Chart 1, the money that fuels the entire system comes collectively from consumers and advertisers and works its way down the chain. In each link, that money represents compensation for intellectual property rights (via licenses or work-for-hire arrangements), personal services (the work of cast and crew),

access to content services (consumer subscriptions to MVPDs or networks), or access to eyeballs (for advertising purposes).⁷

While the television industry (and its product) is certainly unique in many vital respects, it can also be substantially understood by analogy to the development, production, and distribution of traditional manufactured goods—for instance, a smartphone.

i Service Providers (Talent)

Actors, writers, directors, producers, and other service providers—which, for purposes of this book, will be referred to collectively as “talent”⁸—are the day-to-day artisans of the television industry. While the names and/or faces of the most prominent may be familiar to viewers at home, most of these individuals are largely unknown to the general public (though, of course, many aspire to greater recognition and acclaim). In the smartphone analogy, they are the engineers who design the device and the workers who manufacture it.

The day-to-day work of developing and producing television content is generally performed by dozens or hundreds of freelance workers who are engaged to lend their expertise and labor to the production process. The most recognizable among these “workers” are so-called “above-the-line” talent—actors, writers, directors, and producers who centrally influence and guide the creative process, and whose names and images may be central to the public’s interest in and recognition of a piece of content.⁹ In broad, structural terms, however, these high-profile individuals occupy the same type of role as that played by editors, camera operators, electricians, carpenters, and the dozens of other types of crew members who participate in production (generally known as “below-the-line” crew). They are hired and paid for their creative and physical labor, on a show-by-show, episode-by-episode, week-to-week basis, or even

7 Of course, monetization begins only after production is complete, which means that the service providers at the bottom of the chart, whose creativity and labor generate the shows being monetized, are actually getting paid first. But looking at the industry structurally and holistically, rather than through the lens of a single series, the money used to pay those individuals came from the successful monetization of the shows that came before. So, while this chart is structured as a one-way waterfall of revenue, it can also be understood as a cycle.

8 In the entertainment industry, the term “talent” is sometimes used to refer more narrowly to actors, and “talent agents and managers” to refer to agents or managers who specialize in representing actors, as distinguished from “literary agents and managers,” who specialize in representing writers and directors. Unless specifically noted, this book will use “talent” to refer more broadly to any high-level creative service provider, including writer/producers, non-writing producers, directors, and actors.

9 The term “above-the-line” refers to the traditional format of budget “top sheets,” which are summary pages outlining the major categories of expenditure and total costs of a production budget. Historically, costs associated with these high-level individuals, as well as writing and underlying rights fees, were displayed above a literal line on the budget top sheet, with the balance of physical production costs being displayed below that line.

day-to-day basis. They primarily contribute their effort (and the creative fruits of that effort) to a project without making any direct personal financial investment. Consequently, while some may enjoy a financial interest in the success of a project (i.e., “backend”) via a defined “contingent compensation” or “profit participation” formula,¹⁰ they generally have no ownership interest in the final product (even if they personally came up with the idea for it).¹¹

This category includes not only individual service providers, but also a variety of corporate actors, from physical asset vendors (such as caterers and equipment rental companies) to creative services vendors (such as visual effects companies) to so-called “production companies.” Within this last category, companies may focus primarily on physical production (meaning the day-to-day management of all of the human and physical resources that go into the production process) or creative development (identifying, developing, and selling ideas or intellectual property as the basis for production). In many instances, such creative production companies are closely aligned with (or may be a mere “vanity shingle” for) prominent individual members of the talent community.¹² Other prominent production companies such as Anonymous Content, 3Arts, and Brillstein Entertainment Partners are primarily talent management companies with deep rosters of successful writers as clients, which often results in these companies (and/or their principals) becoming attached as producers to their clients’ projects. Although these companies may invest a limited amount of capital in their own salaries/overhead, or in preliminary development activity, they seldom provide direct at-risk production financing for projects, and often

10 See Chapter 9 (pg. 351).

11 Although it is a ubiquitous and essentially non-negotiable canon of the U.S. television industry that non-financing parties do not retain any intellectual property ownership, regardless of the extent of their creative contributions, that is not always the case in other parts of the world. For instance, in the United Kingdom, television production is dominated by small, independent production companies, rather than by large corporate studios. The “Terms of Trade” that legally govern the British Broadcasting Corporation prohibit the BBC from acquiring ownership of the content it broadcasts, a requirement that has fostered a local industry custom and practice of creator/producer-owned production companies retaining ownership of their shows. As a result, some creators and producers are willing to “bet on themselves” by accepting lower fees and budgets from British broadcasters (who also tend to afford them greater creative control) in lieu of the higher upfront fees and budgets offered by American platforms. Perhaps the most prominent such example is Michaela Coel, creator and star of *I May Destroy You*, who revealed in a 2020 interview that she declined a \$1 million offer for the project from Netflix, because the platform refused to allow her to retain any share of the copyright in the series. She instead eventually sold *I May Destroy You* to the BBC, retaining ownership and creative control, and still broke into the American market after the BBC later brought on HBO as U.S. exhibitor and co-financier.

12 Among more substantive examples, Amblin Entertainment is the production company founded and controlled by director Steven Spielberg, Smokehouse Productions by multi-hyphenate George Clooney, and Appian Way by actor Leonardo DiCaprio.

lay off their overhead costs onto studio partners¹³ while recouping development costs from production budgets when projects actually proceed to production.¹⁴

These parties are generally in direct contractual relationships with studios, and although the details of these deals vary depending on the role these parties play in the development and production process, the unifying thread is that the studio that engages and pays a service provider is the owner of the results and proceeds of the service provider's efforts, as a work-made-for-hire under copy-right law.¹⁵ This status effectively empowers the studio to do whatever it wants with the product, in perpetuity.

ii Studios

Studios may be the most important players in the television industry that consumers know little or nothing about. These companies are at the center of the development and production of television content—sourcing ideas for shows from the talent marketplace, hiring and paying service providers, financing and managing production of shows, and generally owning the resulting intellectual property—but cultivate little relationship directly with consumers. In the smartphone analogy, they are the international factories/manufacturers of the

13 This is often in the context of first look or exclusive overall deals. See Chapter 10 (pg. 390).

14 Over the 2010s, the rise of low-risk cost-plus licensing arrangements with global streamers (see Chapter 2, Section B (pg. 66)), combined with suddenly easy access to private capital and to revolving credit lines in a persistently low interest rate environment, led many of the industry's largest production companies to invest in expanding their in-house production capacities and to position themselves as studios (or co-studios) for the shows they sold. (A co-studio's stake in the economic success of a project is defined much more favorably than the backend accorded to non-financing profit participants. See Chapters 9 (pg. 351) and 11 (pg. 406).) This was most common for large production companies affiliated with major management companies (including those listed earlier) or major talent (such as Reese Witherspoon's Hello Sunshine and Joe and Anthony Russo's AGBO). Independent studios hungry to secure access to these companies' most desirable projects, such as Paramount Television Studios, Skydance Television, and MRC, have shown some willingness to recognize these company as co-studios. Paramount Television Studios alone has made first look deals with both Anonymous Content and Brillstein Entertainment Partners, getting preferred access to their development projects in exchange for allowing them to enjoy studio economics. For the most part, however, platform-affiliated and other major studios have refused to entrust these talent- and manager-driven companies with primary responsibility for physical production, or to otherwise recognize them as studios. Streamers eventually developed a practice of "buying out" the studio position of such companies with generous up-front cash terms, retaining their preferred full ownership of their projects.

15 The "work-for-hire" or "work-made-for-hire" is a concept arising under U.S. copyright law, which designates the employer of a party or parties creating intellectual property (e.g., writers, directors, and actors) to be the legal author and owner, from inception, of the copyright (and other intellectual property rights) of the employees' work. This concept is sometimes abbreviated as "WFH" (which appears in Chart 1).

smartphone (e.g., Foxconn, the Taiwan-based manufacturing company which owns and operates the factories that produce Apple's iPhone).¹⁶

Studios operate a high-risk/high-reward business. Although much of the labor of production is outsourced to service providers who are engaged for active projects rather than retained on salary, studios nevertheless operate a high-overhead business, employing significant numbers of full-time executives and support staff. Studios finance or co-finance development expenses for a large volume of projects, only a small percentage of which are ever likely to make it to production of a pilot, let alone a series. This is, in part, because studios depend on networks to order projects to production, and most development projects will never cross that hurdle (and therefore never see a return on the studio's investments). Before streaming's cataclysmic disruption of this whole system, the range of outcomes for any given show was very wide: projects that made it to production could cost the studio millions or even tens of millions of dollars if they failed to find an audience and were quickly canceled by the commissioning network, but major hits like *Friends*, *Seinfeld*, or the *CSI* franchise could easily generate hundreds of millions of dollars—and those major successes were always necessary to subsidize the higher volume of projects that failed while the studio was in search of that next big hit.¹⁷

Studios are an essentially “B2B” (or “business-to-business”) business, engaging in numerous vital transactions with more visible players in the television industry (such as talent on the one hand and networks on the other), while often operating more or less invisibly to the general public. For most television series, the only outward identification of the studio has traditionally been a two-to-five-second logo at the conclusion of the end credits.¹⁸ Because of the typical practice on streaming services of automatically skipping credits and advancing viewers to the next episode, however, studios now typically receive production credit in the main titles. In any event, few television viewers could likely identify the studios behind streaming hits such as Netflix's *You*, Amazon's *The Boys*, or Peacock's *Poker Face* (Warner Bros. Television, Sony Pictures Television, and MRC, respectively), yet in the long run, it is the studios that may reap the greatest economic rewards of their shows' successes. Because most studios have little branding relationship with the general public, they will

16 This comparison is perhaps the most strained in the “television series as smartphone” analogy because in general, factories/physical manufacturers do not own or control the intellectual property of the products they produce. In the television industry, studios are the IP owners. So, imagine Foxconn owning the patents on the iPhone.

17 See Chapter 3, Section C.ii (pg. 139) for the story of this system's collapse (from the business affairs perspective).

18 Think the “WB” shield/water tower of Warner Bros., or the distinct musical theme of the Sony Pictures Television card.

often seek to develop and produce a wide variety of very diverse shows across a variety of networks/platforms, without necessarily forming a “house brand.”¹⁹

The aforementioned Warner Bros. Television, Sony Pictures Television, and MRC are representative of “independent” studios, i.e., television studios that have no corporate relationship, or only a very attenuated corporate affiliation,²⁰ with a network. Other prominent examples of independent studios include Fifth Season (formerly known as Endeavor Content, the studio behind Apple’s *Severance*), Paramount Television Studios (Amazon’s *Jack Ryan*), Legendary Television (Apple’s *Monarch: Legacy of Monsters*), and Skydance Television (Amazon’s *Jack Reacher*). The market is largely dominated, however, by studios that are directly affiliated and operated in conjunction with sister networks, who have a corporate mandate to supply programming to their sister networks (and whose sister networks have a corporate mandate to purchase programming largely from their affiliated studios). Such studios exist in connection with all types of networks, including broadcast (e.g., ABC Signature²¹ for ABC, CBS Television Studios for CBS), basic cable (e.g., FX Productions for FX, AMC Studios for AMC), premium cable (e.g., HBO’s studio arm), and streaming (e.g., Amazon Studios for Amazon Prime Video). Television studios that are directly affiliated with networks at traditional media companies always show at least some preference (institutionally formalized or otherwise) for their sister networks (which may include a first look on all proposed output), but often maintain significant business with third-party networks, especially those in different media or with different creative sensibilities from the studios’ sister networks. For example, all four studios affiliated with the four major broadcast networks have long produced shows (that their sister networks have passed on) for one another, and each has produced at least one series for Netflix.²²

The precise elements of the contractual relationship between a studio and a network for a given television series will vary depending on a number of factors, including the type of network involved (e.g., broadcast vs. cable vs. streaming),

19 It is important to note that, just because a studio may not have a “house brand” from the perspective of the viewing public, it probably has a reputation within the industry itself—generated by the studio’s own history of successes and failures in various formats and genres—as an effective/reliable or ineffective/unreliable producer of specific types of television programming.

20 For instance, Warner Bros. Television is part of a large corporate family that includes TNT and TBS (and previously The CW), but it is nevertheless generally managed within that conglomerate and regarded by the broader television community as an “independent.”

21 ABC’s longtime broadcast studio, ABC Studios, and its more recent cable/streaming studio, ABC Signature Studios, were combined into a single operating entity in 2020 under the name ABC Signature. For clarity, this book will consistently identify this studio by its current (as of its writing) name, even when referring the studio in relation to shows or events that took place while it was still operating under one of its prior names.

22 More precisely, former FBC sister studio 20th Television (pre-Disney deal) has produced for Netflix and for the other three major broadcast networks; as of this writing, current FBC sister studio Fox Entertainment (founded in 2022) has not.

the type of show (e.g., thirty-minute comedy vs. sixty-minute drama), and the relationship between the studio and network (e.g., independent third-party studio vs. affiliated company). In general, however, the relationship between the studio and network is based on a license agreement by which the studio grants the network specified, limited rights in the series.

iii Networks

Networks are the first players in the television industry's chain of rights transfers who tend to maintain a direct relationship with the consumer. They function as aggregators and distributors, collecting a variety of television series produced by different studios but generally consistent with a network "brand," and then marketing—and in some cases directly delivering—that content to consumers. In the smartphone analogy, they are the consumer-facing brand and product wholesaler (e.g., Samsung, Apple, or Nokia).

Networks work hard to create a "brand" and spend heavily to market that brand to viewers as a signifier of a certain style or quality of content, often embodied in a pithy advertising slogan, such as HBO's classic, "*It's not TV. It's HBO.*" Although consumers may not be able to put the perception into words, they generally associate networks with a specific type or style of series. A network's slate is generally a mix of content that it has acquired via license agreements with third-party studios/content owners, and content that it has generated in-house through a subsidiary studio or acquired via license from an affiliated studio entity.

In many respects, networks (now represented primarily by the streamers) are the power-center of the television business. Because they determine their own programming strategies, networks collectively control how much new content is produced and exhibited per year, the mix of original and library content on their schedules (or in their libraries), the specific new and returning programs that will make the cut, and more broadly, the level of access and opportunity offered to independent studios (or others that are unaffiliated with any particular network). And because networks control the purse strings, they usually wield the most leverage in any given situation.

Streaming services functioning as networks have also been the locus of disruption and innovation in the business over the last fifteen years—both directly, and via the dramatic strategic and tactical reactions they have spurred in traditional media companies. Compared to other industry players like studios, networks have more varied business models overall, and individual networks tend to make more consequential changes over time in both their creative and business operations.

For these reasons, although this book is explicitly mostly written from the perspective of the television studio (and the TV studio business affairs negotiation), this "beginner's guide" introduction chapter dedicates the most attention

to networks. At the same time, however, although this section will make occasional references to streaming services such as Netflix and Amazon as examples of contemporary streaming-based “networks,” it will focus primarily on traditional linear television networks,²³ while Chapter 2 explores streaming networks in greater detail.²⁴

a Life Cycle of a Network

New networks tend to follow a similar life cycle. They launch by offering a relatively low-cost mix of second-run content, filling their broadcast hours primarily with somewhat older theatrical motion pictures and/or reruns of preexisting television series from other networks. They eventually move into original series production but rely primarily on outside suppliers with established studio capabilities. Relying on outside studios reduces the need for costly overhead and infrastructure investments that come with building a studio, and gives the network immediate access to the best show ideas, wherever they may come from. Once these networks have built an audience and a brand for their original content through their partnerships with outside studios, they tend to build their own studio operations and shift toward ordering new shows primarily from their own in-house/affiliated studio arms.²⁵

Two of the best-known basic cable networks exemplify this process of evolution. In its early days, when “AMC” stood for “American Movie Classics,” AMC was known for airing classic Hollywood films. It made its mark in original programming with shows like Sony Pictures Television’s *Breaking Bad* and Lionsgate Television’s *Mad Men*.²⁶ The more recent mega-franchise *The Walking Dead* and its spinoff, *Fear the Walking Dead*, were produced by the affiliated AMC Studios (although it has struggled to generate other hits). Similarly, for years, FX’s programming day primarily comprised reruns of broadcast network shows, such as *Dharma & Greg*, *Married. . .with Children*, and *Fear Factor*, and cable exhibition of major theatrical films (often those produced and

23 “Linear exhibition” refers to a continuous pre-programmed stream of content that is accessed by the customer by dipping into the stream at any given time, without the customer having individualized control over the specific programs they watch and when (which would constitute “on-demand exhibition”).

24 The word “network” can be used in tricky and imprecise ways. In some contexts, it is used as a synecdoche for broadcast networks or the broadcast business. In other contexts, it can be understood as interchangeable with synonyms like “platform,” “buyer,” or sometimes “distributor.”

25 Even as they invest more heavily in their own original programming, however, networks do not necessarily abandon their roots as exhibitors of second-run content; FX, for example, still fills considerable space on its programming schedule with the same kinds of movies it always has.

26 Thanks to copy editor Elizabeth Miller for her correction that AMC actually broke into original programming as far back as 1996 with *Remember WENN*, a now-mostly forgotten half-hour comedy with a murderer’s row of guest stars including Jason Alexander, Harry Hamlin, Patti LuPone, Rue McClanahan, John Ratzenberger, Molly Ringwald, Mickey Rooney, and J.K. Simmons.

distributed by the affiliated 20th Century Fox motion picture studio). It moved into original programming with shows like Sony Pictures Television's *The Shield* and Warner Bros. Television's *Nip/Tuck*. More recent hits like *American Crime Story* and *The Bear* have come from studio arm FX Productions, and the network has continued to lean heavily on studio affiliates 20th Television²⁷ (*American Horror Story*) and Touchstone Television²⁸ (*Mayans M.C.*).²⁹

b Network Business Models

Historically, in linear television, the business models of the three basic categories of networks—broadcast (i.e., ABC, CBS, Fox, and NBC), cable (e.g., FX, AMC, Bravo), and premium pay networks (e.g., HBO, Showtime, Starz)—have collectively reflected a spectrum of emphasis on the “direct pay” vs. “ad-supported” revenue models. On one end were the broadcast networks, which were (and remain) freely accessible by customers across the country through their over-the-air broadcast signals. These networks primarily supported themselves financially by selling advertising against their content, the value of which was (and remains) tied to the volume and demographics of the network's viewership. Roughly speaking, the difference between the network's total advertising revenue on the one hand, and the network's total content licensing costs, marketing expenses, and operational overhead on the other, constituted the network's profits. On the other end of the spectrum were the proudly ad-free premium pay networks, which generated 100% of their revenue from customer subscription fees collected through cable and satellite providers (who helped market these networks and retained a cut of the subscription fees collected through their services). In between were the conventional cable networks, which generated revenue through a combination of advertising sold against their programming and carriage fees received from cable and satellite

27 Formerly 20th Century Fox Television (or “TCFTV”). For clarity, this book will consistently identify this studio by its current (as of its writing) name, 20th Television, even when referring the studio in relation to shows or events that took place while it was still operating under its prior name.

28 The Disnified rebrand of Fox 21 Studios, which had itself previously absorbed one-time sister studio Fox Television Studios.

29 The broadcast networks similarly developed a preference for content that they (or their affiliated sister studios) own in whole or in part once given the opportunity by deregulation. In 1970, the FCC adopted a set of rules known as the “Financial Interest and Syndication Rules,” or “fin-syn rules,” which effectively prohibited the broadcast networks from owning the programming that they broadcast. These rules were somewhat relaxed during the 1980s, before being abolished entirely in 1993. The repeal of the fin-syn regulatory scheme precipitated a major shift by the broadcast networks toward ownership of their own programming, and with it, a substantial contraction in the marketplace of independent television studios (which found it increasingly difficult to compete with network-affiliated studios for scarce broadcast time, in light of the networks' significant financial incentives to favor their affiliated studios).

providers (which are themselves driven by the overall level of viewership of, and consumer demand for, the network).³⁰

The revenue model of a network substantially affects how it evaluates its returns on investments and makes decisions about the shows it commissions and renews. For a traditional network that relies substantially on advertising, the network's revenue is directly proportionate to the number of viewers that tune in to each show. This direct relationship between ratings and revenue makes viewership the essential measure of success for any given series. As a result, broadcast networks in particular have tended to commission "broad" programming that they hope will have wide, if potentially casual, appeal to viewers. On the other hand, for networks like HBO or Netflix that have—at least until recently—largely eschewed advertising and instead generated their revenue from monthly subscriptions, the goal of programming is not necessarily to attract as many viewers as possible, but rather, to attract new paying subscribers and to retain existing subscribers. And for streamers in particular—which can offer viewers a theoretically unlimited amount of content without the constraints imposed by a finite "programming schedule" tied to specific times and days of the week—it is easier to pursue a content strategy based upon the management of an overall diversified slate of programming, rather than the need to maximize viewership for every individual program.

As a result, such streaming networks have tended to prioritize exclusivity in their deals (in order to make their subscription services essential), and to look for a mix of larger series that achieve cultural ubiquity and must-see status (such as *Game of Thrones* or *House of Cards*) and smaller series that may not boast huge audiences but have dedicated followings (as when Netflix revived or rescued from cancellation series that had completed their runs on traditional networks, such as *Arrested Development* and *The Killing*). For these networks, show-by-show ratings may be less significant than overall brand-building across a portfolio, and there is greater reason to invest in arguably niche programs that command substantial loyalty from smaller groups of viewers. In any event, the performance that a network demands of one of its series is determined, in part, by the network's level of actual financial investment in that series. In other words, expensive shows may be required to demonstrate better and more immediate results than inexpensive series that are easier to allow time to develop an audience.

30 The details of such carriage agreements are extremely complex and generally beyond the scope of this book, but in general, these agreements provide for the MVPD to pay the network some portion of its collected subscriber fees in exchange for the MVPD's right to include the network as part of its channel offering to customers.

c Traditional Networks and the Digital Revolution

Over time, mounting economic pressures from a variety of factors—including the splintering of audiences across an ever-increasing number of available video platforms, growing competition from video games and social media for viewers' leisure time and attention,³¹ an ever-accelerating decline in pay TV subscriptions,³² and the struggle to keep pace with significantly better-funded new competitors from the technology industry—have pushed traditional networks (and their parent companies) to increasingly hybridize their business models, and to invest heavily in carving out a customer-facing, digital-first future for their businesses.

Such hybridization has been critical to sustaining the operations in broadcast over the last several years of decaying viewership and advertising revenue, as networks have increasingly relied on retransmission consent fees from cable and satellite providers to supplement their advertising revenues.³³ Between 2006 and 2014, aggregate broadcast station retransmission fees grew from \$200 million to \$4.6 billion per year. By 2022, despite years of declining cable and satellite subscriptions, annual broadcast retransmission revenue had grown to \$14.5 billion and was expected to continue to grow modestly for years to come.

But beyond finding ways to squeeze every last remaining penny out of the pay TV business,³⁴ linear brands have also experimented with a number of product strategies and business models as they have sought—with highly variable levels of success—to reinvent themselves as digital brands.

Several cable networks with especially distinctive brands (including CNN, ESPN, AMC, and Discovery) have attempted to launch standalone subscription streaming services, usually branding them by tacking a plus sign to the ends of their names (e.g., CNN+, ESPN+, AMC+, Discovery+). These services have typically offered a mix of the content available on their linear channels (subject to some content blackouts due to rights issues), with some streaming-exclusive originals. In general, however, they have featured small, mostly undifferentiated libraries, with few (if any) compelling original series. At the same time, their lack of scale has made it impossible for them to significantly undercut far more robust premium services like Netflix and Amazon on price. As a result, these “Cable Network Plus” services have mostly ended up as niche products

31 In 2017, Netflix's then-CEO Reed Hastings famously declared that Netflix was competing with sleep (and winning).

32 Discussed further in Section B.v.

33 These “retransmission consent fees,” as well as the regulatory context from which they derive, are also explored in greater detail in Section B.v.

34 In common usage, “Pay TV” is a blanket term for cable, satellite, and other traditional MVPD subscriptions. In the context of the WGA and DGA Basic Agreements, it refers more narrowly to premium pay networks (as distinct from “cable” or “basic cable”).

for niche audiences, with questionable upside and uncertain futures. Perhaps most dramatically, CNN+ was discontinued less than a month after its launch (following the arrival of new management, once AT&T's spinoff of Warner Bros. and merging of the company with Discovery Communications officially closed in 2022). AMC+ has muddled along, and in 2023, licensed several recent AMC+ originals to Max in hopes of luring new subscribers willing to follow the show back to AMC+ for new seasons.³⁵ Warner Bros. still offers Discovery+ as a standalone product, though that is unlikely to continue for very long now that the service has been combined with HBO Max into the single, integrated Max service. ESPN+ has arguably been the most successful such service, thanks in large part to Disney's bundling of ESPN+ with Hulu and Disney+, as well as the lure of exclusive content for ESPN+ subscribers on the extremely popular ESPN.com news site. Given the exorbitant cost of sports broadcasting rights, however, analysts have questioned ESPN+'s ability to thrive as a standalone product in a world without the still-significant (though ever-degrading) revenue provided by the ESPN linear channel. In large part for this reason, ESPN was the subject of significant speculation throughout 2023, as many wondered whether Disney would pursue a digital transition directly or instead sell off the asset altogether.³⁶

35 Industry analysts had widely varying opinions on this decision, and as of this writing, there is not enough publicly available data to assess its success. But one certainly cannot blame AMC for trying it, particularly given that this same basic strategy proved wildly successful for AMC at least once before, when the network broke new ground by allowing studio Sony Pictures Television to license past seasons of the then-ongoing *Breaking Bad* to Netflix, with the hope that new audiences would discover it there and flock back to the AMC linear network for new seasons. (They did.) See Chapter 3, Section C.i.a (pg. 129).

36 Here too, as of this writing, there has been no definitive resolution, and even for a historically successful enterprise like ESPN, the path to a digital future is murky and uncertain. For some years, analysts have estimated that to afford the ever-growing costs of broadcast licenses with major sports leagues (without significant incoming revenue from carriage fees from MVPD partners), ESPN would have to charge around \$30 per month—a price point so high that it could make it impossible to achieve the subscriber scale necessary to make the business work. As of May 2024, however, Disney seems to have found its path for ESPN in the form of Venu, a newly announced joint venture with Fox and Warner Bros. Discovery—quickly nicknamed “Spulu” (for “Sports Hulu,” recalling Hulu's original ownership structure) before the Venu name was announced—that would collect, under a single streaming roof, sports programming from across the wide array of linear sports networks owned by the three conglomerates, including ESPN, ESPN2, ESPNU, SEC Network, ACC Network, ESPNNews, ABC, Fox, FS1, FS2, BTN, TNT, TBS, and truTV. The announcement quickly drew criticism from the NFL and an antitrust lawsuit from sports-oriented vMVPD Fubo. This all-in-one sports streamer is intended to coexist (and offer sports programming co-exclusively) with the companies' existing linear networks, diversifying the joint venturers' sources of revenue with comparatively modest additional operating expenses—and Venu's owners hope, to achieve significant subscriber scale even at a high price point (like \$50 per month). This expanded revenue base help compensate for the decline in MVPD affiliate fees and make it easier for the joint venturers to compete with deeper-pocketed tech streamers for valuable sports broadcast rights. Venu could also allow its owners to compete with deeper-pocketed tech streamers by offering leagues access to significantly larger audiences than their streaming competitors, although some analysts have speculated

Other legacy brands have sought to establish digital identities *within* larger services, often as a branded “tile” within their user interfaces. For example, National Geographic has its own tile on Disney+, while Bravo continues to be prominently featured within NBCUniversal’s Peacock. And after a long digital journey—from the 2010 launch of HBO Go as a companion to linear subscriptions, to the 2015 launch of HBO Now as a standalone subscription service, to its 2020 integration (and lending of its name) to HBO Max—HBO has, at least for the time being, settled in as a tile on Max (itself a rebrand and merger of the HBO Max and Discovery+ services, following the 2022 merger of parent companies Warner Bros. and Discovery Communications into the new Warner Bros. Discovery).

The closest thing to a success story for this model of digital evolution has been FX. From 2017 to 2019, FX experimented with the standalone “Plus” model, offering an ad-free FX+ subscription as an upgrade for Comcast/Xfinity subscribers. But FX’s new digital reality truly began in March 2020 (about one year after Disney’s acquisition of Fox closed),³⁷ when Disney launched “FX on Hulu,” a prominent tile within the Hulu interface that served as a hub for FX content. Disney has maintained the FX linear channel, but for a time launched new original series under the “FX on Hulu” brand, which became one of the “general entertainment”-oriented Hulu’s major differentiators, especially as a contrast to its family-oriented competitor/affiliate, Disney+ (which launched about three months before “FX on Hulu”). Hulu’s prominent featuring of the FX mark helped the brand retain relevance in the streaming world—an achievement that has eluded once-storied brands like MTV and Comedy Central, which missed their opportunities to establish themselves as digital brands, and now seem doomed to slowly degrade into (further) irrelevance within the collapsing cable ecosystem. By December 2021, Disney had begun to phase out the “FX on Hulu” branding, instead returning to the pure “FX” brand (which was featured prominently alongside its shows on the service). When Disney began integrating Hulu into the Disney+ service in December 2023, FX’s shows were included (still with the FX branding) within the service’s Hulu tile/hub, rather than as a separate tile alongside Hulu on the main Disney+ landing page.³⁸

that this alliance among companies that have historically bid against one another for valuable broadcast rights may, in the long run, dampen the currently hot market for sports rights.

37 As part of that combination, Disney acquired of all of Fox’s non-news cable networks (including FX), as well as Fox’s stake in—and with it, operational control of—Hulu.

38 Interestingly, Disney continues to offer Disney+ subscriptions that exclude Hulu, and to offer Hulu as a standalone subscription/app. This likely reflects a compromise to address brand safety concerns arising out of the availability of Hulu/FX’s often edgy, adult-oriented content on the mostly kids-and-family-oriented Disney+. Separate subscription offerings give concerned parents the ability to subscribe to Disney+ without their dollars also supporting—at least not directly—Hulu and FX’s more potentially controversial programs.

Like manufacturers of devices and other consumer products, all networks maintain a branding relationship with their customers, but not all maintain direct economic relationships with their customers. The majority of brands do not sell products and collect revenue from customers; rather, just as each brand may be an aggregation of many product types, most brands are bundled, aggregated, and offered for sale via third-party retailers. So, using the smartphone example, most brands (e.g., Nokia, Samsung, Huawei) are sold primarily or entirely through retailers like Best Buy or Amazon.com or through partner cellular service providers, rather than through direct-to-consumer sales; the long-time outlier has been Apple, which has been able to take advantage of its status as a powerhouse consumer brand to operate its own Apple retail stores at scale. By the same token, for most of television's history, it was unusual for networks to maintain disintermediated subscription relationships directly with their customers. Instead, like brands that wholesale their products to customer-facing retailers, linear television networks—essentially as a matter of technological necessity—sell their services “wholesale” via carriage agreements with cable and satellite television providers (known in technical/regulatory jargon as multichannel video primary distributors, or “MVPDs”), which in turn bundle and deliver these networks into viewers' homes, collect subscriber fees, and share them with the network owners. The early Apple-like exception to this standard model was Netflix, which, from inception, took advantage of its “over-the-top” delivery system to create disintermediate subscription and service relationships with its customers.³⁹ HBO and Showtime were first among traditional linear networks to try to replicate the disintermediated Netflix model, offering standalone direct-to-viewer subscriptions starting in 2015.⁴⁰

Today, the aggregated “retail” pay TV is wobbly but persists, and linear networks continue to collect a substantial portion of their revenue via their MVPD partners. The tech and studio streamers that have entered the market since Netflix have all embraced the control afforded by such “over-the-top” distribution, offering platform subscriptions independent of any underlying or related MVPD service (and therefore any revenue-sharing obligations). At the same

39 The term “over-the-top” refers to these services' technological capacity to reach users through their general-purpose internet subscriptions, without relying on a separate, service-specific technological system (such as the coaxial cables that underlie cable television or fiber-optic cables used by telecom providers).

40 For years, these premium channels had benefitted hugely from advertising provided and paid for by their MVPD partners, who aggressively “up-sold” their own subscribers on these channels for supplemental monthly fees (of which the MVPDs took a significant cut). Once these networks offered customers the option of standalone services that did not require an MVPD subscription (as access to premium channels historically had), and therefore economically cut out the MVPDs, the cable and satellite providers immediately and dramatically pared back such advertising and up-sell efforts. In any event, in the decade since, those standalone services have been discontinued, as the HBO and Showtime brands and content offerings have been substantially consolidated into their parent companies' principal streaming offerings, Max and Paramount+, respectively.

time, the general declining pace of subscriber growth, especially in the United States, has spurred these services to go find new subscribers where they are, rather than relying on the subscribers to find them. So, just as Apple also offers its hardware products through many major third-party retailers (despite lower margins than sales from its own website or stores), streamers have sought out harder-to-reach subscribers via partnerships with “retailer” platforms (even if that means cutting the partner platforms in on the deal). Thus, Amazon, Apple, and Roku have emerged as major feeders for new subscriptions for third-party services. Leveraging their successful hardware business and widespread installed user bases, these companies have built “channel stores” that offer customers (who are already familiar with and committed to these companies’ devices and interfaces) a la carte access to (mostly) unaffiliated subscription content services (with the intermediaries taking a cut of revenue from subscriptions originating on their platforms). Popular vMVPD YouTube TV has long offered a monthly “add-on” for services like Max and Paramount+. And more recently, streamers have begun experimenting with discounted/bundled offers via traditional MVPD partners—most notably a \$10/month bundle for Verizon telecom subscribers featuring the ad-supported plans of Netflix and Max, and a \$20/month plan that adds Disney+ (without ads), Hulu (with ads), and ESPN+ (with ads), that debuted in December 2023.

iv Broadcast Stations

Broadcast stations⁴¹ occupy an unusual middle ground in the television industry landscape, one that does not neatly correspond to any analog in the world of physical goods.

Broadcast stations are usually closely affiliated with broadcast networks (i.e., ABC, CBS, Fox, and NBC) but are technically separate entities. Each broadcast station is a local business, serving a defined geographic market that is usually based around a single major metropolitan area.⁴² This distinguishes the individual stations from their affiliated networks, which are national in scope.

Every broadcast station in every geographic market (e.g., KABC7 in Los Angeles, CA, or WNBC4 in New York, NY) is a distinct business and a distinct corporate entity. In many major media markets, such as Los Angeles and New York, the broadcast networks themselves own the local stations that carry their programming. Such stations are known as “owned and operated” or “O&O” stations. Other broadcast stations, particularly in smaller markets, may be

41 Think of the channel on which you (or let’s face it, probably your parents) watch the local news.

42 A few especially prominent stations, such as Atlanta’s WTBS and Chicago’s WGN, started out as traditional local broadcast stations but achieved “superstation” status by eschewing any affiliation with a major national broadcast network and securing nationwide distribution through cable and satellite services.

owned and operated independently of the major networks and enter into “affiliation agreements” to gain access to such networks’ programming. Many of these “independent” stations, however, are still parts of large “station groups” collectively owned by major media companies such as Tribune Broadcasting and Sinclair Communications.⁴³

Network-affiliated broadcast stations are generally provided with programming by their affiliated network for broadcast during morning and evening primetime hours. They fill the rest of the broadcast day (and unaffiliated stations fill the entire broadcast day) with a combination of original self-produced programming (primarily local news); licensed reruns of television shows that were previously broadcast by a television network (so-called “second-run syndication licenses,” usually for beloved half-hour comedies); licensed broadcasts of movies or other previously exploited programming; broadcasts of some games for local sports teams; and licensed broadcasts of first-run original content produced by third-party studios or production companies. This “first-run syndication” model is typically used for daytime talk shows such as *The Kelly Clarkson Show* (produced by NBCUniversal Syndication Studios) or daytime game shows such as *Jeopardy!* and *Wheel of Fortune* (both produced by Sony Pictures Television).⁴⁴

Broadcast stations are also subject to an overlapping pair of regulatory structures, administered by the Federal Communications Commission (or “FCC”),⁴⁵ known as “must carry” and “retransmission consent.”⁴⁶ By virtue of this

43 In May 2017, Sinclair Communications announced its intent to acquire Tribune Broadcasting for \$3.9 billion in a deal that would have left Sinclair owning or having operational control over stations available in 72% of all households with a television in the United States. The deal fell apart under regulatory scrutiny in August 2018, after which Tribune instead merged with Nexstar Media Regroup. The resulting company (still named Nexstar) became the nation’s largest television station owner, but the combination passed regulatory muster after Nexstar agreed to divest enough stations to stay within FCC requirements on mass station ownership.

44 The term “cable syndication” may be used to identify the licensing of library episodes of existing television series for reruns on a basic cable network (rather than on a broadcast station).

45 More broadly, broadcast stations are uniquely subject to regulation by the FCC, whose regulatory scheme is generally outside the scope of this book but dramatically impacts all aspects of the operation of these businesses.

46 Historically, prior to the advent of consumer satellite television services in the 1980s and telecommunications-based television services in the 1990s, a handful of cable providers maintained nearly monopolistic control over the market for multichannel television subscriptions, often engaging in minimal (if any) competition with one another on a geographic market-by-market basis. The prohibitively expensive cost of building cable wiring infrastructure posed a significant barrier to entry for would-be market challengers. The FCC’s “must carry” and “retransmission consent” system was implemented as part of the 1992 United States Cable Television Consumer Protection and Competition Act, and offered broadcast networks and stations special protection in the face of the superior market power enjoyed by cable providers during this era. These rules are embodied in 7 U.S.C. Part II and were upheld by the U.S. Supreme Court in *Turner Broadcasting v. Federal Communications Commission*, 520 U.S. 180 (1997). In the intervening years, however, the cable industry’s market power has steadily eroded in the face of challenges from satellite and telecommunications-based

regulatory framework, smaller broadcast stations (such as public television stations and other stations without a major network affiliation) generally exercise their “must carry rights” and compel MVPDs to offer their channels to local subscribers in their markets for no compensation (based on the premise that the public benefits from the broad availability of such broadcast stations). Larger broadcast stations (in particular, those affiliated with major networks), on the other hand, generally opt to negotiate “retransmission consent agreements,” by which they receive significant fees from these MVPDs in exchange for allowing the MVPDs to include their stations in packages for local subscribers. In the early years of the growing cable bundle (during which physical infrastructure imposed a practical limit on the number of channels an MVPD could carry), the four U.S. broadcast networks made only modest revenue from such retransmission fees, but instead used the “retransmission consent” process to help initially secure MVPD carriage for then-“upstart” cable networks like CNBC, ABC Family, and Fox News. In more recent years, retransmission fees—which are technically unique to broadcast stations but essentially analogous to the “carriage fees” paid by MVPDs to networks—have evolved into an increasingly vital source of revenue for both broadcast stations and networks (which typically split such revenue between them, an arrangement known as “reverse retransmission”).⁴⁷

v MVPDs

Multichannel video primary distributors (“MVPDs”)—what most people just call “cable or satellite companies,” such as Spectrum, Comcast, DirecTV, and Verizon FIOS—are the television industry players that maintain the closest economic relationship with the customer, traditionally representing the actual point of sale where customers exchange their dollars for access to television programming. In short, they sell to consumers subscriptions for packages of various television networks. In the smartphone analogy, they are the retailer—the Best Buy or Verizon Wireless store that sells a wide array of different (and competing) brands in one convenient place.

Although the technical means they use vary from service to service (e.g., coaxial cable for cable providers; microwave transmissions for satellite providers; fiber-optic cable for telecommunications providers), MVPDs all provide essentially the same service to customers—a bundle of networks delivered directly into the viewer’s home. MVPDs maintain subscription relationships with customers, collecting monthly fees in exchange for access to the MVPDs’ services. A substantial portion of these monthly fees are paid by the MVPDs

television providers, while the regulatory framework has been slow to keep up with evolving market realities.

47 See also Section B.iii.c.

to the networks on the MVPDs' services (in exchange for the MVPDs' right to offer such networks to their customers); in general, these carriage fees are denominated on a dollars-per-subscriber basis, with the most-watched and in-demand networks (long led by ESPN) commanding the highest carriage fees. Alongside the advertising revenue infused into the system at multiple levels, these carriage fees represent the essential economic fuel that flows through all of the other participants in the chain of television production and distribution.

Like brick-and-mortar retailers, who must spend heavily on real estate or other physical overhead expenses, MVPDs invest significantly in the costly infrastructure needed to actually deliver access to television programming in viewers' homes. Like many retailers, they generally provide customers with access to very similar collections of products (i.e., networks) but compete with one another based on price, reliability, customer service, and overall customer experience. In marketing to consumers, they advertise both themselves and the products (i.e., networks) that they offer.

For a decade or more, the prevailing narrative around MVPDs and the basic cable package has been its inexorable decline. According to data from MoffettNathanson, as of the first quarter of 2023, total pay TV penetration of U.S. households had dropped to 58.5%, its lowest point since 1992, with an estimated 75.5 million customers nationwide. At the same time, the annual rate of the long-standing decline in these subscriptions—a trend broadly referred to as “cord cutting”—had accelerated to nearly or over 10% for all of the major MVPD providers. Meanwhile, there has long been evidence that younger consumers who have grown up with streaming and without pay TV subscriptions—a generation referred to as “cord-nevers”—will not flock to the segment in significant numbers even as they grow older and more financially independent. MoffettNathanson estimated that the “floor” for the pay TV industry was a steady state of between 50 and 60 million homes, but warned that given recent trends, the reality could be even lower.

For the last few decades, pay TV has represented the economic lifeblood of the television industry, with revenue from subscribers filtering back to networks in the form of carriage fees, and those same subscribers providing the audience for networks to monetize with advertising. The decline of the pay TV business therefore represents an existential threat to both the “direct pay” and the “ad-supported” components of the network business, and in fact to the entire media ecosystem that has been effectively “propped up” by pay TV for years. But while any serious observer must acknowledge the serious and accelerating *decline* of the pay TV industry, stories of its *death* have—at least for now—been greatly exaggerated. Despite many consecutive years of subscriber losses, the carriage and advertising revenue arising out of the pay TV business continue to provide much of the free cash flow for traditional television companies, and has essentially financed the industry's ongoing (and, as of this writing, still largely unprofitable) efforts to transition to a digital future.

vi Advertisers

a Traditional Advertising

As described at the beginning of this chapter, the television industry relies on a dual revenue model, which combines traditional “direct pay” (best exemplified by theatrical feature film exhibition) and “advertiser-supported” (best exemplified by terrestrial radio) business models. The “direct pay” revenue in this system originates with consumers, who pay subscription fees to MVPDs (such as Comcast, DirecTV, and Verizon FIOS) and direct-to-consumer “over-the-top” subscription services (such as Netflix, Amazon Prime Video, and Hulu, described in further detail in Chapter 2). These fees filter upward through the television ecosystem through the series of intermediary contractual relationships described earlier (in the form of per-subscriber fees paid by MVPDs to the networks they carry, license fees paid by networks to the studios that provide their content, and compensation paid by studios to talent and other service providers).

Advertisers, on the other hand, channel money into the television ecosystem at virtually every stage of the process. On average, approximately 25% of broadcast time on advertiser-supported television networks—eight minutes of each half-hour program, or sixteen minutes of each one-hour program—is dedicated to advertising. Although national networks—which offer the broadest reach to the biggest advertisers—realize much of this revenue, the available advertising inventory (and associated advertising revenue) is allocated amongst all of the players in the system, with MVPDs, networks, and studios all acting as sellers of advertising time.

For instance, carriage agreements divide available advertising minutes between MVPDs (who often sell their available advertising minutes to local advertisers on a market-by-market basis) and networks (who sell their available advertising minutes primarily to national advertisers).⁴⁸ Similarly, affiliation agreements between local broadcast stations and national networks allocate available advertising minutes during the day to each of the parties, with the national network controlling most or all of the advertising inventory tied to the network’s nationally distributed programming, while the station controls most or all of the advertising presented alongside the station’s self-produced or licensed syndicated programming.⁴⁹ In the world of first-run syndication

48 This allocation of advertising inventory explains why viewers of national cable networks may still be presented with advertisements for local businesses.

49 For this reason, local news programming—for which broadcast stations control the entire available advertising inventory—is especially vital to the economic well-being of broadcast stations. Local stations also make a disproportionate amount of their revenue during election years, when political advertisers—who usually target specific, narrow geographic markets—buy advertising time in great quantities.

(which is dominated by daytime talk and game shows), licensee stations typically compensate the studios with a mix of cash license fees and “barter” advertising time—in other words, allowing the studio that produces and distributes a show to sell, for its own benefit, some portion of the available advertising time during the program.

Promotional messages may appear in separate commercials exhibited during or around a series (the standard form of “advertising”)⁵⁰ or be worked, discreetly or conspicuously, directly into the content of the series itself (called “product integration”). In either case, however, creative, production service providers and even studios (other than in first-run syndication) are effectively shut out of the television advertising sales market, with ad-supported networks substantially favoring flat or budget-based license fees with no obligation to account for or share advertising revenue with their studio partners. Within the shows themselves, studios and networks expressly prohibit writers, producers, and other providers from accepting compensation from advertisers without the studio and/or network’s explicit consent or control over the transaction.⁵¹

b Product Integrations

“Product integration” (or “product placement”) is a broad term capturing the paid use, depiction, and/or mention of an advertiser’s product within a television show (or other filmed entertainment). Product integration/placement differs from traditional advertising in that it is incorporated—or “integrated”—directly into the television program itself, as opposed to being presented through obvious, separately demarcated advertisements that are broadcast before, after, or during the creative program.⁵²

Product integration can take many forms and many levels of obviousness to the viewer. Some advertisers pay a relatively modest fee just to have their products and logos appear visibly but passively on screen during a program. This is sometimes referred to as a “passive integration.” For a higher fee, an advertiser may purchase an “active integration,” under which the characters on screen actively touch and use the advertiser’s products, typically without any

50 Advertising that appears before a piece of content may be called “pre-roll,” advertising that appears in a distinct commercial block that interrupts the content is called “mid-roll,” and advertising that follows a completed view is called “post-roll.”

51 Federal regulations, particularly in the broadcast television world (which is subject to FCC oversight), also require that broadcasters disclose payments made by advertisers in exchange for having their products used, depicted, or mentioned on television. All that said, an actor or host’s participation in some kind of in-show product integration can sometimes be the basis for a new direct endorsement relationship between the actor and brand that continues outside of the series itself (including in advertising that specifically accompanies the series).

52 The financial and control issues around such integrations are discussed in greater detail in Chapter 11, Section A.xiii (pg. 443).

special mentions but with logos that are visible and reasonably conspicuous on screen.⁵³ Other advertisers pay an extra premium for characters to mention their products aloud by name brand, though many networks and studios shy away from such intensive integrations because of their obviousness to the viewer. As a result, in scripted television, such extremely active integrations are seldom seen outside of the context of daytime soap operas.

A related concept is the “commercial tie-in,” an arrangement between a show and a brand, by which the brand provides advertising for the show as part of advertising its own products. For example, in the theatrical world, Marvel Studios has a longstanding commercial tie-in relationship with Dr Pepper, by which the soda company has released special edition cans with Marvel characters on them to support the launches of various Marvel Cinematic Universe features. Such “commercial tie-ins” may resemble merchandising, which also involves the incorporation of series intellectual property into unrelated commercial goods or services. Unlike merchandising, however, commercial tie-ins are primarily a marketing-based arrangement and tend to involve changes in packaging or advertising, or very minor tweaks to existing products, rather than the creation of entirely new products. A “commercial tie-in” deal may be made on its own, or as part of a broader product integration and/or advertising relationship.

Product integration represents a balance between art and commerce, and partnerships with brands can be a welcome source of cost savings for television production. Many studios actively solicit “tradeout” deals, by which an advertiser provides the production with free products which can be used as wardrobe, set dressing, or props on screen (thereby saving the studio the expense of buying or renting such items), but does not provide any separate compensation to the studio, or receive any separate assurances about the nature and extent of the depiction of the brand's products. Where an advertiser does pay cash compensation for an integration, the more conspicuously a brand is featured, depicted, and/or mentioned on screen, the more money the advertiser is willing to pay for the integration. But at some point, the obvious commerciality of such integrations can prove off-putting to viewers, as well as to writers (who typically don't want their creative work converted into an advertisement) and actors (who may feel that their participation in product integrations effectively converts them into indirect spokespeople for the brands).⁵⁴ As a result, most studios and networks seek integrations that are “organic” to the story being told, often favoring

53 Think of a camera shot of a car approaching the camera, swiftly pulling over, and parking, with the car's front grille and logo prominently coming into focus as the car nears the camera. That car manufacturer probably paid tens or even hundreds of thousands of dollars for that shot.

54 Many higher-level actors—particularly those who have extensive branding or commercial endorsement relationships of their own to protect—seek to limit the extent to which a studio may compel them to use, mention, or otherwise participate in “active integrations.”

deals with everyday lifestyle products (such as cars, consumer electronics, and alcohol brands) that can be integrated seamlessly—and often solely visually—into the world of the television series.⁵⁵

The new frontier in product integration is “digital product integration,” in which studios use artificial intelligence-driven tools to retroactively insert products and logos into existing filmed material. These digital integrations are inexpensive, unobtrusive when executed well, and can be updated dynamically as branding and sponsorship relationships change over time. They are happening today, in more shows than people realize, but—due to ongoing resistance from the talent community—in fewer shows than many platforms would hope.

Product integration is often more conspicuous—and therefore more lucrative—in the world of unscripted programming. Because such programs are (ostensibly) “reality”-based and do not require a suspension of disbelief by the viewer, they are more amenable to intensive, conspicuous integrations. Sets can be designed specifically to highlight partner brands, as was the case on Fox’s *American Idol*, which prominently featured Coca-Cola logos in set dressing and consistently depicted the series judges with large Coca-Cola logo cups in front of them at the judge’s table. Individual segments or challenges of a competition program may be identified with a specific presenting sponsor, while major prizes may be expressly presented and funded by a specific brand. For instance, Glad Products, a company specializing in trash bags and plastic food storage containers, was for many years the presenting sponsor for the grand prize of Bravo’s cooking competition series *Top Chef*; San Pellegrino Sparkling Natural Mineral Water eventually replaced Glad as presenting sponsor for the grand prize, and was more recently replaced by Saratoga Springs Water.

Some networks have extremely particular policies about product integration, driven by other elements of the networks’ business (or that of their parent companies). ABC holds itself to a higher standard of “family friendliness,” including with respect to its selection of integration partners, because of the network’s status as part of the family-oriented Walt Disney Co. Amazon and Apple provide studios with a list of product categories that they can never integrate, because those products are competitive with the tech giants’ other consumer offerings. As a result, one can expect never to see an Amazon show that features an iPad (which competes with Amazon’s Kindle tablets) or an Apple show with characters on Android phones (which compete with Apple’s iPhone).

55 An amusing counterexample is *Community* (originally broadcast on NBC and later on Yahoo! for its sixth season), which featured a prominent, multi-season integration program with sandwich chain Subway. Subway is integrated extensively throughout the scripted comedy, featuring prominently in major storylines, with one guest character even being named “Subway” and functioning as an explicit spokesman for the brand. The integration ended up serving as an amusing meta-commentary about product integration and television (while netting meaningful revenue for studio Sony Pictures Television).

Product integration is particularly significant in digital series production outside of the premium, traditional television-like Netflix/Amazon/Hulu context, on platforms like YouTube, Roku, or the now-defunct Go90 (from Verizon) and Seed (from the CW). Although the license fees and advertising revenue shares on such platforms may not be sufficient to support larger-scale production, even in the short-form format more typical to such platforms, savvy digital producers have built partnerships with major brands, developing and producing entire series around products. Such arrangements go beyond both traditional advertising and even product integration, and the resulting productions are sometimes referred to as “branded content.” In such deals, the brand sponsors can enjoy substantial creative input in exchange for covering most, or even all, of the branded series’s production costs.⁵⁶

vii Talent Representatives

The era of talent representation arguably began in 1898, when a German-Jewish immigrant named Zelman Moses, having adopted the anglicized name “William Morris,” went into business as a “Vaudeville agent,” starting the organization that would grow into the venerable William Morris Agency, regarded by many as the first great talent agency in show business. (The William Morris Agency merged with the Endeavor Talent Agency in 2009 to form William Morris Endeavor.) Talent representatives arose in the Wild West of the early twentieth-century entertainment industry, when entertainers struggled to find work—and even more often, to get paid for the work they did—in America’s emerging creative industries. Since then, agents, managers, and lawyers have played a crucial role throughout all areas of the entertainment industry, but arguably, nowhere is that role more visible—or more economically impactful—than in the television industry, where each of these players has carved out a specific and vital niche for themselves.

In considering the distinct roles played by agents, managers, and lawyers, it is important to remember that the distinctions among them may sometimes be more theoretical than practical. Every talent representative seeks to develop a trust relationship with their client and may be a creative partner, a personal confidante, a business advisor, and a networking resource all at once. While many writers and actors choose to have one of each of these professionals on their teams, some more established and successful individuals are content to have only one or two of the three, and the selection of which depends entirely

⁵⁶ Prior the shuttering of Go90, AwesomenessTV supplied the platform with numerous brand-oriented or funded series, including *Royal Crush* (in partnership with Royal Caribbean cruise lines) and *Versus* (in partnership with Gatorade). Funny or Die has also produced original branded content in partnership with KFC.

on the needs and desires of the talent and the nature of their relationships with the members of their team.

a Agents

The principal job of a talent agent (whether that individual represents a writer, director, producer, or actor) is to find work for their client. Agents nurture close relationships with creative executives at various studios and networks and keep a close watch on the development activities (and hiring needs) of these organizations. Using these relationships and this business intelligence, agents find and create opportunities for their clients, often serving as the client's first line of communication with studios and networks (or "buyers"). In addition, depending on the style and preferences of the individual agent and client, as well as the presence or absence of a lawyer on the team, agents may serve as frontline deal negotiators on their clients' behalf.

Agents often play a significant creative role in their clients' careers, counseling them on what jobs to take or decline, advising them on what types of projects to develop based on the appetites of the market, and providing a creative sounding board for their clients' ideas. However, because many agents maintain large stables of clients at any given time, the level of creative attention they provide may be limited (a limitation which creates further opportunity for managers, who, also unlike agents, are permitted to work and receive compensation as producers of their clients' projects). Agencies can also create opportunities for their clients by connecting them to one another, putting together compelling groups of talented individuals who can more effectively attract the attention and interest of studios and networks than any one of the clients could alone, a practice known as "packaging." Until recently, agencies that engaged in packaging—some of which had dedicated "packaging agents" or "packaging departments"—could negotiate to receive so-called "package commissions." These were lucrative fees, paid directly to agencies by buyer studios, in exchange for pre-curating and collecting the major creative elements of a project before selling it and continuing to service the project's creative needs over its lifetime.⁵⁷ Agencies receiving packaging fees would customarily forego

57 The details varied (especially after streaming came on the scene), but in scripted television, the traditional structure for a "full agency package" was known as the "3/3/10 package," in which the studio paid to the agency (1) a budgeted fee equal to 3% of the license fee received from the initial domestic network licensee (usually capped at between \$15,000 and \$75,000 per episode, paid to the agency up-front during production, and accounted for as a budgeted production cost of the show); (2) an additional fee, equal to the first 3% fee, deferred and payable (if ever) out of the (onerously-defined) "Net Proceeds" of the series (so, probably never); and (3) a backend equal to 10% of MAGR (generally on the same definition as the most favorable definition accorded by the studio to any of the agency's clients on the project, but with no third-party participations of any kind taken off-the-top). To decipher all this, see Chapters 9 (pg. 351) and 11 (pg. 406).

collecting commissions from their own clients on such “packaged projects.”⁵⁸ (More on the recent end to this practice shortly.)

In order to act as a talent agent in California, New York, or Tennessee (the three hub states of the American entertainment and media industries)—that is, in order to “procure employment” for an entertainer—an individual must be licensed in accordance with that state’s requirements. In California, the governing statute is the Talent Agencies Act (“TAA”) and licensing is administered by the California Labor Commissioner’s office. Among other requirements, licensed talent agents must submit their representation agreements for the Labor Commissioner’s review and approval, comply with statutorily defined bond requirements, and maintain client funds in dedicated trust accounts. At the same time, because virtually all agencies represent clients who are members of at least one of the major entertainment guilds—SAG-AFTRA (Screen Actors Guild/American Federation of Television and Radio Artists), WGA (Writers Guild of America), and DGA (Directors Guild of America)—they are also subject to franchise agreements with those unions, by which the unions (as the legal collective bargaining representatives for their members) authorize the agencies to represent their members. These franchise agreements functionally empower the unions to negotiate additional rules and restrictions (beyond those imposed under state laws and regulations) with respect to the agencies’ businesses as a condition of allowing those agencies to represent indispensable union talent. Yet for decades, few people took notice of the leverage these franchise agreements provided to the unions and their members (if they remembered that these agreements existed at all).

That all changed with what the WGA called its “Agency Campaign.” In 2017, the WGA gave the Association of Talent Agencies (“ATA”), the trade organization representing Hollywood’s talent agencies, its contractually required one year’s notice that the union would not renew the longstanding franchise agreement granting the ATA’s members the right to represent WGA writers. Instead, the WGA nonnegotiable conditioned ATA members’ ongoing representation of WGA writers on the agencies abolishing two business practices that the union contended put the agents’ interests into conflict with those of their clients: the longstanding practice of charging agency package commissions (as described earlier), and the more recent phenomenon of agency-owned content financiers/producers (the most successful of which, WME’s Endeavor Content, had quickly become one of the more

58 In the years leading up to the WGA’s Agency Campaign, agency packages had become so ubiquitous, virtually presumed for all scripted series, that major agencies could command partial or even full “package positions” on the basis of a single major agency-represented element (such as a writer/creator who was qualified to showrun their own series, or a particularly prolific and well-established non-writing producer; in either case referred to as a “packageable element”).

aggressive and prolific independent studios in the market). While people have long commonly understood agency economics to be based on percentage commissions,⁵⁹ in the decades before the Agency Campaign, package commissions paid directly by television studios had actually accounted for a majority (though notably declining) share of the revenue earned by the then-“Big Four” talent agencies of William Morris Endeavor (“WME”), Creative Artists Agency (“CAA”), International Creative Management (“ICM”), and United Talent Agency (“UTA”). At the same time, one of those major agencies’ key strategies to make up for the already-ongoing decline of packages was to go directly into the financing and production of films and TV series (including and especially those made by their own clients)—a pivot that would be immediately foreclosed by the new “Code of Conduct” demanded by the WGA, which would prohibit agencies from receiving package commissions on WGA-covered projects and from maintaining more than 20% ownership (or any operational control) of their own studios. Observers wondered if the WGA would dare to follow through on its repeated threats to terminate its ATA franchise agreement and instruct all of its members to fire their agents (at least insofar as the representations related to their work as writers) if the agencies did not agree to the union’s demands.

The WGA very much dared, and on April 22, 2019, more than 7,000 WGA members submitted written termination letters to their agents and committed to re-sign only with those agencies that agreed to the WGA’s new “Code of Conduct.” As the requisite resulting litigation percolated in the background, boutique and mid-size agencies—which generally had no aspirations to open their own studios, relied much less heavily on packages as the economic bedrock of their businesses, and sometimes lacked the liquidity and volume of non-WGA business to remain solvent if the dispute dragged on too long—began to accept the new Code of Conduct, one after the other, to get back into business with their writer clients. The first of the Big Four to relent, UTA, did so in July 2020 (more than a year after “firing day”). The next, ICM, agreed to the WGA’s terms in August 2020. CAA followed in December 2020. And finally, in February 2021, WME—the last holdout, and probably the one with the most to lose in both its packaging and studio businesses—agreed to the WGA’s demands. After a brief sunset window, the era of agency packaging (at least on WGA-covered projects) came to an end on June 30, 2022 (although package deals

59 Indeed, agencies are sometimes slangily referred to in industry trade publications as “tenpercent-eries,” referring to the standard 10% commission charged by talent agencies on all revenues earned by their clients. In California, there is no statutory limit on commissions, beyond the legal requirement that they be reasonable. New York law sets statutory maximums on commissions depending on the nature of the client’s work. The 10% benchmark is an enshrined maximum in the agencies’ franchise agreements with the guilds.

made prior to that date, including those that automatically apply to new derivative productions of previously packaged and produced projects, will remain paid and serviced for years to come).⁶⁰

60 Though recent, the WGA's Agency Campaign no doubt represents an indelible moment in modern Hollywood history, in which the WGA more or less singlehandedly and simultaneously brought to an end one ubiquitous business practice (packaging fees) that had been part of the basic fabric of the industry for decades, and one growing business practice (agency-owned studios) that had developed, at least in part, specifically to mitigate the decline of the former, and that looked poised to become a big part of the industry's future.

The sky did not fall at any of the major agencies, which had long been aware of and planning for the long-term decline of packaging revenue. Around the same time that new packaging deals came to an end in June 2022, the "Big Four" agencies became the "Big Three" as CAA completed its acquisition of ICM, quickly becoming the largest-ever representation business in entertainment and media. CAA's in-house studio, wiip, had achieved only limited scale and success during its short existence, and by the summer of 2021, CAA had sold a majority stake (and operational control) to Korean studio JTBC. UTA's Civic Center Media, technically a branded "affiliation" with MRC and not a bona fide standalone studio, remained operational, with A24 stepping in for MRC as UTA's operational and production partner in January 2024).

Meanwhile, the fortunes of WME and its owners had already increasingly become tied to those of Endeavor, the parent company spun up by superagent/entrepreneur/hurricane Ari Emanuel that also owned other valuable assets like IMG, Professional Bull Riders, Miss Universe, Frieze, UFC, and (later, and after some corporate reorganization) WWE. Despite having been effectively forced into divestiture by the WGA, Endeavor was soon able to secure a \$785 million deal to sell an 80% stake (and operational control) of the scripted business of Endeavor Content—the most prominent and fastest-growing of the agency-owned studios—to Korean media powerhouse CJ ENM. Beyond changing its newly acquired studio's name to Fifth Season, CJ ENM retained most of the old Endeavor Content's leadership, and has continued to operate it with little outwardly noticeable change. The world turns.

Rather, the long-term significance of the Agency Campaign is to be found less in the substance of these outcomes, and more in the *fact* of them, and of how they were achieved. The WGA generated a level of passion and solidarity among its membership that was unprecedented in modern Hollywood history, successfully managed competing viewpoints among its membership, picked a fight with some of industry's most powerful and entrenched interests, and *won*. On its face, the Agency Campaign was an almost unqualified success, with the WGA wildly exceeding most observers' expectations by not only achieving all of its stated goals, but also effectively announcing itself as a new power center of the industry, with the leverage and ambition to make consequential change through sheer force of will. But, while the town quickly adapted to the new business realities created by the Agency Campaign, its more intangible consequences continue to be felt, and will be for some time.

As the Agency Campaign was ongoing, many observers (both inside and outside of the major agencies) speculated that both the WGA's "crusade" against packages, and the agencies' sometimes equally zealous resistance to it, had less to do with the actual practices at issue or their economics, and more to do with the WGA challenging the broader industry-wide power and primacy of the major agencies. This observation is included here not to be endorsed or criticized, but because the mere fact that it was a somewhat popular narrative at the time says a lot about how many people understood the conflict's context and stakes.

The WGA waged its Agency Campaign—which, over time, became more narrowly (but never exclusively) focused on the agency packaging issue—in often very personal and moral, rather than dispassionate and business-oriented, terms. Never-shy/always-quotable writer and showrunner David Simon (*The Wire*) wrote in a widely circulated March 2019 blog post, "Packaging is a lie.

b Managers⁶¹

The precise role of a manager varies widely depending on the particular client/manager relationship, but in general, compared to agents, managers are distinguished by having fewer clients, more intimate personal relationships with their clients, a more pronounced creative influence on (and creative participation in) their clients' work, and a more significant role in their clients' personal as well as professional lives. Managers may serve as consiglieres, best friends, surrogate parents, or creative partners—sometimes all at once. Compared to agents, managers are much more likely to invest significant time and effort

It is theft. It is fraud. In the hands of the right U.S. Attorney, it might even be *prima facie* evidence of decades of racketeering. It's that fucking ugly." Inevitably, this kind of forceful language drifted from describing *the practice of packaging* to frequently being used to label the agencies and agents themselves. Individual agents who had enjoyed deeply personal and committed relationships with their clients, and often prided themselves on being their clients' champions and protectors, chafed at being labeled as corrupt crooks—especially those who seldom if ever engaged in the practices being challenged by the WGA, but found themselves largely lumped in with those who had by the public messaging from the union and its most vocal members. Even agents who eagerly reunited with their clients at the first available opportunity often quietly carried hurt feelings from the writers' fiery rhetoric.

As the Agency Campaign carried on through early 2020, the WGA prepared to direct the passion and solidarity it had generated among its members toward the union's next big fight: negotiating a dramatically improved Master Basic Agreement ("MBA") with the Alliance of Motion Picture and Television Producers ("AMPTP"). The AMPTP is the trade organization that represents Hollywood's major motion picture studios, television networks, and, more recently, the largest tech streamers. The AMPTP negotiates on the industry's behalf collective bargaining agreements with all the major entertainment unions, under the control of its "Class A" members—currently Disney, NBCUniversal, Paramount, Sony, Warner Bros. Discovery, Netflix, Amazon, and Apple. The unprecedented wholesale destabilization of the industry by the Covid-19 pandemic in March 2020, however, and the resulting industry-wide sense of existential insecurity (and, at times, a sort of "all in this together" bonhomie), effectively preempted and defused what many had expected to be an extremely contentious MBA negotiation in summer 2020.

But virtually as soon as the industry had emerged from the pandemic, shaken but intact, it began to look ahead to the next triannual round of MBA negotiations, in summer 2023. And the WGA, still emboldened by its success in the Agency Campaign, prepared to deploy its new playbook in the coming negotiations—one based on a firmly adversarial and Manichean worldview, "all-or-nothing" hard bargaining tactics, unshakeable union solidarity (sometimes rigorously enforced with public shaming), identification and alliance with the broader cause of labor (in the entertainment industry and beyond), the recasting of business issues as moral ones (with total moral certitude), and passionate direct public advocacy from its members (whose rhetoric sometimes crossed the line into *ad hominem* attacks). All of this unquestionably contributed to the protracted and demoralizing fractiousness, chaos, and paralysis of the "Hot Labor Summer" of 2023, during which the entire industry was substantially paralyzed by a rare "double strike," with the WGA striking for 148 days (the second-longest such labor stoppage in WGA history) and SAG-AFTRA striking for a (partially overlapping) 118 days.

61 For all purposes here, this book refers to "personal managers" as opposed to "business managers," a term that refers to finance/accounting professionals, typically CPAs, who more narrowly help manage their clients' income, savings, investments, and other economic affairs.

developing young, inexperienced clients who do not yet have significant, obvious, and immediate employment and revenue-generation prospects.

Unlike agents, managers are unlicensed and unregulated. As a technical matter, this means that they are legally precluded from procuring employment opportunities for their clients, an activity which is legally reserved exclusively for licensed agents. In theory, therefore, the role of manager is intended to comprise a mix of personal support and general career advice, without crossing the line into generating work. As a practical matter, few managers would be willing or able to explain to their clients that, in fact, they cannot help their clients find arguably the one thing the clients (especially the young, poor ones) want more than anything: a job. This puts managers at constant risk of running afoul of the agency licensure laws, particularly California's TAA, whose application is determined by conduct (i.e., the act of procuring employment), not titles (i.e., whether an individual refers to themselves as an "agent" or a "manager"). Managers who cross the line into acting as unlicensed agents by procuring employment for their clients not only risk having their representation agreements prospectively voided, but may be required to disgorge past commissions they have already collected. Where clients and managers find themselves at odds—a fairly common occurrence, given the intense personal elements of the manager-client relationship—these powerful legal remedies almost always give clients a significant upper hand in the dispute.⁶²

Like agents, managers are commonly understood to work primarily for a percentage-based commission on their clients' earnings—often 10%, although some managers (who, again, are not subject to state licensure laws or franchise agreements with the entertainment unions) may charge as much as 15%.⁶³

62 For this reason, although the TAA nominally regulates agents, many industry observers regard it as essentially a defensive tool of talent agencies, allowing them to maintain a legal monopoly over the critical service of helping clients find work, and making them effectively essential to clients in a way that managers may not be. This perception is bolstered by provisions of the TAA that allow an individual to procure entertainment employment without an agency license if they work alongside a licensed agent. In short, the TAA—which is invoked in roughly thirty lawsuits per year between disgruntled clients and their former managers—is the bane of managers' collective existence and has survived numerous constitutionality challenges brought by spurned managers. See, e.g., *National Conference of Personal Managers, Inc. v. Brown*, Case No. CV 12–09620 (C.D. Cal. Aug. 13, 2015). In 2008, however, the California Supreme Court created some relief for spurned managers through its decision in *Marathon Entertainment, Inc. v. Blasi*, 174 P.3d 741 (Cal. 2008). In that case, the California Supreme Court held that the legal doctrine of severability could allow terminated managers to retain the right to receive compensation for legally provided non-procurement management services.

63 The scope of this commission may vary between agents and managers as well. Agents generally commission clients only on revenues earned from deals specifically sourced and/or negotiated by the agent, leaving the client's other revenue sources, investments, and business endeavors outside of the scope of the agency's commission. On the other hand, because managers may play a more involved role in all aspects of a client's life, some managers insist on commissioning all the client's earnings from all sources.

Many managers in the television industry, however, rely principally on a different primary source of income: producing fees.

Unlike agents, managers are permitted to serve as producers on their clients' projects; this freedom is one of the major reasons why some experienced talent representatives prefer to function as managers rather than agents, despite the risks posed by the TAA and its remedies for unlicensed procurement of employment. Many managers (particularly "literary managers," who represent writers and directors, as opposed to "talent managers," who represent actors) view themselves primarily, or at least equally, as producers. And for such managers/producers, their primary source of new projects to produce is their own clients—who are often happy to have their trusted confidantes enjoy formal ongoing creative roles on their projects, and even happier to have those confidantes waive their commissions because they are being separately compensated by the studio with their own producing fees.⁶⁴

As a result, the major literary management companies, such as Anonymous Content (*True Detective*), the now-Lionsgate-owned 3Arts (*It's Always Sunny in Philadelphia*), and Brillstein Entertainment Partners (*The Sopranos*), are also among the most prolific non-writing producing entities in the television industry, although some studio executives tend to regard them (rightly or wrongly) as "baggage" that they must deal with in order to get access to the managers' clients.

c Lawyers

Finally, many clients retain lawyers as part of their representation teams. As with the other types of representatives, the precise role played by the lawyer varies depending on the preferences of the client, the skills and capacities of the client's other representatives, and the relationship between the lawyer and those other representatives.

In the simplest terms, the lawyer's role on the team is as legal advisor and negotiator. In some cases, lawyers enter the dealmaking process only after the client's agents have already negotiated the substantive deal terms in full, with the lawyer focusing solely on negotiating the resulting paperwork. At other times, lawyers work side-by-side with agents to negotiate the substantive deal

64 One of the most acrimonious disputes between client and manager was between comedian Garry Shandling and his former manager Brad Grey (who eventually left the management company previously known as Brillstein-Grey Entertainment to become the chairman and CEO of Paramount Pictures). Shandling's primary complaint in the dispute was that Grey received substantial fees and backend as a producer of Shandling's successful *The Larry Sanders Show* on HBO, while simultaneously commissioning Shandling's fees and backend from the series in his capacity as Shandling's manager. Although Shandling and Grey confidentially settled the dispute on the eve of trial in 1999, as a result of this high-profile and nasty litigation, most managers have become much more scrupulous about eschewing such "double dips."

terms, with the lawyer taking over the paperwork on their own once that phase of the process is complete. And in other cases, an agent who has sourced an employment opportunity will immediately step aside and allow the lawyer to serve as primary negotiator for the resulting dealmaking (although the agent, in such instances, would almost certainly remain engaged with the process behind the scenes). Entertainment lawyers, of course, must be qualified and licensed to practice law in their state and are subject to the same professional responsibility rules and fiduciary duties (including duties of loyalty and confidentiality owed to their clients) as all attorneys.

Although lawyers may enjoy the same type of close personal relationship with their clients as agents and managers, for the most part, the role of the lawyer is narrower than that of the other representatives (and as a result, lawyers may be able to simultaneously represent a larger number of clients). Compared to agents and managers, lawyers typically have a much less significant role in generating employment opportunities⁶⁵ or advising on creative matters, although again, it all depends on the specific client and the specific lawyer. For instance, actor Bill Murray famously chooses to operate without an agent or manager and to conduct all of his business through his attorney. And of course, lawyers helpfully expanded the scope of their services in a variety of ways to meet their writer clients' needs during the WGA's Agency Campaign (between February 2019 and February 2021).

Unlike agents and managers, entertainment lawyers generally maintain a basic, one-dimensional revenue model—commissioning their clients' earnings from deals negotiated by the attorney, typically at the rate of 5%.⁶⁶ Lawyers generally do not enjoy any alternative revenue streams (such as package

65 To the extent that lawyers engage in procurement activity on behalf of their clients, if they do not simultaneously maintain an agency license (which would be unusual), they face the same TAA-related risks as managers. In fact, one 2013 case before the California labor commissioner suggested even greater risks for entertainment lawyers, by ruling that “acts undertaken in the course of negotiating for the employment of an artist”—in other words, the very heart of the service particularly provided by entertainment lawyers to their clients—constitute “procurement” for purposes of the TAA. *Solis v. Blancarte*, TAC-27089 (Cal. Lab. Com. Sept. 30, 2013). This decision would effectively render virtually every practicing entertainment attorney an unlicensed agent, violating the TAA on a daily basis. However, this case has not generated the same wave of TAA-based disputes between disgruntled clients and attorneys as has historically been seen between disgruntled clients and managers.

66 This fee structure is unusual among attorneys, who most commonly work for hourly fees. When considering only the highest-earning clients, it may also seem over-compensatory, especially since lawyers may continue to commission backend payments from successful projects long after the lawyer's active representation of the client has ended, as long as the fee-generating deals were negotiated during the representation. In fact, some higher-earning clients eventually seek to move their attorneys to hourly rates, rather than commission-based fee arrangements. Most entertainment lawyers resist this fiercely, however, as the valuable 5% commissions from high-earning clients are necessary to sustain the lawyers' overall businesses, and allow them to invest time and effort in representing less-lucrative, lower-earning clients (who may someday grow into high earners).

commissions or producing fees) that they could accept in lieu of commissioning their clients. As a result, some individuals—particularly those represented by major agencies that employ their own lawyers as “business affairs” executives and make these lawyers available to assist the agency’s clients as a further courtesy service—prefer to reduce their overall commission obligations by eschewing lawyers and allowing their agencies to handle all aspects of negotiating the clients’ deals, without the participation of outside counsel.

2

STREAMING: THE END, PRESENT, AND FUTURE OF TELEVISION

The first edition of *The Business of Television*, published in 2018, began its section on streaming by declaring—in hindsight, rather blandly—that the emergence of “streaming” or “digital video”¹ had “presented the television industry with its greatest market challenges and its greatest market opportunities of recent history.” It went on to say that streaming:

represents, all at once, the death of some classic markets (having largely cannibalized the physical home video business), the birth of a new one (providing a valuable new medium/window for downstream distribution of traditional television programming), and the exciting new frontier in original content (with the major players investing heavily in original programming and emerging as vital buyers for new television content).

Six years later, this second edition can confidently introduce streaming in more decisive terms:

Streaming is the end of television, having hastened the demise of the pay TV bundle (a once-impossibly bountiful revenue stream that, while now famously in decline, still provides the legacy powers with much of the free cash they

1 The FCC’s preferred regulatory term, which the first edition rather academically insists on using, is the somehow much more bureaucratic-sounding “online video distribution.” Some people also describe these platforms as “over-the-top,” referring to these services’ technological capacity to reach users through their general-purpose internet subscriptions, without relying on a separate, service-specific technological system (such as the coaxial cables that underlie cable television or fiber-optic cables used by telecommunications-based television providers).

are using to build their own digital futures), while also irrevocably changing people's habits and expectations around content consumption.

Streaming is the future of television, with Netflix seemingly the winner of the Streaming Wars, Amazon and Apple (with their unfathomably deep pockets and ecosystem-oriented strategies) able to remain big players for as long as they care to be, and the major legacy companies all having largely committed themselves to transitioning their programming and audiences to their own "general entertainment" streaming platforms.

And streaming is increasingly indistinguishable from television, thanks to ever-improving access to high-quality broadband internet; the growth of "virtual" MVPDs (such as YouTube TV and Hulu with Live TV) offering an enhanced yet familiar multichannel viewing experience (complete with old-school channel guides); the rise of Free Ad-Supported Streaming Television (or "FAST") channels that recreate the "lean-back" basic cable viewing experience; and the widespread adoption of easily interconnected mobile and "smart" devices.

In understanding the role of digital content platforms in the marketplace, it is helpful to refer to our previous visualization of the television industry, at Chart 1. Most every major digital content company can be understood as occupying one or more positions in that chart, and every position in the chart has been taken up by at least one major digital content company.

Most well-known digital platforms function primarily as networks, a group that includes Netflix, Amazon Prime Video, Hulu, Apple TV+, Disney+, Max, Peacock, and Paramount+. Although these streamers are seldom referred to as "networks" in popular language, they began as a part of—and are quickly evolving into the successor to—a decades-old marketplace that had already grown from three broadcast networks to a universe of dozens of broadcast, basic cable, and pay cable networks. The newer crop of streaming networks is distinct from these "traditional networks" in three principal ways: (1) they offer content on an "on demand" rather than "linear" basis; (2) they are accessed over the internet rather than through other purpose-built infrastructure (such as coaxial or fiber-optic cable); and (3) they generally maintain direct subscription relationships with their viewers, without the intermediation of an MVPD. Each of these distinctions, however, has lost much of its salience over time.

Virtually since the advent of streaming (which immediately delighted viewers and quickly terrified entrenched media interests), linear networks have sought to meet evolving consumer expectations by developing "on demand" viewing options, especially for current and recent programs, via branded applications for mobile devices, smart TVs, and set-top boxes and/or MVPD-based "video on demand" systems.² At the same time, the advent of these

2 Originally, these primarily took the form of network-branded applications like FX+ and HBO All Access, which did not offer standalone subscriptions, instead requiring users to authenticate

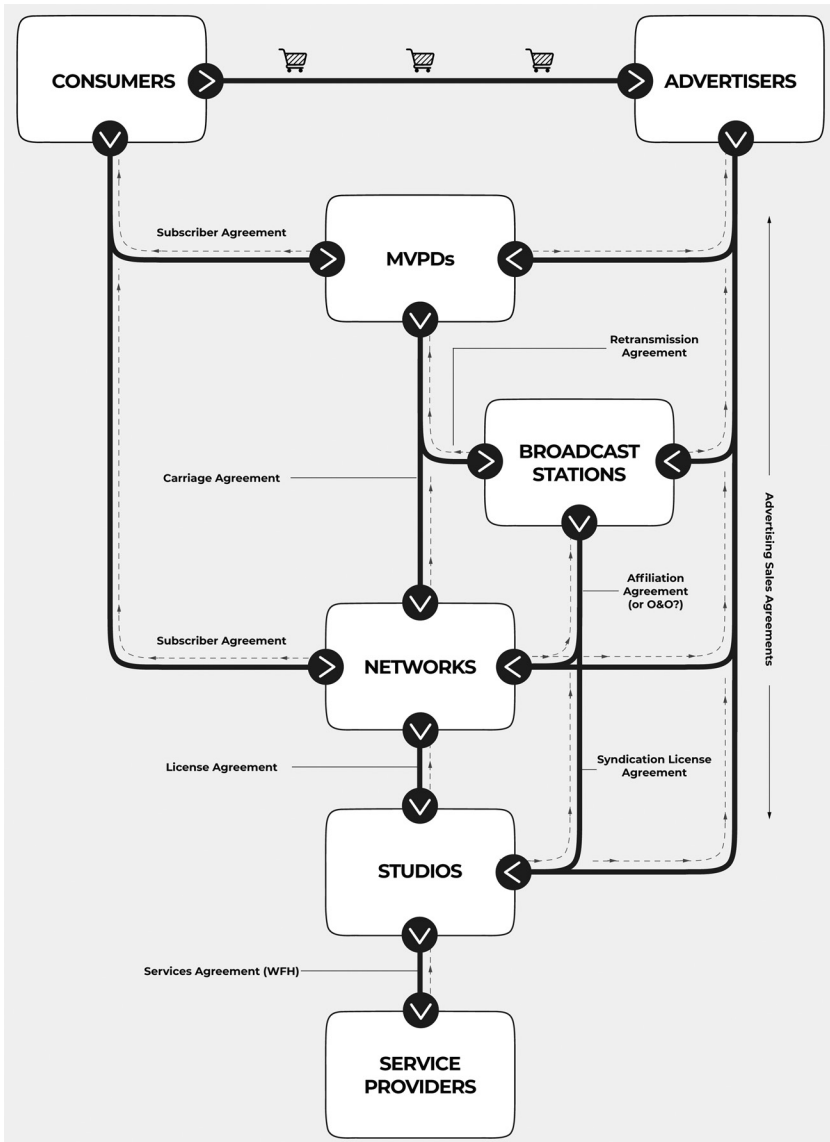


CHART 1 Structure of the Television Industry

themselves with a cable or satellite subscription to access content from the network on an on-demand basis. By requiring such authentication, these services were functionally extensions of their corresponding linear networks (and, indirectly, the MVPDs), rather than bona fide standalone services. For that reason, they are not discussed in this chapter on streaming, but are instead explored as part of the “digital revolution” for traditional networks at the dawn of the streaming era. See Chapter 1, Section B.iii.c (pg. 31).

same technologies, and especially the dramatic expansion of access to high-bandwidth broadband internet, has rendered the technical distinction between streaming and traditional networks largely invisible and irrelevant to viewers.³ And, in order to reach new customers who might not otherwise seek out these services on their own, tech and legacy company-owned streamers alike have increasingly partnered with hardware manufacturers, with each other (particularly Amazon and Apple), and even with traditional MVPDs—relying on these partners for advertising support, paying significant dollars for premium placement on consumer-facing interfaces and remotes, and even allowing their partners (like the old MVPDs before them) to control the direct subscription/payment relationship with the customer (and claim a share of the subscription revenue).⁴

As these streaming services have expanded and matured, they have also grown to occupy both of the other basic corporate positions in the television industry value chain depicted here, producing and owning their own original content (and therefore acting as studios), offering subscription access to and bundles with third-party streaming services (thus engaging in MVPD-like packaging of networks), and even substantially recreating and directly competing with traditional cable and satellite multichannel subscription services.⁵

A Streaming Alphabet Soup

Streaming businesses models can generally be broken down into a series of acronyms, which differentiate them by their method of monetization. Content licenses may distinguish explicitly among these forms of distribution; on the other hand, services often expressly rely on a combination of one or more of these means of monetization. Digital buyers of content consider the prior streaming history of a television series in determining that series' market value, and prior exhibition via the same streaming model (e.g., subscription-based, ad-supported, etc.) is generally considered to have a stronger downward impact on the licensing value of content compared to prior exhibition via a different streaming model.

3 Furthermore, the coaxial cable and fiber-optic infrastructure originally developed and deployed for television distribution provided the initial foundation for, and has largely been repurposed for the expansion of, broadband internet access.

4 For example, in June 2023, Verizon offered a price-discounted bundle of Netflix and Paramount+ as part of its +play subscription-aggregation hub.

5 Perhaps the only major players in the digital content ecosystem that do not fit neatly into the prior chart are TVOD retailers such as Apple's iTunes and Google Play, which functionally occupy the place traditionally held by retailers and renters of physical home video products, such as Target, Best Buy, and defunct rental house Blockbuster Video. See Section A.ii.

i SVOD

“SVOD” refers to “Subscription Video on Demand”—authenticated access for paying subscribers to a library of on-demand streaming content. The classic ad-free offerings of Netflix and Amazon are examples of “pure” SVOD services, and all current major “premium” streaming services are primarily, but no longer exclusively, SVOD-based.

In its early years, SVOD was generally understood to refer narrowly to real-time, on-demand streaming, and this (in addition to the specific forms of monetization involved) helped distinguish SVOD from TVOD (described later). More recently, however, major streaming platforms like Netflix and Amazon have introduced (and expanded their licensing requirements to allow for) “tethered downloads,” a feature by which customers can download content for permanent or semi-permanent access off-line so long as those users maintain active subscriptions.⁶

SVOD constitutes a “direct pay” form of monetization, in that customers must pay for access to content, rather than receiving it for free in exchange for exposure to advertisements. However, it is an attenuated form of direct pay, in that customers pay for blanket access to a library of content, without regard to whether they are watching any specific piece, or any particular quantity, of content (analogous to a customer paying for a subscription to a traditional pay television network like HBO, even if they may not watch every individual piece of content on that network).

For much of the streaming era, the most recognizable providers of premium television content online, such as Netflix and Amazon Prime Video, generally employed a “pure” SVOD-based model, offering paying subscribers an exclusively ad-free viewing experience. Especially in the early days of streaming adoption, this approach helped the streamers distinguish themselves and win over converts from traditional television. Today, every major streaming service has either launched or is preparing to launch lower-cost ad-supported tiers of their subscription services, thereby hybridizing the once largely separate business of SVOD and AVOD exhibition.

ii AVOD

“AVOD” refers to “Advertising-Supported Video on Demand”—customer access to one or more pieces of on-demand streaming content accompanied by

6 This technical capability did not exist at the time these acronyms were first developed, and therefore was not contemplated by most early generation contracts granting SVOD rights. Before streamers evolved their dealmaking practices and contractual forms to account for tethered downloads, many content licensors who had entered into earlier generation streaming licenses were able to extract additional compensation (or other concessions) in exchange for newly granting the requisite rights.

advertisements.⁷ YouTube—which by most measures remains the world’s most-watched digital content platform—is the only remaining primarily AVOD-based offering (though technically not a “pure” one, as it also offers upgrades to an ad-free YouTube Premium subscription plan).

In the early streaming era, AVOD exhibition was largely separate from SVOD exhibition, with most AVOD services offering access to content without a subscription (or any other direct charge to the customer). But in the contemporary streaming market—and in particular the portion of the market that falls within this second edition’s revised definition of “television”⁸—such “pure AVOD” services (meaning those that offer *on-demand* content, supported by ads, with no subscription or other direct charge to the consumer) have largely vanished. The most prominent standalone service, Hulu’s subscription-less ad-supported “Hulu Classic” offering, was discontinued in 2016.

To be clear, in general, advertising is playing an already large, and rapidly growing, role in streaming. Current ad-supported services, however, usually fall into one of two categories, neither of which is strictly “AVOD” as that term was originally understood. FAST channels, described later, provide ad-supported content on a *linear* (rather than “on demand”) basis without requiring a subscription. On the other hand, every major service now offering ad-supported content *on demand* does so with a hybrid SVOD/AVOD model, in which customers are still required to maintain a paid subscription to access content, but can elect to pay a lower monthly fee than those who value an ad-free viewing experience.

iii TVOD

“TVOD” refers to “Transactional Video on Demand”—paid access to content via the internet, often (but not necessarily) downloadable by the viewer and accessible without an active internet connection, with purchase and/or rental fees paid on a specific product-by-product basis (rather than for a blanket subscription to a library of content).⁹ Major TVOD services include digital marketplaces such as Apple’s iTunes, Google Play, and Amazon Instant Video.

7 Such advertisements may be “pre-roll” (i.e., shown before the content itself), “mid-roll” (i.e., one or more distinct commercial breaks interrupting the content), and/or “post-roll” (shown after the content is complete).

8 See Chapter 1, Section A (pg. 13).

9 The more recent concept of “tethered downloads” initially blurred the lines between SVOD and TVOD, but after a period of adjustment, the industry seems to have largely accepted such subscription-authenticated downloads as a feature of SVOD, as described in Section A.i. In other words, the thing that principally distinguishes TVOD from SVOD is not the permanence of a download or its accessibility without an internet connection, but rather whether the customer individually pays for the content or accesses it from a broader content library covered by a paid subscription.

TVOD can be further subdivided into “Electronic Sell-Through” (or “EST”), referring to permanent downloads of episodes or series, akin to the purchase of a traditional physical DVD or Blu-ray that the customer gets to keep,¹⁰ and “Electronic Rental” (“ERT”) or “Download-to-Rent” (“DTR”), referring to a temporary time-limited download/viewing right, akin to the rental of a traditional physical DVD or Blu-ray.¹¹ TVOD is largely viewed as a successor to, and replacement for, the traditional home video market. Alongside traditional home video, it represents the purest expression of theatrical-style “direct pay” distribution/consumption in the television industry.

iv FVOD

“FVOD” refers to “Free Video on Demand”—access to digital content without a direct charge, paid subscription, or requirement of viewing ads. Because it is essentially a non-monetized business, FVOD has little practical role in the professionalized television industry, and typically appears, if at all, in the context of promotional exhibition of special feature-type secondary content (though even this type of content is usually advertising-supported).

v PVOD

“PVOD” refers to “Premium Video on Demand”—a variation on TVOD in which especially desirable films are made available for download concurrently with, or very shortly after, their initial theatrical releases, at a significantly higher price point than a standard movie ticket or TVOD transaction (e.g., \$29.99, compared to \$14.99 or less for most standard EST sales, and \$4.99 or less for most ERT/DTR transactions). In theory, a PVOD transaction may be “permanent” (like an EST download) or, at a somewhat lower price, temporary (like an ERT/DTR transaction). The availability of a title on PVOD may or may not be limited to subscribers of a related SVOD service (on which the title would be offered to subscribers at no additional charge after a further delay). Still relatively new and experimental (the term “PVOD” does not appear in this book’s 2018 first edition), PVOD releasing was especially significant in 2020, when

10 As a technical matter, some companies take the legal position that there is no such thing as a “sale” of digital content, and that even “EST” is merely a perpetual license to the consumer, not a “sale” as such. This fine legal parsing can have consequences for revenue accounting and piracy enforcement, but as a practical matter, it is something of a legal fiction.

11 It bears noting, however, that although such digital rentals have been widely available for many years, there is not (and has never been) any substantial “ERT”/digital rental market for television programming (as opposed to for theatrical feature films, where such “on demand” rentals have largely persisted as a distinct exhibition window in a film’s distribution lifecycle).

the Covid-19 pandemic completely shut down (and, for some time after theaters reopened, significantly hampered attendance for) theatrical exhibition.¹²

vi VOD

“VOD” just stands for “Video on Demand,” and although the term is often used, it is essentially ambiguous and should be interpreted with care. VOD may act as a blanket term which encompasses all of the aforementioned forms of Video on Demand exhibition. It may be used as a synonym for ERT, or may refer more narrowly to a free or ad-supported form of ERT that is offered through MVPD set-top boxes in connection with the customer’s subscription to a television network included in a cable/satellite package. Of all the acronyms involved in the alphabet soup of online video distribution, “VOD” can be the most ambiguous, particularly when used without a clear context.

vii FAST

“FAST” refers to “Free Ad-Supported Streaming Television.” Usually referred to as “FAST channels,” these services are distinct from AVOD in that, while AVOD services allow customers to access content *on demand* (the “OD” in AVOD), FAST channels offer viewers streaming access to “always-on” linear channels, without the ability to individually select and start specific programs at their own discretion. Major FAST services include Pluto TV and Tubi.

FAST services often offer multiple channels with distinct styles and themes and, particularly when batched in this fashion, FAST viewing largely recreates the “lean back,” watch-whatever-is-on experience of basic cable, which many users find to be a welcome (not to mention affordable) respite from the more decision-intensive, paralyzed-by-infinite-choice experience of on demand viewing. Like “on demand” streaming services, FAST channels/services are typically accessed via dedicated applications on consumers’ smart televisions, set-top boxes, and mobile devices.

Although many FAST channels/services started out as standalone businesses that arose from the Silicon Valley/technology start-up scene (like Netflix many years before), the most promising of these emerging services were soon acquired by major media powers. Today, most prominent FAST channels/services are owned and operated as part of broader media and/or manufacturing portfolios or strategies, and can generally be divided into three distinct categories:

12 Some controversies around PVOD, as well as its impact on the relationship between subscription streaming and theatrical releasing more generally, are discussed in Section B.viii.

- First, general interest multichannel services owned by, and often prominently featuring library content from, legacy media companies. The largest of these, Pluto TV and Tubi, are owned by Paramount Global and Fox, respectively.¹³
- Second, FAST channels that are operated by major device manufacturers, who offer them exclusively on their own devices to try to stand out in the crowded market for set-top boxes, smart televisions, and other viewing devices. The most prominent of these is the Roku Channel, though Samsung and Vizio (among others) also offer branded FAST channels on their smart televisions.
- Third, FAST channels that are owned by and/or branded with existing news, entertainment, and lifestyle brands, such as those offered by Time, Bloomberg, and GoPro.

Early drafts of this chapter referred to a fourth category-of-one: Amazon's Freevee. Since its rebrand from IMDb TV in 2022, Freevee has acted at once as an aggregator of third-party FAST channels (some of which were initially launched on Freevee); a library of older studio films and series; a back catalog of Prime Video originals, with a "teaser" selection of episodes from newer series intended to attract new subscribers to Amazon's flagship subscription service; and a pure-AVOD brand for scripted originals, including 2023 darling *Jury Duty* and hit spinoff *Bosch: Legacy*. But by January 2024, it was reported that Amazon was likely to merge its Freevee originals into Prime Video and potentially restructure the brand into free ad-supported, ad-supported subscription, and ad-free subscription tiers.

The market for FAST channels is also so new that, like "PVOD," the term does not appear at all in 2018's first edition of *The Business of Television*. Instead, in a catch-all section for "Other Key Distinctions" in streaming terminology, the first edition referred to a "small marketplace—entirely separate from those introduced above—of linear digital services," which would "provide a continuous pre-programmed stream of content, via one or more channels, which is accessed by the customer by dipping into the stream at any given time," on a digital and streaming basis, "but are not 'on demand,' in the sense that the customer does not have on-demand control over what he or she watches

13 Both Pluto TV and Tubi nicely illustrate the fast rise of FAST services. Paramount Global (then known as Viacom) acquired Pluto TV in January 2019 for \$340 million in cash, at a time when the service had 12 million monthly active users and generated \$70 million in annual revenue. By the end of 2022, the service boasted nearly 78.5 million monthly active users and annual revenue exceeding \$1 billion. As for Tubi, it was acquired by Fox in March 2020—roughly one year after Fox closed its deal to sell most of its assets (including its stake in Hulu) to Disney—for a reported \$440 million. In February 2023, Bloomberg reported that Fox had turned down offers to sell Tubi to its larger competitors for around \$2 billion—approximately 4.5 times what Fox had paid for the upstart FAST service less than three years earlier.

and when.” It is that “small marketplace” of “linear digital services” which has evolved into today’s thriving FAST channel industry—one of the fastest-growing and most-accessible segments of the streaming industry (for both viewers and market competitors, given the entrenchment of the major powers in subscription streaming).¹⁴

viii SST

“SST” refers to “Subscription Streaming Television”—always-on, programmed, and non-“on demand” linear content channels that are accessible over the internet with a paid subscription. Or at least, it could refer to that—as of 2024, there are no substantial ongoing businesses pursuing this business and exhibition model (which means there are also no generally prevailing terms to describe it). Subscription linear streaming—which could take the form of internet-served “simulcasts” or “rebroadcasts” of existing linear content channels or totally original programmed channels—is perhaps the last “obvious” business/exhibition model remaining to be firmly established in the streaming industry.

There are many reasons why no such “SST” service has ever taken hold in the market, and it is not solely for lack of trying. In 2012, when smartphone adoption in the United States was rising quickly but still under 40%, serial entrepreneur Barry Diller¹⁵ helped found Aereo, an innovative and controversial new service that allowed subscribers in specific geographic markets to view live and time-shifted streams of their local over-the-air broadcast television stations on internet-connected devices. Because Aereo declined to seek consent from (or offer payment to) station or content owners, the company understood from its inception that it was operating in murky legal waters and would inevitably be sued. The Aereo product was therefore uniquely engineered in consultation with lawyers who helped design it specifically to defeat anticipated claims from copyright owners that Aereo infringed on their exclusive “public performance”

14 Of course, by January 2014, with the FAST industry having quickly expanded to over 1,500 channels in the U.S. alone, analysts—who had by this time universally agreed that the industry as a whole had moved beyond its “peak TV” era—were already asking, “Are we at peak FAST TV?”

15 Diller himself is an accomplished and fascinating figure, having served as CEO of Paramount Pictures from 1974 until 1984—a prolific, historically creatively and commercially successful run that included the release of films like *Saturday Night Fever* (1977), *Grease* (1978), *Raiders of the Lost Ark* (1981), *Terms of Endearment* (1983), and *Beverly Hills Cop* (1984), as well as the launch of television series like *Laverne & Shirley* (1976), *Taxi* (1978), and *Cheers* (1982)—before going on to found or co-found the Fox broadcast network, QVC, Home Shopping Network, and USA Network. His list of professional mentees, sometimes called the “Killer Dillers,” is no less impressive, including former Disney Chairman and CEO Michael Eisner, former DreamWorks Animation and Disney head Jeffrey Katzenberg, prolific film producer (and long-time partner of Jerry Bruckheimer) Don Simpson, Uber CEO Dara Khosrowshahi, former Columbia Pictures president Dawn Steel, and former FCC Chairman Julius Genachowski.

rights.¹⁶ It didn't work. An adverse Supreme Court ruling led the company to suspend business operations in June 2014 and declare bankruptcy in November 2014.¹⁷ Since then, no platform would dare to offer subscription-based linear

16 Specifically, rather than capturing over-the-air broadcast signals with a single large antenna in each geographic market, Aereo assigned every subscriber their own individual antenna, with a one-to-one relationship between each subscriber's stream of content and that personally assigned antenna. This somewhat cumbersome approach was engineered to fit within the Second Circuit's ruling in *Cartoon Network LP v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008), in which the court held that a "remote storage digital video recorder system" ("RS-DVR" or, more simply, remote DVR) offered by MVPD Cablevision to its customers, in which recorded programming was stored and transmitted from Cablevision-owned/controlled servers rather than user-owned local set-top boxes, did not infringe on copyright owners' exclusive "public performance" rights because Cablevision's technology made separate individual copies of every program at each user's command, rather than distributing a single centrally-stored copy. Consequently, the Second Circuit reasoned, providing users with remote access to these separately created and stored copies was a series of "private" (rather than "public") performances of the copyrighted material.

The Second Circuit was forced to undertake such legal gymnastics to "save" Cablevision's remote DVR system because it had to distinguish the so-called "Transmit Clause" of the 1976 Copyright Act, which expands the plain-language understanding of "public performance" to include the exclusive right "to transmit or otherwise communicate a performance or display of the work to . . . the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times."

The Transmit Clause, in turn, had been included by Congress in the 1976 Copyright Act specifically to supersede prior U.S. Supreme Court decisions which held that "community access television" ("CATV") systems—a precursor of modern MVPDs that captured over-the-air broadcast signals on a large public antenna and transmitted them, by wire, to paying subscribers, often those in geographic areas with poor access to over-the-air broadcast signals—did not infringe on copyright owners' "public performance" rights because CATV subscribers were accessing the wire-delivered broadcast signals at different times, on different devices, and in the privacy of their own homes. *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968). The Supreme Court held such CATV transmission to be legal even after CATV operators began using increasingly powerful antennae to offer viewers access to broadcast stations from outside their own geographic regions, which challenged the broadcasting industry's bedrock regulatory and licensing norms around geographic subdivision. *Teleprompter Corp. v. Columbia Broadcasting System, Inc.*, 415 U.S. 394 (1974). The Transmit Clause was added to the 1976 Copyright Act in response to aggressive lobbying from the broadcasting industry, which viewed as an existential threat free-riders who could, under *Fortnightly* and *Teleprompter*, widely rebroadcast their signals without compensation or consent. This legal change also set the stage for introduction of the "retransmission consent" and "must carry" regimes as part of Congress's major 1992 overhaul of the Communications Act. See Chapter 1, Sections B.iv (pg. 35) and B.v (pg. 37).

17 See *American Broadcasting Companies, Inc. v. Aereo*, 573 U.S. 431 (2014). Notably, while the Supreme Court decision in *Aereo* is seemingly irreconcilable with the Second Circuit's in *Cartoon Network*, the majority opinion scarcely discusses or distinguishes *Cartoon Network* and conspicuously declines to overrule it. The simplest explanation for this disconnect is pragmatic and logical, rather than legal. To an average observer (or federal judge), the remote DVR system at issue in *Cartoon Network* largely felt intuitively unobjectionable (and became only more so as time passed and DVRs came to be seen as an ordinary aspect of TV viewing). On the other hand, even though Aereo was rebroadcasting signals that were already available for free to anyone with an antenna, its unauthorized "free-riding" monetization of the broadcasters' signals—to audiences that the stations themselves could not measure, and therefore could not monetize with advertisers—felt intuitively

streaming of terrestrial broadcast signals (or any other traditional linear television network) without the consent of the stations and/or networks involved.¹⁸

Nor have there been any significant efforts to launch a subscription-based (rather than free and ad-supported) linear streaming service offering original FAST-style “always on” programmed channels. This seems to be less a function of law than one of economics. Although library and second-run content both play a vital role in customer retention for subscription-based services, customer *acquisition* is usually more a function of exclusive original programming and, increasingly, sports—both very expensive to the platforms. On the other hand, with few exceptions (most notably the Roku Channel), FAST channels in general offer a lower-cost content mix of older library content (often licensed on a non-exclusive basis), and (often non-union) short-form, unscripted, and documentary programming. Such lower content costs enable one of the major appeals of FAST channels: as the acronym itself states, they are *free*. It is highly questionable whether customers, who have also been trained over the last 15 years to expect an “on-demand” experience from their *paid* streaming services, would ever see enough value in a non-on-demand streaming experience—essentially, a recreation of basic cable but probably without the recognizable brands—to pay for it out of pocket in large numbers. If such subscription-based linear streaming of original digital channels does eventually emerge, it is likely to come not from new services built primarily on this approach, but from established players (most likely the FAST services) experimenting with a “premium” option to “up-sell” their most loyal existing users.

ix vMVPDs

“vMVPD” stands for “Virtual Multichannel Video Primary Distributor” (or “Virtual MVPD”)—a service that substantially recreates the multichannel subscription package traditionally delivered by MVPDs such as cable and satellite television providers, but which piggybacks on existing internet and “smart device” infrastructure (such as smart TVs and multipurpose set-top boxes), rather than relying on traditional coaxial, fiber-optic, or satellite infrastructure and equipment. As of 2024, the clear market leaders in this space are YouTube

“icky.” American copyright and communications law is complex and flexible enough that the judges in both *Aereo* and *Cartoon Network* could start with their desired substantive outcomes—DVRs are OK, *Aereo* is not—and work backward in their legal reasoning. And had the Supreme Court gone so far as to explicitly overrule, rather than mostly ignore, the Second Circuit’s decision in *Cartoon Network*, it would have implicitly illegalized the unobjectionable-feeling remote DVRs, which had grown widespread in the intervening years.

18 To the extent companies have sought to do so *with* consent from and payment to the stations and networks, these offerings have taken the form of “virtual MVPDs,” which are discussed in Section A.ix.

TV and Hulu with Live TV, both of which offer channel lineups comparable in size and composition to those offered by traditional MVPDs.¹⁹

These services are often functionally indistinguishable to customers from traditional MVPDs, but because of their internet-based (rather than cable or satellite-based) delivery, they do not fall within the FCC's technical regulatory definition of MVPDs (and therefore are not subject to the "must carry" and "retransmission consent" regimes applicable to traditional MVPDs under U.S. communications law). Like FAST channels, the vMVPD market was largely nascent at the time the first edition of *The Business of Television* was published in 2018 (though, unlike FAST services, it was defined and established enough for the term to appear), but has grown significantly and demands more attention in this second edition.

Like traditional MVPDs, vMVPDs like YouTube TV and Hulu with Live TV also pay the equivalent of "carriage fees" to their partner networks, give customers the option of higher-priced "tiers" that include additional networks, and offer subscription portals for premium pay networks like HBO and Starz and/or for standalone streaming services like Max and Hulu (the latter of which is included standard in the Hulu with Live TV product). Compared to traditional cable and satellite services, these vMVPDs also tend to offer more robust user interfaces, somewhat lower prices, greater ease of starting and stopping one's service, and superior customer service.

Other past and present vMVPD competitors include DirecTV's DirecTV Stream (formerly DirecTV Now), Sony's PlayStation Vue, Dish Network's Sling TV, Philo, and Fubo. These services provide similarly familiar packages of linear channels from traditional television but are more oriented toward "skinnier" channel bundles with lower price points, ideal for those who are looking for a one-stop-shop content offering but who have no specific allegiance to one or more "must have" networks (which would likely command significantly higher carriage fees, thereby increasing the cost of customer-facing subscription packages). As of this writing, for example, Philo's entry-level subscription package of 70 channels is only \$25 per month. Fubo, on the other hand, distinguishes itself by focusing primarily on access to major sports programming.

In 2023, Google acquired exclusive rights to NFL's vaunted "Sunday Ticket" package (which allows viewers to watch any out-of-market regular season NFL game), outbidding the already struggling DirecTV, whose exclusive control of Sunday Ticket had been the satellite provider's signature market advantage for

19 As a bundler of influencer/user-generated (rather than traditional media company-owned/branded) content channels, the standard YouTube service also arguably plays a role analogous to an MVPD (while YouTubeTV is less analogous to an MVPD than it is a direct alternative or replacement). In addition, this second edition of *The Business of Television* regards the short-form/creator-oriented YouTube as altogether distinct from the "television industry," and therefore largely outside this book's scope. See Section A.

nearly 20 years. Google’s takeover of Sunday Ticket represented another milestone moment in the decline of traditional pay TV and the rise of internet-based TV viewing. Google even flexed its market strength and confidence by making Sunday Ticket available to those who did not also subscribe to its YouTube TV service (though this may have been a short-term tactic to lure in new customers with a lower financial commitment, and it seems likely that Google will eventually require viewers to subscribe to YouTube TV to access Sunday Ticket).

x Standalone vs. Companion Rights

In the context of licensing content for streaming exhibition, “Standalone” streaming rights are those granted to services such as Netflix and Hulu, in which streaming of the content by viewers is the exclusive (or at least substantially primary) form of exhibition and consumption contemplated by the deal.

“Companion” streaming rights, on the other hand, are those granted to traditional linear network licensees who want to provide their customers (often subscribers, in the case of basic cable or premium pay networks) with some form of digital access to the network’s shows, such as access for authenticated subscribers to a real-time internet-based stream of the network’s linear broadcast, or the ability to view series episodes on-demand (with or without ads). Such companion rights may be exploited through directly branded websites (such as ABC.com); directly branded mobile applications (such as the now-defunct HBO Go and FX Now apps); affiliated streaming services (such as Tubi, which was acquired by the Fox Corporation in 2020 and succeeded Hulu as the Fox Broadcasting Network’s companion streaming service); or the MVPDs that carry a network (through set-top box on-demand offerings, which are tied to the customer’s actual channel subscription package).²⁰

B The Evolution of Streaming Networks (2007–2024)

From a programming perspective, the evolution of the original “Big 3” of streaming—Netflix, Amazon Prime Video, and Hulu—looked a lot like the evolution, one to two decades before, of prominent basic cable networks such as AMC and FX, which progressed over time from offering only second-run content that had already appeared in theaters or on television, to original content produced by third-party studios, to a mix of content produced by third-party studios and content produced by their own in-house/affiliated studio arms.²¹ All three services’ streaming offerings began with a focus on second-run licensing

²⁰ See Chapter 11, Section A.vi.b (pg. 425).

²¹ See Chapter 1, Section B.iii.a (pg. 28). And, like FX before them, Netflix and Amazon have continued to invest in acquiring robust libraries of licensed second-run films and television series, which continue to drive much of the streamers’ subscriber engagement.

of content that had previously appeared on other networks—essentially, cable syndication licenses in a digital context. Netflix and Amazon relied on arms-length licensing deals with outside studios, while Hulu enjoyed a pipeline of content from its owner-affiliates, broadcast networks ABC, Fox, and NBC.

In response to increasing competition from one another and rising content licensing costs for second-run programming, all three services eventually expanded into original content. Netflix was first to market with its original content, debuting Norwegian series *Lilyhammer* in 2012 and breakout hit *House of Cards* in 2013, initially relying entirely on outside studios to provide its content (*House of Cards* from MRC; *Hemlock Grove* from Gaumont International Television; *Orange Is the New Black* from Lionsgate Television; *Arrested Development* from 20th Television; etc.). Before long, however, Netflix developed its capacity as a studio, allowing it to directly produce, own, and control all rights in its programming—most notably signature franchises *Stranger Things* and *Squid Game*.²² Amazon trailed Netflix in entering the market for original content, debuting its series *Alpha House* and *Betas* later in 2013; however, unlike Netflix, Amazon embraced a position as a studio as well as a network from inception, with both of its debut series being produced through Amazon Studios. Since then, Amazon's slate has represented a mix of in-house Amazon Studios shows (such as early hits *Transparent* and *Man in the High Castle*) and shows licensed from outside studios (such as Fabrik Entertainment's *Bosch*, Sony Pictures Television's *The Boys*, and Skydance Television's *Reacher*). Among the original "Big 3" streamers, only Hulu has declined to develop its own in-house studio, instead relying exclusively on original content from supplier studios (such as MGM Television's *The Handmaid's Tale* and MRC's *The Great*). That said, Hulu has shown a longstanding preference for content from studios with which it is affiliated via its parent companies, which only became more pronounced after 2019, when Disney took ownership of Fox's studios and its stake in Hulu. 20th Television (*Only Murders in the Building*, *Dopesick*, and *Solar Opposites*) and ABC Signature (*Fleishman Is in Trouble*, *Little Fires Everywhere*, and *Death and Other Details*) have been especially prolific as producers of marquee Hulu originals. All three services also tend to take co-production positions in programming licensed from third-party studios.²³

22 The broader context and motivating factors for this turn are explored in Chapter 3, Section C.ii (pg. 139).

23 As a notable counterexample to this "typical" model, when Apple launched its Apple TV+ subscription streaming service in 2019, it did so with no meaningful content library, instead relying from inception on a quick succession of premium original programming from third-party studios, including its flagship launch series and functional equivalent of *House of Cards*, the equally starry (and equally wildly expensive, even adjusted for the intervening six years) *The Morning Show* from startup studio Media Res. In the years since, Apple has developed itself as a studio and released several critically acclaimed self-produced shows, though third-party studios have continued to supply

As a whole, however, the industry has struggled to settle on a sustainable and replicable long-term business model for streaming—in part because the unique circumstances of the various streamers means that they have a variety of definitions of, paths toward, and obstacles to “success.” The current crop of “premium” SVOD services—Netflix, Amazon Prime Video, Apple TV+, Hulu, Disney+, Max, Paramount+, and Peacock—can be best understood by dividing them into three categories:

The first is a category of one: Netflix, an 800-pound gorilla with a single, straightforward business—selling subscriptions to Netflix. Success therefore simply means making more money in subscriber and advertising revenue than the company spends on content and operational expenses, with improving margins over time. In developing its business, Netflix has enjoyed several key competitive advantages, including a significant first-mover advantage as the “inventor” of the modern SVOD service, a historically favorable macro-economic environment, and the freedom to make choices without the need to protect any legacy businesses or business relationships on which it relies.²⁴ Capitalizing savvily on these advantages, Netflix is currently the only major SVOD service to have “cracked the code” on streaming and achieved the worldwide scale necessary to support a profitable and sustainable standalone streaming business.²⁵

The second category is the “tech streamers,” Amazon Prime Video and Apple TV+. Because constantly referring to Netflix in its own category is cumbersome and not always meaningful, however, this text often treats the streaming business as being divided into the “studio streamers” and the “tech streamers” (as used in this way, a category that includes Netflix alongside Amazon and Apple TV+). Amazon and Apple’s streaming offerings are ancillary to the companies’ broader businesses (as an “everything company” and device manufacturer, respectively), making the independent financial performance of their streaming services less critical than those services’ broader impacts on their companies’ businesses.²⁶ Amazon and Apple’s enormous revenues from their other businesses (and correspondingly enormous enterprise values)

some of its most prominent series, including *Ted Lasso* (Warner Bros. Television) and *Severance* (Endeavor Content/Fifth Season).

24 These advantages, and Netflix’s success in capitalization upon them, are explored in greater detail in the Introduction.

25 These competitive advantages, as well as Netflix’s apparent victory in the Streaming Wars, are discussed in greater detail in the Introduction.

26 Although Amazon Prime Video has been available as a standalone subscription since 2016, its streaming content offering was originally available only as an integrated component of Amazon’s broader Amazon Prime subscription program (which includes a variety of other benefits, including free shipping, that are intended to increase overall customer affinity and activity across Amazon’s products and services), and most Prime Video users continue to access Amazon content through that broader Prime subscription. This diversified, multi-product/service subscription model makes it even harder for outsiders to evaluate the performance of Amazon’s content business in isolation,

are such that their multi-billion dollar investments in content, while massive compared to some of their legacy entertainment and media industry competitors, are virtually immaterial to their overall balance sheets. And, with their uniquely massive and uncommonly dedicated userbases across a wide variety of products and services, Amazon and Apple have invested most heavily (and successfully) in also developing themselves as aggregators and customer acquisition portals for other streaming services (from which they can take a “rake” on revenue from subscriptions originated through these companies’ platforms and devices).

The third and final category is the “studio streamers” operated by the legacy entertainment and media powers, comprised of Hulu and Disney+ (Disney), Max (Warner Bros. Discovery), Paramount+ (Paramount Global), and Peacock (Comcast/NBCUniversal). These services are intended as the successors to their owners’ declining broadcast and cable television assets and the foundations of these companies’ digital-first futures.²⁷ Each of these services was explicitly expected to operate at significant deficits at launch, driven by huge content and customer acquisition costs (to be initially subsidized by the companies’ declining but still-lucrative linear television businesses), with a promise of achieving profitability over time. And critically, even at the outset of the

although Amazon itself is known to use sophisticated (if inevitably inexact and ever-evolving) internal measurements to attribute value from Prime subscriptions to content consumption.

27 For many years, Hulu’s unique history and ownership might have put it in a category of its own. From 2009 to 2019, Hulu was a joint venture of ABC (itself owned by Disney), Fox (then part of News Corp), NBCUniversal (owned by Comcast), and (after 2016) Time Warner (later WarnerMedia, now Warner Bros. Discovery), during which time it served as the primary companion/catch-up streaming service for original series from the ABC, NBC, and Fox broadcast networks. (Over the same period, CBS—which had declined to take a stake in Hulu—focused on using its CBS-owned and controlled series to develop and support its independent, proprietary CBS All Access platform, which eventually evolved into Paramount Global’s Paramount+ service following the (re-merger of Viacom and CBS in 2019.) Hulu began as a wholly free and ad-supported platform before introducing a subscription product (“Hulu Plus”) in 2010, eventually discontinuing its non-subscription offering (“Hulu Classic”) in 2016.

With its 2019 acquisition of most of Fox’s assets, Hulu became owned 67% by Disney and 33% by Comcast/NBCUniversal, with Disney exercising sole operational control. Those agreements gave Comcast—which had also substantially “bid up” the price of Fox prior to Disney closing its deal, inflating the already significant debt load that Disney had to take on to complete its acquisition—the right to compel Disney to buy out Comcast’s remaining Hulu stake in 2024, in a deal that analysts estimated would cost Disney \$10 billion or more.

As November 1, 2023 approached—the date on which Comcast could exercise this “put” right—Disney reportedly explored alternative transactions, including an outright sale of Hulu to Comcast or an “in-kind” swap involving other Disney and Comcast-owned assets (such as Comcast acquiring a stake in the Disney-owned ESPN, and/or Disney acquiring certain film/television and theme park rights in Marvel Comics characters that were secured by NBCUniversal prior to Disney’s acquisition of Marvel Entertainment in 2009). As of this writing, however, Comcast has exercised its “put” right, and the parties are engaged in an extensive valuation process (set forth in the parties’ original put/call agreement) for a simple cash sale of Comcast’s interest to Disney. Unfortunately, that process will not be complete until after this book goes to print.

Streaming Wars, it was widely assumed that the market could not, in the long term, profitably sustain so many competing direct-to-consumer services, and that at least some of these new market entrants were therefore destined to fail. The onset of the Covid-19 pandemic in March 2020, and the resulting spike in demand for streaming video from the suddenly home-bound public, delayed this reckoning, though the winnowing of the competitive field for premium SVOD remains all but inevitable. With the passage of time, it is unclear that these companies' long-term strategies for their streaming operations amounted to much more than "get big and maximize 'efficiencies,'²⁸ survive longer than everyone else, and eventually—ideally once consumers have fewer available alternatives—slash content spends and raise prices enough to find profit."

Netflix, by this time already well-established as a DVD-by-mail rental service, debuted its subscription streaming platform in January 2007. The launch fulfilled a long-held ambition of co-founder and then-CEO Reed Hastings, who has said that he deferred pursuing that vision until the broadband internet access necessary for long-form and/or high-definition video streaming had achieved sufficient market penetration, by which time the rapid success of YouTube (launched in 2005) had clearly demonstrated the public's unaddressed appetite for watching video content online.

The streaming industry as we know it today, however, began to take recognizable shape over a series of major February events between 2011 and 2014: the February 2011 launch of Prime Instant Video (now just Prime Video) as a free and unlimited component of Amazon's Prime program; the February 2012 release of Netflix's first exclusive "original" program, the Norwegian series *Lilyhammer*; the February 2013 release of Netflix's first self-commissioned and worldwide-exclusive original series (and the first blockbuster hit of the streaming age), *House of Cards*; and the February 2014 release of the first streaming series to break through the gatekeepers of Hollywood's awards apparatus, Amazon's *Transparent*.²⁹

If streaming's disruptive potential was not fully apparent at the time, it is because this same period represented the "golden age" of the cable business, over which the industry reached its zeniths in subscriptions, revenue, and

28 A euphemism for consolidation and layoffs.

29 Other noteworthy milestones during the same period include the November 2010 launch of Amazon Studios (which initially sought to produce crowdsourced, low-budget, non-union content that would disrupt Hollywood's old ways, before the combination of the success of the decidedly high-budget, very Hollywood-y *House of Cards* and the growing importance of Amazon's Prime program resulted in a virtually 180-degree turnaround in Amazon's approach); the November 2010 launch of the subscription-based Hulu Plus service; the April 2013 debut of Amazon's experimental "Pilot Season," in which viewers got a first-of-its-kind opportunity to view TV pilots and have their feedback (allegedly) taken into account in series ordering decisions (discontinued after 2017); and the November 2013 release of Amazon's (less-celebrated) first generation of original series, the self-produced *Alpha House* and *Betas*.

both volume and excellence of creative output. In 2010, pay TV subscriptions reached over 90% penetration of U.S. television homes. In 2011, *Mad Men* won its fourth straight Emmy for Outstanding Drama. In 2012, over 100 million U.S. homes had pay TV subscriptions, and the number of scripted shows on cable (125) surpassed the number on broadcast (119) for the first time.³⁰ In 2013, AMC's *The Walking Dead* became the most-watched scripted show on television.³¹ In 2014, pay TV revenue peaked at \$101 billion—and in March of that year, a widely-reported study from SNL Kagan stated that the pay TV industry recorded its first-ever full-year subscriber decline in 2013, igniting growing concern about whether this “cord cutting” thing people were talking about was a sign of oncoming permanent secular decline.

By the end of this 2013–14 transformation period, Netflix had emerged as the dominant player in the space, its name becoming as synonymous with streaming video as Google's had become with internet search.³² Netflix achieved this status in part by adopting with almost religious fervor a series of new product and business practices that offered viewers an enhanced product experience that distinguished Netflix from “traditional television” and recalled HBO's iconic slogan, “*It's not TV. It's HBO.*”³³

Because there were few if any meaningful precedents to study at the time, Netflix's early product and business design choices were grounded largely in philosophy and intuition rather than in data-driven analysis. They reflected Netflix's origins in Silicon Valley, with its “move fast and break things” culture, indifference (or even hostility) toward established custom and practice, prioritization of happy customers over happy business partners, and long-term willingness to tolerate low profits in favor of rapid exponential growth. Nevertheless, given Netflix's almost immediate dominance in the space, these choices quickly became virtually unquestioned orthodoxies that powerfully shaped consumers' expectations for streaming, and that were almost universally (and largely unthinkingly) adopted by Netflix's competitors as they launched their own platforms.

30 The number of scripted cable series peaked at 189 in 2015—one of the last high-points of the cable/pay TV business before streaming's takeover.

31 2013 also saw the debut of FX's criminally underappreciated *The Americans* in January, and the finale of AMC's celebrated *Breaking Bad* in September.

32 Although Netflix is rightfully credited as having made excellent use of their first-mover advantage, they were technically not the first streaming service (YouTube launched in 2005), or even the first to offer premium long-form content (Apple's iTunes store had been offering paid downloads since 2005, and Amazon began its digital video business in 2006 under the name Amazon Unbox).

33 Around this same time in 2013, Netflix's then-content chief/now-co-CEO Ted Sarandos offered his equally memorable (at least within the business) mission statement for Netflix: “The goal is to become HBO faster than HBO can become us.” Less remembered today is how Sarandos described that in practical terms: generating a minimum of five original programs per year—a then-“bold” target that feels charmingly quaint in hindsight.

More than a decade later, however, broader market forces have shifted the focus of the entire streaming industry away from growth-at-all-costs and toward profitability and sustainability. At the same time, product and business design choices that had been made in an informational vacuum can now be more rigorously evaluated with the benefit of years of hard data and lived experience. As the industry moves forward from the Streaming Wars era, the leading streaming networks will be increasingly defined not by their adherence to these old orthodoxies, but by the speed and effectiveness with which they break away from them in order to position their products and businesses for long-term sustainability and success.

The remainder of this section will explore a selection of the Netflix-defined early orthodoxies of streaming as both a product and a business, and how those orthodoxies look poised to be continued, revised, or altogether abandoned in the years to come.

i Ad-Free Experience (“Direct Pay” Only)

At its launch, Netflix embraced an exclusively “direct pay”-based business model, actively highlighting the absence of advertisements on its service as one of the key features distinguishing it from “regular TV,” just as earlier premium pay networks like HBO and Showtime had done years earlier. Netflix was followed in this choice by Amazon,³⁴ Apple TV+, Disney+, and Max.³⁵

34 Although Amazon’s streaming service technically predates Netflix’s, it only grew to prominence (and evolved as a product) after Netflix’s launch. Amazon also experimented briefly with advertising support and presenting sponsorships for its initial public-facing “Pilot Seasons,” but for many years made no moves toward integrating advertising into its flagship subscription streaming service (although it did specifically develop a separate free, ad-supported service which eventually became the Freevee service). See Section A.vii.

35 The decision of the other three major premium streamers—Hulu, Paramount+, and Peacock—to integrate advertising in their services from inception can be understood in light of the specific timing of their launches, their individual histories, and their corporate ownership.

As discussed earlier, Hulu launched all the way back in 2009 as a purely ad-supported (non-subscription) platform, at the time competing more with YouTube than with any linear networks. It was founded with backing from News Corp (parent of Fox) and NBCUniversal, and quickly added Disney, and later Warner Bros., as co-owners. In its early years, Hulu tended to offer promotional clips from its owners’ series, before evolving into the principal home for full episodes of series that had originated on the broadcast networks of its three main owners, who were already heavily invested in advertising and, at the time, would have been reluctant to draw viewers away from their linear networks. Hulu added a subscription tier with reduced ads in 2010, launched its first ad-free subscription plan only in 2015, and continued to offer some subscription-free content as late as 2016.

Paramount+ is the successor to CBS All Access, which launched in 2014 effectively as an extension of the CBS broadcast network, featuring a library of current and historical CBS-owned or -controlled properties. From its founding, CBS All Access offered both higher-priced ad-free and lower-priced ad-supported subscription tiers. Original content arrived only in 2016, principally in the form of spinoffs of major CBS broadcast properties. Following the (re-)merger of CBS and Viacom in 2019, the newly combined ViacomCBS (itself since rebranded as Paramount Global),

This focus on the “direct pay” model made sense for these upstart services for several reasons. First, Netflix (and its successors) could immediately market its ad-free product as a “premium” viewing experience that distinguished it from standard television and helped justify customers committing to an out-of-pocket monthly subscription (especially at a time when more consumers were still paying substantial monthly fees for their cable and satellite subscriptions). Second, because advertising revenue is directly tied to viewership, structuring deals with advertisers would require these services to share at least some of their data with those advertisers, which Netflix and the others specifically preferred not to do.³⁶ Third, by being beholden to advertisers, the streamers were freer to support more challenging, risqué, or otherwise potentially controversial content. And fourth, incorporating advertisements into the services would require significant investment of human and financial capital to develop (or outsource) ad sales staff and relationships, technical features, and other infrastructure necessary to sell and serve such advertisements. Although such an effort would eventually enhance revenue, in the short term, these investments would have drawn resources away from other initiatives that would have more directly improved customer experience, and therefore marketability and customer acquisition.

Eventually, pressure from Wall Street to focus on profitability forced all of the streamers to look for new sources of revenue as well as ways to reduce their costs. At the same time, the proliferation of new streamers with ad-free services had made the absence of advertising less “special”; consumers feeling burdened by having too many paid monthly subscriptions seemed eager

leveraging its expanded content library and production resources, “re-launched” CBS All Access as Paramount+ in 2021, and retained the predecessor service’s structure of subscription offerings.

NBCUniversal’s Peacock was the final entrant in the Streaming Wars, launching in 2020 (about six months before the rebranding of CBS All Access to Paramount+) with original as well as library content as part of the initial service offering. Peacock also quickly supplanted Hulu as the “digital catch-up” destination for NBCU’s shows from its broadcast and basic cable networks. Peacock came in three tiers—a free, ad-supported tier, a “Premium” subscription tier with more available content and fewer ads, and an ad-free “Premium Plus” subscription tier—making it the only major standalone SVOD service founded after the rise of Netflix to have incorporated advertising into its business model from inception.

One key thing that Hulu, Paramount+, and Peacock have in common is that all three came from parent companies with mature, sophisticated ad sales operations, whose businesses had long been built principally upon advertising, with ad-serving technology that had been developed over a period of years on predecessor services. This vitally distinguished them from Netflix, Amazon, and Apple (whose advertising businesses were either non-existent or totally disconnected from content exhibition at the time of their launches), and from HBO Max (now Max, whose corporate parent, Warner Bros., had experience with ad-supported businesses like basic cable networks TNT and TBS, but never in connection with the HBO linear or digital products from which HBO Max had directly evolved). Only Disney+ might have been expected to offer an ad-supported tier from inception, and Disney in fact always signaled its intention to eventually offer one, but clearly prioritized the other factors described in the main body text as it sped toward launch.

36 See Section B.iv.

for lower-cost options; and the existence of ad-supported tiers on three out of eight of the major SVOD services, as well as the declining perception of any meaningful distinction between “streaming” and “television” in general, had largely diminished customer expectations that streaming should necessarily be ad-free. Consequently, an industry-wide embrace of advertising—the lifeblood of creative industries since the earliest days of radio—became as obvious as it was inevitable. In June 2021, less than one month after the announcement that AT&T would spin Warner Bros. off into a new company combined with Discovery, HBO Max (since rebranded as Max) became the first previously all-commercial-free streamer to launch an advertising-supported tier. Disney+, which had from inception promised an eventual lower-cost ad-tier, announced the coming launch of “Disney+ Basic” in March 2022, rolling it out in the U.S. in December 2022 and internationally in late 2023.

Seemingly the most strident holdout was Netflix, which had helped define streaming’s largely commercial-free earlier years, and which had long professed a principled and almost philosophical opposition to advertising. That changed suddenly in April 2022, when the company reported its first-ever quarterly loss of subscribers, and was immediately badly punished for it by investors. Netflix quickly announced that it would introduce a lower-cost ad-supported tier, which launched in November 2022. One year later, Netflix reported that its ad-tier had reached 15 million active users per month. Although Netflix’s publicly reported data does not clearly distinguish between newly acquired customers who signed up for the ad-tier versus existing subscribers who elected to “downgrade” their subscriptions, the company can be equally happy with both: thanks to the dual revenue stream it enjoys from its ad-tier, Netflix actually makes more total revenue per month from users who opt for the lower-priced ad-tier than it does from those who pay more to continue to avoid ads. This observation clears the way for Netflix to steadily increase the price of its premium ad-free tier, confident that price-insensitive subscribers will bear it, while price-sensitive customers who try to cancel their subscriptions can instead be funneled into Netflix’s “low cost” yet more lucrative ad-supported offering. Meanwhile, Netflix has also sought to better leverage the technical sophistication of its platform to offer advertisers more features and better targeting, which would allow Netflix to raise the rates it charges to its advertising partners even as it does the same with its customers.

The realization that lower-paying ad-tier subscribers generate greater revenue than higher-paying subscribers on ad-free tiers has not been lost on Netflix’s competitors, all of which are similarly poised to steadily raise the prices of their premium ad-free tiers and drive subscribers toward the streamers’ more lucrative ad-supported options (with Max and Peacock announcing the first such increases in late spring 2024). Amazon has taken an even more assertive approach, integrating commercials into its flagship Prime Video subscription service in 2024 as the new automatic default for all subscribers (from which

they have to “opt out” to “upgrade” back to commercial-free viewing for an additional \$2.99 per month), rather than as a new option into which existing users would have to “opt in.” As of this writing, Apple TV+ stands as the last premium SVOD service without a lower-cost ad-supported tier. It has been reported, however, that the company is actively exploring one, and—should Apple TV+ choose to remain in operation long-term—the arrival of advertising on the service is widely seen as inevitable.

The arrival of advertising in streaming will do more than offer a second revenue stream to support the industry; it will fundamentally impact the kinds of shows being made on these services. The streamers’ independence from advertisers made it easier for them to invest so heavily in risky, subversive, and sometimes profane content that would not be considered “brand safe” for advertisers. While these platforms probably will not turn away from such challenging programming altogether, they are likely to impose some additional restraints designed to ensure that their shows do not wind up being completely toxic for potential advertisers. The platforms are also likely to develop more content that is designed from inception to appeal to advertisers (probably in “classic” TV genres). And, because advertisers who align with a favored series prefer the consistency, reliability, and more consistent audience access that comes with longer episodic runs, streamers are likely to pivot back toward ten- and even thirteen-episode orders for shows that are expected to particularly appeal to advertisers.

ii “Premium” (a/k/a “Expensive”) Programming

When *House of Cards* premiered on Netflix, many viewers had never seen anything like it. Directed and produced by David Fincher, starring a pre-scandal/height-of-his-powers Kevin Spacey, and released at a time when television was still largely perceived by many creatives in Hollywood as “junior varsity” to the theatrical feature film world, the series boasted a cinematic style and cinematic credentials that had seldom, if ever, been seen on television. With an estimated gross budget of nearly \$5 million per episode over the show’s first two thirteen-episode seasons, *House of Cards* was not the most expensive TV show ever made—the first season of HBO’s *Game of Thrones*, released nearly two years earlier, cost a reported \$6 million per episode. But that kind of investment in a character and dialogue-driven political thriller, as opposed to an action- and effects-driven fantasy piece, was unprecedented, and Netflix’s willingness to support such a budget was visible in the production values on screen (as well as, no doubt, the bank accounts of the show’s powerhouse creative talent).

As not only the first fully original series on streaming but also an instant cultural sensation, *House of Cards* thus set the template for what a “streaming series” looked and felt like: complex and story-rich, beautiful and cinematic,

star-driven both behind and in front of the camera, and—as both cause and effect of each of those other characteristics—*very expensive*.³⁷

This was no accident. With a still-small subscriber base for its streaming product, the only way that Netflix could make an immediate splash in original content was by putting out something that would command attention, both within the industry and from the general public, disproportionate to how many people would (or even could) initially watch the thing. And with no track record or creative identity to speak of, the only way that Netflix—then still known better for its roots as DVD-by-mail rental service—could compete with the likes of HBO and Showtime for a show with the pedigree of *House of Cards* was by opening up its check book. If *House of Cards* had failed, it might have been remembered as one of the entertainment industry’s all-time whiffs (not to mention boondoggles). It did not fail, to say the least.

A little over two years before *House of Cards*’ release, Amazon had launched Amazon Studios as a financially immaterial experiment in disrupting what the Seattle-based giant saw as Hollywood’s exclusionary, spendthrift, and data-poor ways with targeted low-cost productions crowdsourced from open submissions by non-professional writers. Then two things happened almost at once: Amazon reoriented its broader corporate strategy to focus on its Amazon Prime subscription program, and *House of Cards* became the exemplar of content that could drive subscription decisions. Amazon’s pivot toward flashy, high-cost, highly professionalized and star-driven content was as fast as it was dramatic.

Meanwhile, Netflix sought to capitalize on the success of *House of Cards* to establish itself as the first stop for top-end creators and studios to bring their best projects. It did so by offering them everything that more traditional networks would not or could not: for the talent and filmmakers, the highest upfront fees, most richly funded productions, and most creative freedom; and for the studios, a first-of-its-kind “no-risk” deal structure with license fees that substantially exceeded each show’s cost of production.³⁸ Talent working for Netflix’s supplier studios found that their contingent compensation was, for the first time, worth meaningful money even on the basis of a single produced season, while those who dealt directly with Netflix as its own studio received “backend buyouts” that treated every show produced as a moderate hit, regardless of its performance (the reality of which was opaque at best in any event).³⁹ These creative and economic enticements lured more and more stars and filmmakers from the theatrical feature film world, chipping away at the historical

37 The word “premium” can mean many different things in many different contexts across the television business, but in general, especially as applied specifically to content, it is usually, at least in part, a euphemism for “expensive.”

38 See Chapter 11, Section A.iv.a (pg. 413).

39 See Section B.iii.

gap in prestige between the media. In other words, Netflix made itself the place where *House of Cards* wasn't the exception to the rules—it *was* the new rules. And with a large war chest, voracious appetite for content, and no linear programming calendar to constrain its volume, Netflix applied those new rules to an extraordinary volume of new original series.

At first, the major traditional entertainment companies were beneficiaries of Netflix's approach, working with a class of talent that had long been largely unavailable to them and selling the growing streaming giant an unprecedented volume of new shows, many of which would have been too creatively or economically ambitious for any traditional network. Amazon quickly emerged as a similarly aggressive (and similarly deep-pocketed) second option, applying more upward competitive pressure on talent fees, budgets, and license fees. And because, in the early iterations of these "cost-plus" license deals, the studio's "premium" (i.e., the portion of the license fee in excess of the cost of production, functionally representing the studio's profit on the series) was typically calculated as an uncapped percentage of the production budget, the studios themselves were financially incentivized not to resist these growing costs.

Over time, the legacy studios came to realize that the growing streaming business represented a replacement for (rather than a complement to) linear television, and that they would therefore have to pivot from supplying Netflix and Amazon—in essence, feeding the beasts that were poised to consume them entirely—to directly competing with them. By then, however, they had no choice to do so but according to the new "rules" and expectations, on the part of both consumers and talent partners, that the studios themselves had helped the streamers create: huge fees, huge budgets. If they could not, then Netflix and Amazon would win the nascent Streaming Wars before they even truly began. And so, fees and budgets continued to swell, such that by the time the last studio streamer, Peacock, debuted in mid-2020, the then-stunning \$5 million per episode that Netflix had spent on *House of Cards*, and the reported \$500,000 per episode paid to star Kevin Spacey, would seem like "the good old days" of fiscal responsibility. To secure the most desirable and competitive projects, studio entities that, not ten years earlier, would have regarded \$125,000 and \$5 million per episode as rare high-water marks for first season acting fees and production budgets, respectively, were forced to regularly support talent fees of \$1 million per episode or more, and production budgets that could easily exceed \$10 million per episode (even without obviously costly action sequences or visual effects). Across the tech and studio streamers alike, the costs for new installments of marquee franchises like Marvel and *Star Wars*, and of latter seasons of established hits like *Stranger Things*, ballooned to a once-unfathomable \$20–\$30 million per episode. Amazon's bombastic 2023 play to create a new worldwide action franchise, the Joe and Anthony Russo-produced *Citadel*, reportedly cost a *still* unfathomable \$50 million per episode for its six-episode first season (which, at \$300 million, is itself only \$50 million more than

Amazon's 2017 deal to secure the rights to produce a *Lord of the Rings* series for an astonishing \$250 million, *before production costs*). But—befitting of an era founded upon a *House of Cards*—this financially freewheeling environment was never built to last.

Historically, even for companies with vertically integrated studio/network operations, the relevant accounting unit for content was *individual movies or television shows*, which, in success, directly generated in revenue more money than they cost to make and market. The studios' largely "all-in" embrace of streaming, however, had effectively shifted the relevant accounting unit to *the platform*, with costs and revenues cross-collateralized across dozens of productions.⁴⁰ Measuring return-on-investment on individual productions became more ephemeral and subjective than merely comparing revenues and expenses side-by-side. And, because the studios' streaming businesses were both new and widely considered the centerpieces of these companies' futures, notions of "profitability" were deferred virtually indefinitely in favor of singular focus on achieving scale in both subscriber bases and business operations. In this environment, studio leaders who largely recognized the unsustainability of such spending could—and, in many cases, likely felt they had no choice but to—dismiss it as "the cost of doing business," at least for the time being.

As the broader economy reeled from the one-two-three punch of the Covid-19 pandemic, inflation, and rising interest rates, however, Wall Street investors quickly shifted their mindsets from growth to profitability.⁴¹ At the same time, investors watching subscriber growth slow even for the mighty Netflix grew increasingly skeptical of the industry's long-rosy projections of the "total addressable market" for the streaming business, and therefore, its ability to sustainably generate enough revenue to replace the industry's diminishing returns from traditional television and theatrical feature films, let alone to support the aggressive spending of the prior few years. Every legacy media power has now announced its intention to slash its content costs, both by reducing volume and by spending less on the content it still makes. Meanwhile, the decline of basic cable and premium pay networks as purveyors of original content (as their corporate owners have rededicated those resources to powering their flagship streaming platforms) has left the marketplace with its lowest number of unique credible buyers for original scripted content in years, further shifting leverage away from talent and studios and back toward the remaining networks. As of this writing, the industry has embarked on a slow and painful process of deflation, with talent and their representatives—who had grown accustomed to the aggressive spending of the preceding decade, but are well aware of the

40 The same was true for the tech streamers, which broadly declined to monetize their self-produced/owned content on other platforms, in favor of prioritizing the exclusivity of originals on their platforms.

41 For a more detailed account of this transition, see the Introduction.

macroeconomic realities and looming contraction—doing all they can to resist and mitigate its impact on themselves.

Ironically, as the legacy studios took on huge debt and otherwise pushed themselves to the financial brink to achieve the operational scale and produce the kind of ultra-premium high-cost content they needed to compete with Netflix and the other deep-pocketed tech streamers, Netflix itself began moving in the opposite direction. Though it continued to grow its aggregate annual content spend, Netflix began to deploy that content budget in more efficient and targeted ways. In 2020, Netflix revealed that, in lieu of relying on traditional demographics, it had begun grouping its millions of worldwide subscribers into approximately 2,000 “taste clusters” based on their actual viewing habits. Armed with those insights, Netflix began to shift its focus from costly, star-driven shows built for mass appeal to more niche programming intended for and targeted to specific groups of subscribers. At the same time, Netflix—which had already helped grow more modest linear TV hits like *Breaking Bad* (AMC), *The Blacklist* (NBC), and *Black Mirror* (Channel 4) into worldwide phenomena—found that its unmatched scale and powerful recommendation algorithm could make bona fide hits even of more inexpensive and traditional shows that had altogether failed to find audiences on their original networks (such as *You* [from Lifetime], *Manifest* [from NBC], and *Cobra Kai* [from YouTube]), and breathe dramatic new life into library content with comparatively low licensing costs (as it did with USA’s *Suits* in 2023).⁴² Today, Netflix—a network explicitly built on the biggest stars and budgets, making the kind of shows viewers could not find anywhere else—is powered largely by new and repurposed procedurals, low-cost documentaries with broad appeal (like the pandemic darling *Tiger King*), comparatively inexpensive local-language shows that occasionally metastasize into worldwide phenomena (most notably the Korean drama *Squid Game*), and the same kind of reality TV programming viewers could find virtually anywhere else (such as “social experiment” dating show *Love Is Blind*). Its most successful original series of 2023 was *The*

42 Netflix’s vaunted recommendation algorithm—designed to keep viewers glued to their screens by offering them the next thing they want to watch before they know they want to watch it—is one of the company’s greatest successes, and has positioned Netflix first among all streaming services when it comes to pairing viewers with content, as well as mitigating the impact of “binge releasing” on content discovery (discussed in the next section). Much more than in series ordering or renewal decisions, the recommendation algorithm is where Netflix extracts the most value from the voluminous data it possesses about its subscribers’ viewing habits. Compared to traditional film and TV advertising, Netflix’s recommendation engine not only offers up suggestions when they are most powerful—i.e., just as a viewer is opening up the application or finishing their last program—but can further tailor its recommendation to the individual user by serving up one of several options for “key art” and full-screen preview images based on which ones the system judges will be most compelling to that individual subscriber based on their viewing history. And perhaps most importantly of all, Netflix’s recommendation algorithm is how it most directly and effectively leverages its competitive advantages in subscriber scale and content library depth.

Night Agent, a procedural drama from long-time broadcast and cable creator/showrunner Shawn Ryan that might have felt as at home on CBS as it did on Netflix.⁴³ In a 2023 profile in *The New Yorker*, Netflix content chief Bela Bajaria memorably described the ideal Netflix show as a “gourmet cheeseburger.” Cheeseburgers, of course, aren’t just more populist than steaks; they’re also a lot cheaper.⁴⁴

iii Binge Viewing

Perhaps no single element of the original content streaming experience on Netflix captured the attention and delight of consumers like “binge viewing.”

Before the release of *House of Cards*, television was broadly understood to be a once-a-week viewing experience. Save for the occasional “stunt” exhibition (like a two-episode season premiere or finale, or a tightly scheduled “mini-series event” like 1977’s *Roots*), new TV series episodes were released one week at a time (subject to some interspersed rerun episodes, especially in broadcast). It is easy to forget that there was ever a “why” to such a longstanding and ubiquitous practice at all, but such weekly releasing was a very practical fit for the production, creative, and business realities of broadcast television, with its long annual broadcast seasons to fill, regular exhibition schedules to maintain, rolling production periods to accommodate,⁴⁵ and advertisers to satisfy (especially those who wanted to reach customers at very specific times, such as movie studios promoting upcoming releases). As original content expanded first to basic cable, and later to premium pay cable (even without its reliance on advertisers), weekly releasing remained an unquestioned part of the TV experience.

For Netflix, however, none of those rationales was salient to its business (especially in those early ad-free days), and the company was hungry for ways to distinguish the new “premium streaming” business from traditional television (where, again, the premium pay networks had already set the precedent of eschewing advertising). Netflix had just seen first-hand, with the breakout success of *Breaking Bad*, how tense, complex, serialized shows could keep viewers glued to their screens for hours at a time as they aggressively burned their way

43 Tangentially: *Wednesday*, arguably Netflix’s biggest show/franchise of the moment (other than/after *Stranger Things*), was released in November 2022 and therefore had a peak viewership period that spanned across late 2022/early 2023, preventing it from topping Netflix’s charts in either year individually. Further tangentially: *Wednesday* was produced by MGM Television, which was acquired by Netflix arch-rival Amazon (along with the rest of MGM) in a deal that was announced shortly before filming commenced on *Wednesday*’s first season, and that closed just as production wrapped.

44 That is not to say that ultra-expensive shows no longer have an important place in the streaming ecosystem. Streaming latecomer Apple TV+ has largely embraced Netflix’s early strategy of overwhelming economic force, frequently shelling out the biggest bucks for the biggest movie stars and filmmakers—at least for the time being.

45 See Section B.

through every available episode. As it developed its initial slate of original content, Netflix looked for shows with the same capacity to capture audiences who could not wait to see what happened next. When that original content finally began appearing on its service, Netflix opted to release full seasons of its new series like no platform had ever done before: all at once.⁴⁶

And people *loved it*. Critics and consumers alike celebrated this new model of television consumption, quickly dubbed “binge viewing,” as rewarding and transporive. Creators relished the opportunity to craft stories that may have been too complex to be clearly followed and enjoyed by viewers who had a week between installments to forget the details of what they had seen. The word “bingeable” entered the lexicon as a form of high praise for engrossing series. Netflix sought to eventize each “drop” of an eagerly awaited new season or series, and superfans began organizing “binge parties” to voraciously consume their favorites alongside friends in a single weekend (or even a single night). Almost immediately, binge releasing became a signature component of the Netflix product experience.

From the beginning, binge releasing had its downsides—for consumers, for creators, for talent, and even for Netflix. On the consumer side, binge releasing—alongside several other factors impacting Netflix and other streaming series in particular—substantially increased the amount of time that viewers would have to wait for the next season of each series by condensing the release of each new season to a single point in time,⁴⁷ and by requiring that every episode be completed in its entirety before any episode could be exhibited. Even without binge releasing, the kinds of complex and “premium” series favored by Netflix, especially in those early years, already demanded more time to write and produce than the procedural dramas and multi-camera sitcoms that dominated network television. The rise of visual effects-intensive action and genre series further extended post-production periods, and therefore inter-season hiatuses, as did the need to build in additional months for localization thanks to Netflix’s international expansion and global day-and-date releasing strategy.⁴⁸

46 To the author’s knowledge, *House of Cards* was the first original series to have its new seasons drop on a “binge” basis, though at the time of its debut, Netflix had already embraced (and begun intentionally tying its brand to) the “binge” releasing model, which it used when releasing library seasons of existing series licensed from third parties.

47 Thus, starting the hiatus clock from each season premiere, rather than from a weeks- or months-later series finale. To illustrate, the equivalent in broadcast network television would be going from roughly four-month-long hiatus between season finales in May and season premieres in September of each year, to one-year September-to-September hiatuses.

48 “Day-and-date” refers to the simultaneous release of a film or television series across multiple territories (e.g., in the United States and abroad) or media (e.g., simultaneous release in theaters and streaming, without an exclusive theatrical window). Historically, “day-and-date” geographic releasing was uncommon thanks to the time necessary for localization, the opportunity for movie studios to build momentum over the course of an ever-expanding international releasing strategy, and the tendency of international television buyers to wait and see if a series succeeded in the U.S. prior to

For creators, binge releasing made it more difficult for shows to develop audiences over time through recommendations among friends and family members, putting more pressure on each show to establish itself as an immediate hit. For writers and actors—whose deals traditionally made them subject to multiple exclusive options to be engaged for future seasons—protracted seasonal hiatuses and delayed renewal decisions meant longer and longer unpaid option periods, during which their exclusivity and schedule obligations to the studio substantially hampered their opportunity to find outside paid work.⁴⁹ And for Netflix, binge releasing put more pressure on its recommendation algorithm to make up for the loss of “word of mouth” in attracting new viewers, while also putting pressure on the service to release more and more new shows to fill the long gaps between seasons of existing ones.

Nevertheless, for many years, binge releasing was embraced (or at least broadly accepted) by all of these constituencies. Audiences largely seemed to find that the joy of binge viewing was worth the longer wait for new seasons. Creators and talent enjoyed the opportunity to work on more creatively fulfilling shows. Netflix valued the kind of addictive consumption and deep engagement that binge viewing could provide.⁵⁰ Amazon and Hulu initially experimented with weekly releasing (sometimes with a two- or three-episode “drop” for season premieres),⁵¹ and never adopted binge releasing with quite the same fervor or consistency as Netflix. Still, by 2019, binge releasing was the dominant paradigm for both Amazon and Hulu, even for latter seasons of many series whose first seasons had been released on a weekly basis.

But as the studio streamers launched over the course of 2019 and 2020, they largely rejected the prevailing binge model. And more than ten years since binge releasing made its dramatic debut in the marketplace—and notwithstanding Netflix content chief Bela Bajaria’s June 2023 claim that “There is no data to support that weekly is better”—the data largely supports those

committing to licensing it abroad. “Day-and-date” releasing in multiple media was at odds with the industry’s historical business model, which was built on monetization across a series of exclusive windows over a period of months or even years after a project’s initial release. For years, growing concerns about piracy had already been pushing the industry toward more simultaneous (or nearly simultaneous) releases in the U.S. and abroad. It was the explosive rise of streaming, however—with these services’ exclusive/un-windowed exhibition strategies and international footprints—that made global “day-and-date” releasing a much more common feature of content strategy.

49 The move toward ever-smaller episodic counts compounded this issue, by shrinking the total compensation-per-season that would have to largely sustain these writers and actors over these growing option periods.

50 The word “addictive” here is not an exaggeration. There is a growing body of research that associates significant binge viewing with not only addictive behavior, but also loneliness, depression, and other mental health concerns. It bears noting that existing studies establish correlation, not necessarily causation, here. It seems intuitive, however, that excessive binge viewing is both a contributing cause and an effect of these maladies.

51 And notably, for the 24-episode first season of Hulu’s Latino teen soap opera *East Los High* in 2013, even daily releasing.

choices. Numerous well-regarded analysts (including, among others, Parrot Analytics Director of Strategy and Puck contributor Julia Alexander and anonymous executive/Substack writer and Ankler contributor Entertainment Strategy Guy) have all argued persuasively that, compared to shows that are released all at once, series that are rolled out weekly are generally better able to grow their audiences over time; more likely to generate stronger and more sustained demand; drive more substantial and sustained conversation in social media; and are more effective in combating subscriber churn.⁵² As advertising grows increasingly important to the streaming business, weekly releases create more and better opportunities to target viewers that advertisers want to reach at specific times. And of course, binge releasing necessitates a much higher volume of new releases to sustain viewer engagement over time, compared to weekly releases that can keep audiences engaged with a service over a period of months.

For its part, Netflix—where, even before *House of Cards* debuted, Reed Hastings had declared, “Netflix’s brand for TV shows is really about binge viewing”—remains committed to binge releasing as its near-uniform release model, and as a core component of the company’s identity. Yet, to capture at least some of the benefit of staged releasing without pivoting away from that identity altogether, Netflix has increasingly elected to release new seasons of major hits like *Stranger Things*, *You*, and *The Witcher* in two chunks spaced weeks or months apart. It has also allowed for occasional experimentation in select circumstances, such as *Arcane*, whose nine-episode first season was released in three weekly installments of three episodes each in November 2021, and several “live” comedy events with marquee talent like Chris Rock and John Mulaney.⁵³

For just about everyone else, however, the prevailing model for new original series in streaming is now typically a two- or three-episode first drop, with all remaining episodes released one week at a time. (Pure weekly releasing also remains common, especially on Disney+ and Max.) Of course, one inherent feature of streaming is that, compared to linear television, it readily allows for platforms to embrace more than one releasing paradigm. So, as the streamers continue to mature, it seems likely that they will become more sophisticated about deploying different release strategies for different series, according to each show’s nature and the platform’s goals and expectations for

52 In the context of streaming, “churn” means the rate or number of subscribers that cancel or let their subscriptions lapse, usually measured as the percentage of subscribers that disconnect per month. “Churn” is also sometimes used less technically to describe the tendency of some subscribers to repeatedly cancel and re-subscribe to a service, based on the timing of releases of certain content.

53 Notably, *Arcane*’s creators had specifically structured the season into three distinct three-episode acts, which made the three-batch release organic to the show’s creative content (as well as beneficial to its producer, Riot Games, on whose *League of Legends* video game franchise the show was based).

it. Nevertheless, the now-popular hybrid model of a “mini-binge” premiere with weekly releases thereafter seems likely to persist as a quality default that can capture much of the benefit of both the full binge and weekly models.⁵⁴

iv Radical Data Untransparency

When it comes to measuring success, traditionally, there have been no secrets in the content business. Although movie studios are notorious for their often opaque and byzantine accountings of revenue and expenses for profit participants, they have traditionally publicly reported the box office grosses of hits and flops alike, and Variety’s reporting of those box office receipts has long served as a contractually designated reference for “box office bonuses” paid to further reward key talent for success. In television, audience measurements published by the Nielson Company have (despite long-understood weaknesses in Nielsen’s methodology) been virtually universally accepted and used throughout the industry since the early 1950s, dictating everything from media narratives about network successes and failures, to renewal decisions for ongoing series, to the calculation of advertising rates, to benchmarking for performance bonuses in talent and studio deals.

The emergence of streaming, however, completely upended the industry’s historical relationship with consumption data: the streamers themselves knew, more precisely and granularly than ever, how many people consumed their content, while talent, business partners, and the general public knew virtually nothing. In this informational vacuum, the tech and studio streamers alike embraced a policy of radical untransparency about viewing data. As these streamers boasted about their ability to use data to make better programming and renewal decisions, the rest of the world was, for all intents and purposes, told to mind its own business and take the streamers’ word for it.

This approach to data sharing was in part a cultural matter, reflecting Netflix and Amazon’s origins as technology companies that had internalized the tech industry’s propensity to ascribe great value to such data and to treat it as completely confidential and proprietary. More than that, however, the streamers’ jealous protection of consumption data was extremely pragmatic. By eschewing advertising (which relied on viewership data for pricing), Netflix and Amazon (and their successors) had no immediate business need to share this information. At the same time, when streaming first emerged, neither Nielsen nor any other company had the capacity to reliably measure streaming consumption (especially across the multitude of devices on which such content

54 It also bears noting that doing away with binge *releasing* in no way entails doing away with binge *viewing*. The opportunity to binge complete past seasons of both original and licensed content remains core to the value proposition of every streaming service, and a valuable way for audiences to discover (or rediscover) both ongoing and discontinued series.

could be accessed).⁵⁵ In the absence of publicly accepted measurements that could be used to keep them accountable, the streamers had nothing to gain by publishing their own data. So, in short, they didn't.

This allowed the streamers to effectively control the narrative of their own successes, free to publicly pronounce shows to be hits according to unstated criteria and usually without providing any measures to support such claims. This was especially valuable in the streamers' early years, when their smaller subscriber bases meant the audiences for even the most successful streaming originals would almost necessarily pale in comparison to those for hits on linear television. To illustrate, in the first quarter of 2013, when *House of Cards* debuted, Netflix reported having 34.24 million paying subscribers worldwide.⁵⁶ By comparison, according to Nielsen, the most-watched, regularly scheduled, non-football series of 2013 was CBS's *NCIS*, with an average of roughly 14.69 million viewers in the U.S. Thus, at the time of its premiere, for *House of Cards* to have been watched by as many people in total as *NCIS* had been in the United States alone would have required it to be watched by roughly 43% of all paying Netflix subscribers worldwide. It is little surprise, then, that when asked by reporters and analysts to describe or quantify *House of Cards*' success, then-CEO Reed Hastings seldom had more to say than some version of "We are very happy with its performance." The same was true of leaders at Amazon Studios, whose 2014 hit *Transparent*—about a retired, divorced college professor with three kids embracing her identity as a transgender woman—was celebrated by critics and awards voters at the Golden Globes and Emmys, but struggled to connect with broad audiences. On the other hand, in the absence of publicly reported metrics, neither Netflix nor Amazon (or the streamers that followed them) ever had to answer pointed questions about underperforming shows; they simply had to not talk about them. As the other streamers entered the marketplace in the ensuing years, they broadly adopted the standard of radical untransparency that Netflix and Amazon had set.

In these early years, Netflix in particular argued that its unwillingness to share this data was actually a boon to creators and other talent and studio partners. No longer would they have to start every morning anxiously checking

55 Nielsen has since invested heavily in the space and, since June 2021, has published ratings for streaming content, relying in part on audio-recognition software included in Nielsen devices already in households around the country. Because Nielsen's rankings are based primarily on total minutes viewed, they tend to favor shows with deep libraries that can generate several hundreds of minutes of viewership in a single aggressive bingeing session. Several other companies have followed Nielsen with their own published "streaming ratings," but every major streaming service has been publicly dismissive of the quality of data from Nielsen and its competitors. Even after several years of refinement, Nielsen's measurements of streaming viewership are not considered to be nearly as accurate or authoritative as its measurements for linear viewing.

56 For reference, as of the third quarter of 2023, that figure was north of 247 million, of which roughly 77 million are in the United States and Canada.

the overnight ratings and wondering what the numbers meant for their shows' futures. Instead, Netflix would simply generously sustain the shows that it found creatively deserving (or that otherwise measured up to its undisclosed definitions of success),⁵⁷ while its cost-plus license fees (as a network) and backend buyouts (as a studio) would financially reward virtually all of its talent and studio partners without the need for any such external measures of viewership or success.

Over time, however, much of the industry has grown increasingly hostile toward the streamers' unwillingness to share viewership data. Fans congregating on social media could give the impression that almost any show was a "hit," which left the talent behind such shows frustrated by cancellation decisions that they did not understand. Independent studios, who had no affiliated streaming platforms of their own to consider, wanted hard data to support their claims for better upside from the biggest hits. Lucrative up-front fees and backend buyouts had served the biggest stars of streaming well, but rank-and-file "working actors"—a group that had often relied on residuals from past appearances on major projects, even in small roles, to sustain them in lean times—often found they could not survive on their wages from streaming alone, and saw data untransparency at the root of their residuals problems in streaming.⁵⁸ Writers had enjoyed a frothy marketplace for lucrative overall deals from the competing streamers and their affiliated studios, but ever-shortening work periods made it increasingly difficult for low- and mid-level writers to piece together a living wage on their up-front fees alone. Meanwhile, the writers who were thriving came to understand that they would never be able to achieve the generational wealth of the top creators of the pre-streaming years.

Data transparency thus became one of the central issues behind the 2023 WGA and SAG-AFTRA strikes, which resulted in the introduction of a bonus on the fixed streaming residuals for titles that receive enough domestic "views"

57 See Section B.v.

58 The term "residuals" (sometimes cheerily referred to as "mailbox money") refers to passive payments owed to talent, separate and apart from any specifically negotiated contingent compensation entitlements, in connection with the ongoing exploitation of films and series over time. All three of the principal talent collective bargaining agreements—with SAG-AFTRA, WGA, and DGA—provide for residual payments to union-covered service providers. In all traditional media, residuals are calculated as a percentage of revenues received by a studio from international and other secondary exploitation of a series. When the residuals system was first extended to streaming, however, it was understood that streaming originals were seldom, if ever, meaningfully monetized outside of their original platforms, which required the parties to devise a non-revenue-based way to calculate residuals. Instead of requiring streaming platforms to disclose viewership numbers as a basis for calculating residuals, the unions—aware that both of these metrics were fast on the rise—agreed to a calculation based on the subscriber base of the platform and the production budget of the series, payable over a ten-year distribution period. Because neither revenue nor viewership is taken into account, all other things being equal, a series watched by 10 million people generated the same residuals as one watched by 10,000 people. When the 2023 collective bargaining season arrived, all three unions made viewership-based residuals central to their negotiating agendas.

in their first 90 days to be equivalent to 20% of the streaming service's domestic subscribers.⁵⁹ In addition, the streamers must now disclose to the unions the total number of hours streamed, both domestically and internationally, of self-produced, high-budget streaming programs. The specific figures may be subject to nondisclosure agreements, but the unions will be able to release reports with aggregated data. This deal is widely considered to be a foundation for further changes to residuals calculations and disclosure requirements in future MBA negotiations. At the same time, as advertisers become increasingly critical to the health of the streaming business, they will no doubt extract more granular data from the streamers to support their advertising choices (and the calculation of their fees). The streaming business is thus on a slow but steady course toward more meaningful data transparency.

The ink was barely dry on the new WGA and SAG-AFTRA deals when, in December 2023, Netflix took the vanguard of the movement away from its own old orthodoxy by releasing the first “What We Watched,” a twice-yearly “Engagement Report” of hours viewed for every title, original or licensed, watched for over 50,000 hours for the prior six-month period (starting with January through June 2023). Netflix had already been promoting itself as the market leader in data transparency,⁶⁰ publishing (since 2021) weekly film and TV “Top 10” (by country) and “Most Popular” lists. Its new report, which Netflix boasted “covers more than 18,000 titles—representing 99% of all viewing on Netflix—and nearly 100 billion hours viewed,” offered the general public nearly the same level of transparency that the unions had just, at great effort, collectively bargained to receive, *with NDAs*.

“What We Watched” is neither a true “data dump” nor a sincere act of repentance by Netflix—which has long considered “radical transparency” to be a core component of its corporate culture—for its data-hoarding past.⁶¹ Rather, it is a carefully measured move by Netflix to get in front of market trends and capitalize on its dominant position in the marketplace.⁶² With its massive subscriber base, Netflix has the least to fear about embarrassing disclosures of dismal numbers for prominent titles. On the other hand, data on prestigious but less-watched series can help manage talent partner expectations and give context to renewal choices. Even the more meager data at the bottom of the report could

59 For the writers, the bonus is 50% of their fixed domestic and foreign residuals. For actors, it's 100% of the fixed residual, with 25% of that diverted into a fund controlled by both SAG-AFTRA and AMPTP trustees, to be distributed among the rest of the union's members. The 20% threshold is surmountable but substantial, especially for shows on Netflix (with its 75 million subscribers in the U.S. and Canada) and Amazon (with its 170 million domestic subscribers, thanks to the Prime program).

60 A little damning with faint praise here.

61 Credit to Matt Belloni's *What I'm Hearing* newsletter, quoting Bank of America securities analyst Jessica Reif Ehrlich, for these observations.

62 And also, in the opinion of many including myself, a bit of a flex.

be used to apply downward pressure on licensing costs for deep library content. Moreover, by drawing out similar disclosures from its competitors, Netflix will likely not only be able to publicly celebrate its dominance in viewership; it will also be able to leverage that dominance in negotiations with creators and talent who might be willing to take a little less if they believe Netflix gives them the best access to a large audience. Of course, as many have observed, Netflix's report is also noteworthy for all the information it *doesn't* provide—historical data from before January 2023, completion rates, attribution metrics for customer acquisition and retention, etc. And few expect Netflix to be especially forthcoming with any of that more granular and meaningful data anytime soon. Netflix has clearly raised the ceiling on data transparency in streaming; in so doing, it might have also built itself a convenient and durable floor.

v Generous Series Renewals⁶³

As Netflix sought to differentiate streaming from traditional television for both creators and audiences (and, as explained in the preceding section, to justify its refusal to share viewership data), one of its key early enticements was the promise that creatively worthy shows would be supported, renewed, and given the opportunity to build audiences over time, without the usual obsessive focus on “ratings.” Netflix's first two hits, *House of Cards* and *Orange Is the New Black*, exemplified this durability, running for six and seven seasons, respectively. It was not until 2017—four years into its original content program—that Netflix declined to order second seasons of major English-language scripted series, starting with the Baz Luhrman-directed *The Get Down* (which had been plagued with budget and schedule overruns) and *Girlboss* (which had been received poorly by both critics and audiences).

The trend was similar at the other streamers who were first to market with original programming. Amazon, after cancelling one of its first two debut original series after one season (*Betas*, which had drawn immediate and unfavorable comparisons to HBO's similarly themed *Silicon Valley*), ordered second seasons (or more) of its first four dramas and nine out of its next eleven (post-*Betas*) comedies. Excluding shows that were explicitly marked as one-season limited series, Hulu ordered at least one additional season of each of its first nine original dramas, and ten out of its first twelve original comedies.

Within a few years, however, the competition for renewals in streaming was as fierce as it had ever been in linear television.⁶⁴ Shows had continued to grow

63 All figures in this section are based on an analysis of information contained in Wikipedia's lists of ended and ongoing original series at each of the streamers.

64 Renewals in streaming also frequently take longer, and are less predictable in their timing, than they are in the regularized broadcast calendar, consistent with the longer and less uniform option periods for engaging actors for new deals in streaming. See Chapter 8, Section A.v (pg. 308).

in cost, while data had revealed the tendency of streaming audiences to decline season-over-season even for hit series. The platforms therefore increasingly favored investing in new shows over continuing existing ones, and especially increased their emphasis on limited series, which appealed to stars who may have been reluctant to commit to a show for multiple seasons, and whose formats were well-suited to telling closed-ended stories based on true events or beloved books. Even putatively “successful” series—whose budgets often ballooned dramatically in subsequent seasons, thanks to ambitious creators and costly salary renegotiations with cast—found it increasingly difficult to survive past their third or fourth seasons. Meanwhile, studio streamers entered the market without ever having made any implicit promises to creators or audiences that they would protect shows with passionate fanbases if those shows’ actual viewership, relative to their costs, did not meet the platforms’ expectations.

With the financial and logistical strains created by the Covid-19 pandemic in 2020, the era of reliable renewals was officially over.⁶⁵ The similarly dramatic operational and economic disruption of the 2023 WGA and SAG-AFTRA strikes—by which time virtually everyone recognized that the “peak” in “peak TV” was behind them—led to a further spate of cancellations and even “un-renewals” of previously picked-up series. And, as the industry now moves into a period of painful contraction—both in the total number of series produced, and the average amount spent on each series—the bar for renewals is likely to only climb higher.

vi Content Exclusivity

A further consequence of the subscription-only business models initially embraced by most of the streamers was a heightened emphasis on content exclusivity. Like the premium pay networks that came before, the streamers had to persuade customers—many of whom also maintained costly cable or satellite subscriptions that provided them with dozens if not hundreds of channel options—to not only initiate a subscription, but just as importantly, to continue paying those out-of-pocket fees month after month. This required the services to offer customers a sufficiently compelling value proposition to justify that monthly expense. One important way to create value for the customer is to offer

65 To illustrate using Netflix’s pandemic-impacted 2020 slate, as of the end of 2023, of the twenty-three non-limited English-language scripted dramas released by Netflix in 2020, fourteen were canceled after a single season (not counting *Ratched*, which is technically alive but seems increasingly unlikely to return for a second season), three were canceled after two seasons, and only five (including *Ratched*) remain ongoing to this day, most significantly *Bridgerton*. Netflix’s other breakout drama of 2020, *The Queen’s Gambit*, was a limited series. The new normal at Netflix was even more evident in comedy, where ten out of fifteen English-language comedies released in 2020 went “one and done,” another two were canceled after their second seasons, and only one—*Emily in Paris*—remains active to this day.

a wide and diverse selection of content accessible via the subscription. Just as important, however, is offering the customer compelling content *that they cannot find/access anywhere else*.

This premium on exclusivity informs why the original streamers (Netflix, Amazon, and Hulu), which had already been operating for years on second-run content alone, began investing so heavily in original content in the first place. It also helps explain why, when licensing original series from third-party studios, all of the streamers—both the initial crop of tech streamers, and the subsequent generation of studio streamers—consistently negotiated for more expansive rights grants, and more onerous holdbacks on studio-reserved rights, than had been the norm in licensing for linear television (even compared to rights-hungrier premium pay networks).⁶⁶ And it is the reason why the major legacy entertainment companies, most notably and aggressively Disney, forewent millions if not billions of dollars in revenue by declining to enter into or renew licenses for their valuable library content, in favor of preserving that library content’s exclusivity availability on their new streaming services as they launched in 2019 and 2020.

But again, what makes sense for a disruptive business in its first year of operation does not necessarily make sense in its tenth, and the industry has shown signs of reducing its emphasis on content exclusivity. No matter how impactful and successful they were in their time, as the streaming industry ages, its oldest hits have an increasingly negligible impact on customer acquisition and retention for their original platforms. Or, to put it more bluntly, it is highly doubtful whether anybody in 2023 initially subscribed to or declined to cancel Netflix because they wanted *House of Cards* or *Orange Is the New Black* (which each premiered in 2013, and completed their runs in 2018 and 2019, respectively). Deprioritizing exclusivity offers the promise of both costs saved (in the form of reduced license fees to supplier studios in exchange for allowing them more [and more unencumbered] reserved rights) and revenue earned (in the form of second-run licenses for platform-owned content, and/or revenue-sharing deals with supplier studios in exchange for waiving existing contractual restrictions on outside exhibition/monetization).

The movement has begun. In July 2023, cash-strapped Warner Bros. Discovery licensed beloved but older (though not always *that* old) HBO originals like *Insecure*, *Six Feet Under*, *Ballers*, *Band of Brothers*, and *The Pacific* to Netflix. Notably, these licenses are “co-exclusive,” meaning that Warner Bros.

66 This choice came at a real financial cost to the platforms. Because supplier studios—who, before long, were also generally granting Netflix and Amazon worldwide rights—were left with few opportunities to meaningfully exploit and monetize their shows off of their original platforms for up to ten years after the series completed their initial runs, the streamers were forced to compensate the studios for that opportunity cost. This resulted in the rise of “cost-plus” license deals. See Chapter 3, Section C.ii (pg. 139) and Chapter 11, Section A.iv.a (pg. 413).

Discovery can continue to offer these series as part of the library on its Max service, even as it monetizes them with Netflix. Around the same time in 2023, the explosive popularity of USA's *Suits* on Netflix—over a decade after the show began its run on basic cable in 2011—also illustrated (or simply reminded people of) the business opportunity in allowing shows to find new audiences in new places.⁶⁷

To be clear, such “co-exclusive” licensing of major titles isn’t necessarily a panacea for all that ails the legacy media companies and their studio-streamers. That is not to understate the importance of the cash generated by these deals, which can be meaningful to the legacy companies’ balance sheets. For example, co-exclusive and later-window re-licensing of streaming and pay TV originals has been critical in pushing Warner Bros. toward net profitability in its streaming operations. But, as with first-run licenses for streaming originals, these deals for co-exclusive or second-window streaming are negotiated on a largely flat basis, without significant data sharing requirements,⁶⁸ ratings/rankings bonuses or other premiums for success,⁶⁹ or sharing with content owners/licensors of advertising revenue.⁷⁰ Consequently, as with such first-run licenses, the streamers essentially capture all of the “surplus value” of unexpected success, with the studio reaping the rewards of that success only outside of its successful license agreement (e.g., ancillary rights, spinoffs, new international sales). In addition, as of this writing, there has been a modest uptick in subscriber churn for the studio streamers that began accepting Netflix’s cash for their library series and even recent originals. It is too early to know if that trend will continue, or to have enough data to meaningfully evaluate how much that uptick can be attributed to the shrinkage of the studio streamers’ libraries, their loss of exclusive control of some major titles, or other factors. Nevertheless, as the entire industry heeds Wall Street’s call to prioritize profitability over growth, we are likely to see more and more library series migrating to new platforms in the years to come.

vii Perpetual Content Availability

For the first ten years following the arrival of original content on streaming, new shows seemed to be eternal. Yes, licensed titles would arrive and depart as the underlying deals were made and expired, but it seemed that original content, once it arrived on a service, would never depart.

67 More about the success of *Suits* on Netflix in Chapter 3, Section C.i.a (pg. 129).

68 See Section B.iv.

69 See Chapter 11, Section A.iv.g (pg. 420).

70 In fairness, it is a longstanding norm of television licensing, well predating streaming, that advertising-supported platforms generally do not account for or share advertising revenue with content partners.

This was a radical shift in the public's historical relationship with the movies and television shows they loved. Prior to the advent of home video, movies that had completed their theatrical runs could scarcely ever be seen again, save for the occasional broadcast on television of the most beloved and rewatchable hits. Even after home video (followed by DVDs, and then Blu-rays) became ubiquitous, Disney, in particular, preserved and capitalized on scarcity by releasing classics from "the Disney Vault" for limited times only, sometimes generating a buying frenzy among families and collectors looking to add these films to their home libraries while they still could. Television networks, bound by license agreements with supplier studios and constrained by limited primetime hours, had to continuously clear out old shows to make room for new ones. Although reruns played an important part in filling out these networks' weekly and annual broadcast calendars, once a show completed its run and ceased producing new seasons, the original networks immediately ceased airing old episodes as well.⁷¹

One of streaming's early benefits to consumers, then, was to remove the time limitations and sense of scarcity from their viewing experience, at least for new original series. Even shows that were canceled after a single season remained available, seemingly indefinitely, to be discovered someday by new viewers or rewatched by loyal fans. Perpetual content availability was never a formal "policy" at any of the streamers, nor especially highlighted in their communications with creators or audiences. It was simply an unstated, and largely unexamined, presumption of the entire streaming industry.

But perpetual content availability comes at a cost, and more recently, it has proven to be another casualty of the industry's ongoing quest for a sustainable business model. While studio owners of films and TV series that originated in traditional (non-streaming) media pay residuals as a percentage of the revenue they actually receive from each streaming license, for first-run original content on streaming, the platform itself pays fixed residuals for each year that a title is exhibited on its service.⁷² These fixed residuals—one applicable to domestic exhibition, one to international, both borne by the same service on global streaming platforms—grow smaller with each passing year that a series is available. Nevertheless, for shows with high budgets⁷³ and small audiences,

71 In success, of course, these old episodes would quickly reappear elsewhere, outside of prime-time hours and/or (eventually) on basic cable, via syndication deals between the owner-studios and broadcast stations (or station groups) and/or cable networks. For successful and long-running series, the syndication of older episodes frequently began even while new seasons were still being produced for the shows' original networks.

72 Technically, this obligation belongs to the studio that produces the show, but streaming services (like linear networks before them) customarily agree to reimburse the studios for residuals obligations arising out of the originating platforms' exhibition of each series.

73 Production budget is one of the factors taken into account when calculating streaming residuals.

the annual cost from residuals alone to maintain the title's availability on a platform may exceed the value of that title to the platform.⁷⁴

As pressure from Wall Street grew over 2022, and a widely anticipated WGA (and possibly SAG-AFTRA) strike loomed for 2023, the studio streamers (lacking the seemingly limitless resources of their tech counterparts) began to turn away from the streaming industry's theretofore unchallenged norm. In August 2022—after the corporate merger of Warner Bros. and Discovery, but before the merger of the newly combined company's HBO Max and Discovery+ services—the especially cost-conscious Warner Bros. Discovery announced the removal of thirty-six lower-profile titles (including twenty originals) from HBO Max. A few months later, in January 2023, the company yanked higher-profile but still underperforming titles like *Westworld*, *Raised by Wolves*, and *The Nevers* from its recently rebranded Max service. Disney followed suit about five months later, removing some of its own wholly-owned titles—including quite recent and high-profile “one-and-done” originals like *Willow* and *Y: The Last Man*—from its Disney+ and Hulu services in May 2023. Dropping these shows not only saved these companies meaningful costs from ongoing residuals obligations; it also opened up other business and accounting opportunities. At Warner Bros. Discovery, several of the titles that were de-platformed in early 2023 were re-packaged into new WB-branded FAST channels that the company licensed to Tubi and Roku.⁷⁵ Disney elected to take a one-time impairment charge on the shows removed in May 2023, valued at between \$1.5 billion and \$1.8 billion.⁷⁶ In both cases, the companies essentially calculated that these

74 According to whatever advanced metrics that platform uses to determine such value (which metrics are determined independently by/for each platform, and which are considered highly confidential and proprietary).

75 To be clear, it was not strictly necessary for Warner Bros. Discovery to remove these shows from Max altogether to make them available to Tubi and Roku. Indeed, as discussed in the preceding section, about six months after the Tubi and Roku deals, Warner Bros. licensed several other HBO titles to Netflix on a “co-exclusive” basis, meaning that the shows could remain (and, to date, have remained) available on Max, but could not be licensed to any additional third parties during Netflix's license term. In general, exclusive licenses are worth more than co-exclusive licenses, which are worth more than non-exclusive licenses, although different platforms ascribe different levels of value to exclusivity (with subscription-based platforms more likely to value it highly than purely ad-supported ones). For the financially-minded and comparatively unsentimental leadership at Warner Bros. Discovery, deciding whether to de-platform a series altogether when offering it to third-party services is simply a math problem, taking into account the licensing value to be gained from granting greater exclusivity, the ongoing residuals cost of keeping each title on Max, and the value to the Max service (based on the platform's preferred viewership and engagement metrics) of that title's ongoing availability.

76 Under Generally Accepted Accounting Principles (“GAAP”), an “impairment charge” is a one-time write-off on a company's balance sheet of the “goodwill” value of assets that have lost most or all of their value. An “impaired asset” is one that has a market value less than the value listed on the company's balance sheet or, put another way, an asset whose fair market value is less than its “carrying value” (historical cost minus accumulated depreciation). After the company takes an impairment charge, if the impaired asset's fair market value subsequently rises due to changed conditions, the

shows were “worth” more to them off of their streaming services than they were on.

Perhaps because the shows removed from Max, Disney+, and Hulu had small audiences in the first place, their disappearance generated relatively little negative reaction from audiences. Creators, however, were particularly jarred by these changes, with those behind the affected series lamenting that audiences would no longer be able to discover their work, and those behind less-watched series that remained wondering if their shows would be next. Many creators also viewed these moves as punitive, especially at Disney, where the company had implicitly (if highly technically) deemed the de-platformed shows to be “valueless,” took steps that would impede their future availability, and announced its decision only weeks after the start of the contentious 2023 WGA strike. The strength of the creative community’s reaction to the removal of these shows, in the face of the long history of movies and television series inevitably going away, reflected how quickly and completely old norms can be broken and new ones formed.

And now that the streaming industry’s norm of perpetual content availability has been cracked, it seems poised to collapse more broadly. The financial pressures that informed Warner Bros. Discovery and Disney’s first wave of content removal in 2022 and 2023 will only persist in the coming years. Moreover, while the WGA and SAG-AFTRA achieved significant and much-needed gains in the value of streaming residuals, as well as a hard-won “viewership-based streaming bonus” that will rightly reward creators for generating outsized value for the companies they work for, these gains inescapably place additional strain on the companies’ already challenging hunt for profitability in their streaming operations, further incentivizing de-platforming of less successful projects. And because residuals obligations are highest in the first years of a title’s availability, the pressure on shows to perform not just strongly but *immediately* will be higher than ever.⁷⁷ The deeper-pocketed Netflix, Amazon, and Apple—which can bear paying “inefficient” residuals on underperforming titles more easily than their studio counterparts—may intentionally decline to join this trend, and instead wield that choice as an inducement to creators who might

company must continue to record that asset on its balance sheet at the lower adjusted dollar amount, and cannot recognize any value from the impaired asset until it is sold. By taking an impairment charge on these de-platformed shows, Disney has essentially said to Wall Street—and, crucially, to the IRS—that those assets are now essentially valueless. The resulting one-time impairment charge can be used to reduce Disney’s income tax liability for the year in which the impairment was taken. However, that decision largely limits Disney’s freedom to pivot back to monetizing these assets for the foreseeable future, as doing so would call into question the legitimacy of Disney’s original impairment charge (and the tax savings it generated). That said, several direct-to-streaming original movies (but not series) that had been removed from Disney+ were later quietly made available for electronic purchase or rental on TVOD platforms like Apple and Amazon.

77 See Section B.iii for a discussion of how binge releasing, compared to weekly releasing, creates similar pressure for immediate success from newly launched series.

favor selling their shows to a platform that will preserve the shows' availability to audiences. But now that the norm of perpetual content availability has been broken, that choice will be a cold cost/benefit calculation by the tech streamers every bit as much as the corresponding decisions by the studio streamers (and similarly subject to change as circumstances evolve over time).

viii *Rejection of Theatrical Exhibition*

After binge viewing, the streaming orthodoxy that is perhaps most immediately noticeable to viewers and talent—and that is perhaps most central to Netflix's identity as a “pure-play” streaming business—is the rejection of theatrical exhibition.⁷⁸

From the inception of its original film program,⁷⁹ Netflix has been vocal and consistent about its general opposition to theatrical releasing.⁸⁰ That policy appears to be both pragmatic and philosophical in nature—pragmatic because of the heightened value to Netflix (especially in those earlier years) of keeping its original content as exclusive to the platform as possible, and philosophical because of Netflix's sense of identity as a forward-looking technology-oriented disrupter (with no historical theatrical feature business). Although the awards-hungry streamer has always allowed sufficient theatrical releases to qualify its most prestigious films for Oscars eligibility, its insistence on day-and-date (or nearly day-and-date) releasing on the Netflix service itself, without a meaningful exclusive theatrical window, has generally resulted in major exhibition chains like AMC Theaters, Regal Cinemas, and Cinemark boycotting Netflix's films. That seems to have been of little consequence to Netflix, which has demonstrated no interest in releasing even its most expensive original films (which, like 2022's *The Gray Man*, can cost in the range of \$200 million) widely in theaters.

78 Admittedly, insofar as this section is concerned specifically with feature films, it may seem somewhat out of place in a book called *The Business of Television*. Nevertheless, the exhibition of library and original feature films has always been an important aspect of the television business, from the use of library films to launch and build new networks, to the major role of library films in programming even highly original series-oriented basic cable channels like FX, to the occasional release of “direct-to-TV” original films on HBO and other premium pay networks. Because streaming is a core component of the television business, and feature-length films (both library and original) are a core feature of streaming platforms, the relationship between the streaming and theatrical exhibition businesses warrants some examination here.

79 Netflix's original film program began in late 2015 and early 2016 with the rather schizophrenic one-two-three punch of *Beasts of No Nation* (a war drama about child soldiers, starring Idris Elba, written and directed by *True Detective*'s Cary Joji Fukunaga), *The Ridiculous 6* (a Western action comedy, the first of a long list of movies that Netflix has since produced with Adam Sandler, that scored a rare 0% on Rotten Tomatoes), and *Pee-Wee's Big Holiday* (a standalone sequel to 1988's *Big Top Pee-Wee* and the last feature film role of star Paul Reubens).

80 Ongoing conflict around this policy is believed to have contributed to the departure of Netflix's long-time film chief Scott Stuber in January 2024.

At the outset, Netflix's hostility toward theatrical releasing made it a bit of an outlier, with Netflix sometimes seeing filmmakers and producers accept less money from other suitors (including rival Amazon) who promised meaningful theatrical releases. At the same time, although traditional exhibition windows for theatrical feature films have been slowly condensing for many years, legacy studios continued to give their major feature films largely traditional exclusive theatrical runs, followed by shorter exclusive windows for physical home media and TVOD transactions, before making them available for subscription streaming online. When theatrical exhibition was forcibly ground to a halt by the 2020 Covid-19 pandemic, however, the legacy studios began making aggressive moves toward Netflix's streaming-focused approach, at the expense of their theatrical businesses (and exhibition partners).

This trend arguably kicked off in earnest in September 2020, when Disney released its live-action remake of *Mulan* as a \$29.99 PVOD upgrade for Disney+ subscribers, with a limited theatrical release only in countries without Disney+ where theaters had reopened. Then, in December 2020, then-WarnerMedia CEO Jason Kilar (previously the founding CEO of Hulu and a long-time evangelist of Hollywood's digital future) announced that the entirety of Warner Bros.'s 2021 theatrical slate—including hotly anticipated tentpoles like Denis Villeneuve's *Dune* and franchise fourquel *The Matrix Resurrections*—would be released day-and-date in theaters and on HBO Max, for all subscribers, without a PVOD up-charge. And in July 2021, with theaters open but still struggling, Disney released Marvel franchise flick *Black Widow* concurrently in theaters and as a \$29.99 PVOD upgrade for Disney+ subscribers.

Except for the PVOD release of *Mulan* (which came at the near-height of the pandemic, when most U.S. theaters were still closed and vaccines had not yet rolled out to the public), these moves generated instant controversy across the entertainment industry. Exhibitors, whose businesses had largely struggled even before the pandemic, resented the further intrusion on their once-sacrosanct exclusive windows. Filmmakers, talent, and financiers were frustrated that Warner Bros. had made its big commitment to day-and-date theatrical/SVOD releasing in 2021 with less than a week's notice to (and little, if any, meaningful consultation with) those involved with the affected pictures.⁸¹ And Disney—whose unpopular then-CEO Bob Chapek had initially assumed an unapologetic and surprisingly combative tone about the decision to release *Black Widow* day-and-date in theaters and on PVOD—ended up sued by (and quickly settled with) disgruntled star Scarlett Johansson, who argued that the

81 Kilar later conceded that the rollout had been "rushed," though it seems likely that—concerned about leaks, and already planning to treat every picture as an economic blockbuster for everyone with a backend or other financial interest—he simply found it preferable at the time to ask for forgiveness rather than permission.

move cost her “very large box office bonuses” that the film may well have achieved with a conventional exclusive theatrical release.

As the pandemic abated, the legacy studios began reorienting themselves back toward theatrical exhibition, though the windowing strategy among theatrical, PVOD, standard TVOD, and SVOD releases has become more of a case-by-case “choose your own adventure” game. In August 2021, WarnerMedia (still led by Kilar) struck a deal with AMC Theaters committing to 45-day exclusive theatrical windows for the studio’s 2022 releases before they could appear on HBO Max. One year (and one merger, and one streaming rebrand) later, Kilar’s successor, David Zaslav, decided that the Warner Bros. film studio would remain committed to the 45-day minimum exclusive theatrical window, but that select titles might be withheld from streaming for longer to allow for further separate monetization. Following its talent relations fiasco on *Black Widow*, Disney never tried to repeat its day-and-date theatrical/PVOD experiment, and largely pulled back from PVOD releasing altogether in 2023. At the same time, following the disappointing performances of Pixar’s *Lightyear* and Walt Disney Animation Studios’ *Strange World* in 2022, the company prioritized theaters even further by delaying the availability of most new theatrically released movies on Disney+ until three (rather than two) months after their initial theatrical premieres. Universal Pictures has most continued to embrace PVOD, striking deals with exhibitors that allow for an exclusive theatrical window of as little as 17–31 days (though the studio can always opt for longer), after which Universal typically makes each major film available outside of theaters only via high-priced PVOD transactions (without requiring a Peacock subscription), followed by standard-priced digital sales and rentals, before the films finally reach Peacock no less than 45 days after their initial theatrical releases. The New York Times reported in June 2023 that Universal’s PVOD strategy had netted it over \$1 billion in less than three years, “with nearly no decrease in box office sales.”⁸² Paramount nearly sent the pandemic-delayed *Top Gun: Maverick* directly to Paramount+ before, under intense personal and legal pressure from star Tom Cruise, giving the movie an “Old Hollywood”-like 90-day exclusive theatrical run in the summer of 2022 that eventually yielded

82 Universal also turned heads with the October 2023 release of *Five Nights at Freddy’s*, which grossed \$78 million domestically (and \$133 million worldwide) in its opening weekend (on the way to nearly \$300 million worldwide over its full theatrical run), despite being released day-and-date on Peacock, where it also became Peacock’s most-watched title and biggest driver for new sign-ups ever. It even dethroned Taylor Swift’s *The Eras Tour* from the top of the box office charts. This remarkable success was attributed, by various analysts, to Peacock’s especially limited reach (at the time, fewer than 30 million U.S. subscribers), the unique power and fandom of the horror genre, the film’s roots in a popular video game, and Universal’s particular prowess at effectively marketing films to young moviegoers. Whatever the reasons, the success of *Five Nights at Freddy’s* demonstrated for the first time that major theatrical moneymaking and fast availability on streaming were not necessarily mutually exclusive.

a staggering \$1.496 billion in worldwide box office receipts.⁸³ Paramount also carved out for itself a more-than-two-month co-exclusive (with theaters) PVID window, starting five months after the film's theatrical premiere, and deferred the debut of *Top Gun: Maverick* on Paramount+ until December, a now virtually unheard-of nearly *seven months* after the film's initial release in theaters. Paramount has since continued to make windowing decisions largely on a case-by-case basis, taking into account each film's performance in theaters. And at Sony, which does not operate its own streaming platform, films are generally released in PVID after two months, and arrive on Netflix (which has taken over the "pay one" window traditionally occupied by premium pay networks like HBO and Showtime) six months after their initial theatrical releases. This collection of practices is noteworthy for how different they are from one another, for how much discretion the studios retain in making case-by-case decisions, and for how willing the studios have been to quickly evolve these tactics based on real-world experience and changing market conditions. For the legacy studios and their affiliated streamers, there simply is no orthodoxy when it comes to theatrical releasing.

None of which has made much of an impact at Netflix, which—at least for now—remains as averse to theatrical exhibition as ever. Even after reportedly paying a staggering \$450 million for the exclusive right to release two sequels to the 2019 hit *Knives Out*—a rare totally "original" (i.e., not based on preexisting intellectual property) film that had succeeded wildly *in theaters* (grossing nearly \$313 million on a budget of about \$40 million)—Netflix theatrically released the first sequel, 2022's *Glass Onion: A Knives Out Mystery*, only in the United States, for a single week, on only 700 screens. The film's limited release generated an impressive \$13 million over its five-day release weekend (and \$15 million overall), leading many to wonder how much money Netflix had left on the table by declining to release the movie internationally, on more screens, or with a longer theatrical run. Netflix's non-plussed reaction, however, seemed to confirm the assumption by many that *Glass Onion's* theatrical run—the largest ever for a Netflix original film—was meant primarily to mollify writer/director Rian Johnson, rather than to experiment with a new windowed approach to monetizing and exhibiting its original movies.⁸⁴

But as with binge releasing, there is now enough data to evaluate Netflix's ongoing commitment to releasing its films exclusively on streaming (or with very limited and non-exclusive theatrical runs), and that data does not appear to

83 This reportedly led director Steven Spielberg to breathlessly tell Cruise, "You saved Hollywood's ass, and you might have saved theatrical exhibition."

84 Further illustrating Netflix's hostility toward theatrical distribution and its willingness to leave money on the table, in order to secure the participation of the major theater chains, Netflix agreed to hold back the release of *Glass Onion* on Netflix for approximately four additional weeks after the film completed its limited theatrical run, rather than simply allowing the theaters to continue exclusively exhibiting the film during that full period before its streaming premiere.

support Netflix's stubborn commitment to its strategy. Despite having received wide theatrical releases, films that are theatrically released by Sony generally outperform Netflix's exclusive originals on the service. Looking specifically at releases for 2022, "the first post-Covid full theatrical year," anonymous blogger/analyst Entertainment Strategy Guy—a long-time evangelist for theatrical releasing, even for the tech streamers—has convincingly argued that, compared to direct-to-streaming movies, theatrically released films have better total viewership (even when looking only at views on the streaming platform itself), drive more audience interest and engagement (as measured by audience interest tracking firm TV Time), command more audience awareness (as measured by pageviews on Wikipedia and searches on Google), and generate more and better ratings and reviews on IMDB. Perhaps his most dramatic and impactful claim is that "If a film opens in theaters first and then goes to a streamer, it gets on average 74 percent more streaming hours in the first four weeks."

Of course, that does not mean that *every* feature film warrants a theatrical release (or, to put it another way, that *no* film should be released exclusively in streaming), particularly given the often-significant cost of properly marketing a wide theatrical release. A 2023 white paper published by Parrot Analytics proposes that studios and streamers alike evaluate releasing and windowing strategies for feature films on a case-by-case basis based on factors including cost, genre, theatricality, and cannibalization. Nevertheless, even Netflix's tech streamer competitors appear poised to adopt a more balanced and nuanced approach to streaming exclusivity, windowing, and theatrical exhibition for their own original features. In late 2022 Amazon—which had recently completed an \$8.5 billion acquisition of Metro-Goldwyn-Mayer ("MGM") to secure the historic studio's intellectual property library and theatrical production and distribution capabilities—publicly committed to spend \$1 billion per year on films meant for wide theatrical releases. It was followed in early 2023 by Apple, which—roughly a year after becoming the first streamer to win a Best Picture Oscar for 2021's *Coda*—made a similar \$1 billion-per-year commitment to theatrically released films.⁸⁵

85 Apple quickly began making good on that commitment, releasing (through Paramount Pictures as its distribution partner) Martin Scorsese's 3 hour and 26-minute epic *Killers of the Flower Moon* in over 3,600 theaters in October 2023, without promotional support from the film's stars due to the then-ongoing SAG-AFTRA strike. The film grossed a bit over \$156 million worldwide, on an "official" budget of \$200 million (which many observers have speculated was actually closer to \$250 million). Nevertheless, *Killers of the Flower Moon* has been widely lauded by critics (including for Apple's decision to give it a wide theatrical release), and performed well at the 2024 Golden Globes and Oscars races (which were mostly dominated by Christopher Nolan's *Oppenheimer*). For the executives at Apple, with its market capitalization of roughly \$3 trillion, Oscars gold might truly be more valuable than actual gold. That said, by May 2024, both Amazon and Apple had made slow progress toward fulfilling these grand commitments, and Amazon released its 2024 remake of *Road House*—a seemingly natural candidate for a theatrical release—exclusively on Prime Video, leading many analysts to question the sincerity and durability of these commitments.

Meanwhile, perhaps the best evidence in favor of theatrical releasing is still on Netflix itself, where, during the first week of 2024—just over two weeks after the release of one of Netflix’s biggest movie bets ever, the Zack Snyder-directed/*Star Wars*-adjacent \$150 million space epic *Rebel Moon*—the ten most watched movies on the service were all theatrically released studio films.

3

HOW TELEVISION IS DEVELOPED, PRODUCED, AND DISTRIBUTED (AND HOW STREAMING BROKE TELEVISION DISTRIBUTION)

A From Idea to Production

Traditionally, the process of getting a television series from an idea (which may not even be committed to paper yet) to series production could be essentially divided into six stages. In broadcast network television, which is organized around a principal “broadcast season” that runs from September of each year to June of the following year, the development process is so well established (and has remained so consistent over the decades) that it can be reliably mapped to the calendar. On other linear and streaming platforms, the process is recognizably derived from this broadcast model, but generally operates year-round (rather than on the standard broadcast calendar) and may emphasize or deemphasize certain elements of the traditional process according to each platform’s creative and competitive preferences.

Television studios have historically managed the inherent creative uncertainty and financial risk of the development process by largely deferring significant spending on a proposed project until after they have secured a network deal. At the same time, networks have traditionally mitigated their own risks by commissioning standalone pilots to evaluate potential series prior to committing to the production of an entire season. But as studios have sought to remain competitive in the crowded marketplace of the “peak TV” era and distinguish their projects as ineffably “undeniable,” they have often taken on more of the development process before pitching (without a network partner). Meanwhile, aggressive and well-funded streamers have competed amongst themselves to secure desirable projects in part by largely foregoing traditional pilots in favor of script-to-series orders—and in so doing, have increased their expectations for pre-greenlight packaging and extensive written development beyond pilot

scripts alone. Over the medium-to-long term, however, such trends are in constant flux; and as the industry enters an era of recession and contraction, there are already signs that it may be re-embracing some of its older (and more conservative) ways.

At this point, describing the life cycle of a modern television series based on the historical practices of broadcast television is a bit like describing how a modern bill becomes a law using the lyrics to *Schoolhouse Rock!*'s "I'm Just a Bill." The traditional network model certainly is not representative of how most series are made and monetized today. Even so, tracking the heavily structured and routinized way that television is developed and produced in broadcast television provides a helpful framework from which to explore the life cycle of a television series—including how that life cycle has dramatically evolved in the last decade as streaming has come to dominate the medium.

i Packaging and Studio Rights Acquisition

Every television series starts with an idea. This idea may be "original," i.e., a fresh invention from someone's (usually a writer's) mind, or based on some underlying piece of intellectual property (such as a book, short story, article, film, podcast, foreign television format, or true-life story). The process begins as that idea is expanded and surrounded with additional key elements.¹

The earliest stages of this process may take place solely among the development-stage "service providers" and their agencies. Independent writers, producers, and/or rightsholders may find one another, either directly or through their representatives, and agree to jointly "pitch" (i.e., try to sell to) studios with a project. Parties may informally agree to work with each other without entering into an explicit agreement or may enter into a more formal "shopping agreement." In a shopping agreement, the parties agree to jointly develop and market a project and agree that neither party will enter into a further agreement with a studio in connection with that project unless the other party also successfully negotiates a deal. In such a case, to proceed with the project, the studio acquiring rights will usually have to enter into agreements with all of the principals who have come together during this pre-packaging process.

The formal dealmaking process generally begins as a studio acquires rights to the idea, script, underlying property, or combination of these elements that will someday become a TV show.² If a writer is sufficiently senior and experienced, then the writer may sell a verbal pitch of his or her idea without

1 This process goes on year-round, but for broadcast network television projects, the studio deal-making process is typically at its peak in late summer through early autumn.

2 See Chapters 5 (pg. 189) and 6 (pg. 212).

having committed it to paper.³ In addition, the presumption is typically that a senior, experienced writer will go on to “showrun” the eventual series, if it is produced. If the writer is more junior, they may have to write out a draft of their idea “on spec” (i.e., independently and without compensation) in order to convince a studio to develop the project. The junior writer/creator should also expect that, at some point, they will be paired with a more experienced writer/producer who will serve in the showrunner role. If the project is also based on an underlying piece of intellectual property (e.g., book, life story, etc.), the studio will concurrently enter into an option-purchase agreement with the owner of this intellectual property.

The studio may, at this time, also make deals with multiple elements that have been pre-packaged (as described earlier) as a threshold to developing the project at all. Alternatively, the studio may make deals solely with a key writer or rightsholder, with the intention of independently choosing and hiring further elements down the line. Often, the studio will seek to incorporate a writer and/or producer with whom it has entered into an exclusive “overall deal” (which provides for that individual to render services exclusively for a single studio for a given period of time, in exchange for significant guaranteed annual compensation that is recouped against fees as earned).⁴

Over the course of this process, the studio will work with the individuals involved to craft and improve the idea, and make strategic decisions about what key elements—underlying rights (essential, if applicable), writer/creator/producer (essential), showrunner (common but essential only if the writer/creator cannot personally showrun), non-writing producer(s) (usually at least one, sometimes more), and perhaps pilot director (rarer but increasingly common in the more filmmaker-driven “peak TV” era) and/or one or at most two actor(s) (once rarer still, but as with pilot directors, increasingly common)—it wants to attach to the project prior to the next phase: the network pitch.⁵

ii Pitching and Set-Up

Once the pitch is ready and the studio has reached agreement on key terms with all the necessary elements, the producers and studio executives collectively seek to “sell” the project by pitching one or more networks.⁶ The studio, having

3 Even in such circumstances, the writer has usually prepared some sample pages, written story synopsis, or other form of written “pitch materials” short of a prepared script.

4 See Chapter 10 (pg. 390).

5 In some cases, the service providers who initiate a project may elect to directly pitch one or more networks without first approaching a studio. Where a network is pitched directly and is interested in proceeding, it typically refers the project and its elements to a studio of the network’s choosing—usually a studio with which the network is affiliated—which will proceed with development of the project pursuant to a development agreement between the network and studio.

6 For broadcast network television projects, this typically takes place throughout autumn.

already made deals with all the elements and obtained control of the necessary rights, makes a deal with an interested network to continue the development and/or production of the project. Although the term “sale” refers to successfully making any deal with a network by which the development of the project is continued, the type of commitment actually obtained may vary widely, depending on the strength of the package and pitch, the interest level of the network, and the competitiveness of the bidding among multiple interested networks.

Most initial network deals are for development only, with the network agreeing to bear some or all of the writing and other development expenses, in exchange for the studio granting the network an exclusive option, for some specified period of time, to order the production of a pilot and/or series. That sale may be based on and structured around an existing draft pilot script, or an unwritten “pitch” for which the writer has been engaged on an “if/come” basis and writing only commences after the project is set up with a network.⁷ Some networks agree only to pay a portion of script writing fees, while others will consider paying or reimbursing a portion of other development expenses, such as option fees for underlying rights, or development or supervision fees paid to producers other than the principal writer. In determining the amount of cost coverage they will offer, networks consider the competitiveness of the situation, the amount of the script fee committed by the studio, and more broadly, the stature and development history of the writer. Some networks negotiate script coverage as a percentage of script fee—in such cases, 50% is a common benchmark, though coverage may be as high as 100% in a highly competitive situation involving a high-stature writer. Other networks—particularly the broadcast networks—prefer to negotiate script coverage as pure dollar amounts, and in the broadcast world in particular, networks may strictly cap their script coverage (often at \$75,000 per project) as a matter of rigidly enforced policy, allowing such networks to systematically limit their annual development expenses.

In addition to script coverage, the studio and network may negotiate over, among other issues:

- The amount of expense covered by the network for items other than the pilot script, such as option fees, supervision fees, or other development expenses;
- The number of development steps committed to, or available at the option of, the studio (e.g., “backup scripts” for further episodes after the pilot;⁸

7 An “if/come” agreement is one in which a studio negotiates writing and producing terms for a writer to develop a specific creative concept, but the entire agreement—and all financial commitments—are contingent on the studio first selling that idea to a third-party network licensee (which will contribute to the development costs of the project).

8 When such episodic scripts are ordered prior to, rather than after, a series has been ordered to production, the applicable scale minimum compensation (which is used for all but the most experienced, prestigious, and sought-after writers) is 115% of the scale minimum for a corresponding

series “bibles” or “formats” to summarize proposed long-term story or character arcs;⁹ etc.);

- The length of the network’s option to order production of a pilot or series; and
- Whether the network has the right to order production of a pilot, versus being forced to choose to produce a series or nothing at all (the latter known as a “script-to-series” deal).¹⁰

The parties may also negotiate regarding what rights, economic or otherwise, the network retains with respect to the material if it declines to order a pilot or series. Typically, rights revert to the studio, subject to a lien in favor of the network for its share of development expenses (potentially with interest) and possibly a modest passive participation (with both fixed and contingent compensation) payable to the network if the series is ultimately produced elsewhere.

In competitive situations involving broadcast networks, the network may commit to pay a specified penalty to the studio—which may range in value from five figures to seven figures—in the event that the network elects not to proceed to production of a pilot and/or a further penalty if a pilot is produced but the network does not proceed to production of a series.¹¹ Networks may also rely on such penalties to nominally adhere to their own policies regarding script

episodic script (e.g., same length, same network type, etc.). Prior to the 2023 WGA Basic Agreement, the 115% requirement did not technically apply to backup scripts commissioned for streaming (as opposed to linear television), but it was frequently honored by the streamers and their partner studios. In 2023, the WGA Basic Agreement was also revised to explicitly extend the 15% premium that had long governed for other platforms to streaming (including high-budget programs produced for FAST channels).

9 In plain language, the word “format” refers to the overall concept and branding of a copyrighted television program, including general story, setting, and characterization, but not including the specific scripts and/or shot episodes of the original series. As a technical term, however, “format” also refers to a WGA-covered written document prepared by a writer that sets out major themes, storylines, character arcs, or other information about an intended series. A format document is understood to be shorter and less detailed than a complete series “bible”—another WGA-covered piece of writing that serves the same purpose, but requires higher minimum scale compensation—but there is otherwise no standard length, structure, or contents for such documents, nor any clearly delineated features that differentiate formats from bibles, leaving writers to largely craft them as they see fit (with the input of the studios and/or networks that have commissioned these documents). Because formats command lower fees, they tend to be favored by studios and networks; for the same reason, in the absence of a clear distinction between formats and bibles, most writers and their representatives prefer bibles for their WGA-mandated higher price points.

10 Though once coveted by creators and studios, script-to-series deals are less meaningful than they used to be due to the general decline of pilots (outside of broadcast television) and the increasingly common practice of networks convening “mini-rooms” prior to committing to ordering a series. See Section A.iii.

11 Curiously, the terminology of “penalties” is dominant, even in negotiation among experienced legal professionals in the television industry, despite the blackletter rule from contract law that contractual “penalties” are unenforceable. Presumably, the tight-knit, repeat-business nature of the entertainment industry is responsible for the fact that no network has ever mounted a full legal

coverage (which, again, may be capped as low as \$75,000 per project), while nevertheless making a more substantial development commitment.

Some networks require that, in order to proceed with development of a project, a license agreement be negotiated in full at this time, at least as to substantive principal terms.¹² Other networks will proceed with development on the basis of a mutual obligation to negotiate a license agreement in good faith at the time the network wishes to order production of a pilot and/or series, with a specified mechanism for what happens if the parties are unable to reach an agreement at that time—typically, a reversion to the studio, finite holdback against exploitation elsewhere, and lien for the network's costs if the project is produced elsewhere. In addition, a network with an affiliated studio may negotiate, at this time, for its sister studio to be granted a co-production position in the project.¹³

Different networks have different preferences and practices with respect to pilots—standalone first episode of a television series that are used to establish and demonstrate the style and content of a proposed television series, and to persuade a network to order production of a full season's worth of episodes.¹⁴ By giving the network a concrete view of the project's style (as pilot direction at least initially dictates the overall style to be duplicated by subsequent episodic directors), as well as an opportunity to observe the cast in action (which can also reveal standout individual performers, or particular chemistry between actors, that the show's writers can write to in the future), pilots can provide network executives with very valuable information to evaluate a project's prospects as a series.

For these reasons, pilots remain the default in broadcast television; and for very strong packages, and/or in highly competitive situations, the studio may obtain a "pilot commitment" from the network, meaning a commitment by the network to order (and pay its applicable license fee/cost share for) the production of a pilot. This is also sometimes called a "put pilot," although that phrase may also refer more narrowly to a pilot commitment with a further penalty owed if the network declines to order a series. As a technical matter, the network is never actually committed to *do* anything; it can scrap production of the pilot at any time, or never proceed to production at all. However, this pilot commitment is typically expressed as a press release announcing the pilot order (which publicly commits the network to the project) and a pilot penalty equal to

challenge to its obligation to pay such a penalty (and that no studio has ever mounted a full legal challenge against a network that quietly refused to pay a negotiated penalty).

12 Such license agreements are described in further detail in Chapter 11, Section A.iv.a (pg. 413).

13 See Chapter 11, Section B (pg. 444).

14 In the old parlance of broadcast network deals, "pilots" are also sometimes referred to as "prototypes."

much (or all) of the full license fee that the network would have paid for a pilot (payable whether or not the pilot is actually produced).

On the other hand, pilots are very expensive—both because their nature as an “audition” often elicits extra investment (especially by outside studios that need to compete with the pilots produced by the favored affiliated studio(s) of the network), and because the inability to amortize costs across multiple episodes inherently makes a pilot significantly more expensive than a series episode with the same production value. They are an especially ill fit for the kind of costly shows with complex, serialized storylines that have thrived on streaming. Pilots also do not necessarily provide helpful assurances about the creator’s ability to deliver an entire compellingly written series, or confirmation that the creator has a well-formed plan for where the series is going after the first episode.¹⁵ And because pilots require actors to work (and be paid) for a single, longer-than-normal episode, and then to be held under option for several months as the network considers the project’s fate, many high-level actors who are otherwise willing to work in television refuse to participate in pilots altogether. For these reasons, non-broadcast platforms have tended not to rely much on pilots, and to instead look to “mini-rooms” as their preferred tool to generate material to evaluate for ordering.¹⁶

Ultimately, however, whether a deal with a network provides for a pilot is almost always dictated solely by the network’s prevailing policies, and it requires tremendous leverage for a creator or studio to get a network that favors pilots to contractually agree to forego one.

The tech streamers’ willingness to get aggressive to secure the most sought-after shows has resulted in the expansive growth of the “straight-to-series” order—a commitment to produce a first season with a specified minimum number of episodes, not only without a pilot, but without the opportunity to engage in joint development work prior to making a decision. Such decisive

15 The pilot episode of ABC’s 2004 series *Lost*, directed by series co-creator J.J. Abrams, is widely considered one of the best pilots ever—a perfect encapsulation of Abrams’s “mystery box” style of filmmaking that, in one tight hour, sets the tone for the series, introduces the audience to several compelling and distinctly drawn characters, and teases numerous mysteries sure to keep the audience coming back looking for answers. That said, as the series carried on over six seasons, it became increasingly clear that the show’s writers did not necessarily have specific explanations in mind when teeing up the show’s many mysteries. This impression was seemingly confirmed by a 2009 special edition of *Variety* celebrating *Lost*’s hundredth episode, which included an account of how the show’s dramatic reveal that two well-established and seemingly unrelated characters (Dharma initiative scientist Dr. Pierre Chang and spirit medium Miles Straume) were actually father and son came from an idea spontaneously thrown out in the writers’ room as a way to break through a creative stall in the writing of one mid-season episode. In later interviews, *Lost* co-creator and showrunner Damon Lindelof has said that the creators always had a “general roadmap” for the series and knew how they wanted it to end, but that it had originally been mapped out for three seasons—leaving the writers with a lot of work to do fill out three more seasons when ABC balked at prematurely ending one of its most-watched shows.

16 See Section A.iii.

commitments may be made to secure the participation of a star during a limited window of their professional availability, or simply to outbid a similarly aggressive competitor—usually, at the highest levels, Netflix, Amazon, and Apple fighting fiercely amongst themselves, deploying their considerable resources to compete with one another over and over for the most desirable shows and creators. These bidding wars have translated, surprisingly often, to even unwritten pitches getting straight-to-season production commitments. For the most aggressively sought-after projects—including *House of Cards*—the streamers have sometimes secured projects by committing to produce two seasons.

Again, because a network is never actually contractually committed to *do* anything—only to pay as if it did—a “straight-to-series” can sometimes be satisfied simply by paying out to producers and any other attached elements their applicable minimum guaranteed compensation for a greenlit first season (although representatives may try to negotiate to receive actual anticipated compensation rather than contractual and/or union minimums). When an outside studio is involved, the parties also must negotiate as to exactly what is guaranteed to the studio by this “series commitment.” In broadcast or cable, it can easily be translated into the payment of the negotiated flat (or capped) episodic license fees for the network’s minimum order under the license deal. Outside of broadcast, the negotiation is more idiosyncratic and can involve flat series “penalties” of seven or eight figures, minimum development/pre-production spending commitments, or sometimes little more than a press release and a personal promise from the network president.¹⁷

As the industry enters its post-“peak TV” period of contraction and austerity, however, platforms have begun to lose their appetites for costly straight-to-series commitments, and even for script-to-series deals. Instead, with every platform under growing pressure to produce fewer, better shows for less money, platforms have begun to rediscover the value of pilots—for both good creative decision-making (offering insight for both executives and creators beyond what can be determined from scripts alone) and for good production planning (providing precious practical experience to inform budgeting, scheduling, and writing for the balance of the season). Consequently, as of this writing, many platforms—especially the studio streamers—have begun to place a renewed emphasis on securing options for pilot production steps in their license deals (at least outside of meaningfully competitive situations).

17 Networks asserted these rights in dramatic fashion as they embraced cost-cutting during and immediately after the 2023 WGA and SAG-AFTRA strikes, not only backing away from several projects that had been on the cusp of being ordered to production prior to the work stoppage, but also rescinding prior greenlights—in effect, “un-ordering” series.

iii Script Development

During the script development stage, the studio, network, writer, and producers work together to further develop a project.¹⁸ If the project was sold on the basis of a pitch alone (either directly to the network or via an if/come deal with a studio), the writer prepares a complete draft of a pilot script and then writes subsequent drafts taking into account the notes of network and studio executives. If the project was based on a previously written “spec script,” or if the writer has already prepared one or more drafts of the pilot script for the studio prior to pitching the network, the writer goes straight to working on rewrites, again based on the notes of network and studio executives. Typically, these drafts are reviewed and commented on by other producers prior to formal submission to the studio and/or network.

During the “peak TV” era, it became increasingly common for studios to firmly engage writers to prepare multiple complete drafts of a pilot script, and even to commission from the writer a series format or bible, and/or one or more backup scripts, prior to pitching the project to networks.¹⁹ Because many seemingly great ideas do not necessarily translate into great scripts, having a quality pilot script in hand when pitching reduces the perceived creative risk in developing a project, and can therefore command greater interest from networks (who will still have an opportunity to push for further revisions or other development work as they see fit). That said, because if/come deals limit a studio’s financial risk and increase its ability to spread a finite development budget over more potential projects, they are showing early signs of a resurgence in the cost-conscious post-“peak TV” era.

Studios that develop scripts in-house (rather than on an if/come basis) take on full responsibility for the guaranteed script fee payable to the writer.²⁰ Traditionally, there is little other dealmaking activity during this period, with most attachments of directors and actors occurring either before any script has been

18 For broadcast network television projects, this phase generally takes place from mid-autumn through January of the following year.

19 As described in Chapter 6, Section A.i (pg. 213), most pilot script writing deals provide for five steps, for which the writer’s compensation is fully guaranteed. Studios who engage in pre-pitching script development typically use two to four of those writing steps to prepare the script they will take to networks, reserving the remaining step(s) to be written and developed jointly with a buyer network. That said, if the project never sells, the original studio is still obligated to pay the writer for any previously unpaid amounts allocated to those unused steps. In such circumstances, studios may elect to require the writer to complete the remaining steps in-house (in hopes of taking the improved script back out to the market, perhaps with more or different elements attached), to simply pay out the writer’s remaining guaranteed compensation and end further work on the project, or to negotiate away the outstanding guarantee as part of making a whole new deal to develop a different project from scratch.

20 For that reason, studios are sometimes able to negotiate somewhat reduced script fees, often with “set-up bonuses” that make up the difference to the writer (possibly with a premium) should the project eventually sell to a network.

written, or only after there is an existing draft of sufficient quality to show to such individuals to pique their interest. It is possible that the studio and network may jointly elect to attach further elements to the project at this stage or to engage a subsequent, independent writer or writing team to further revise the pilot script (although this would be somewhat unusual in television development). In addition, if necessary, the studio may negotiate for and commission additional writing steps from the writer, to the extent required by the network but not otherwise provided for in the writer's existing deal.

Another major change to the traditional script development and pilot/series ordering process during the era of "peak TV," however, has been the rise of mini-rooms (also sometimes called "development rooms" or "pre-greenlight rooms")²¹—shorter in length and smaller in size than "full" writers' rooms for firmly ordered series seasons—convened by a studio and/or network to engage in further creative development prior to the network committing to the production of a full season.²² Usually comprising two or three writers working collaboratively with the series creator or showrunner for a period of roughly ten weeks, a mini-room is meant to "break" the story for the coming season (i.e., work out the major character and story arcs, the pacing of the show over its intended number of episodes, etc.). When a mini-room is convened, backup scripts may be assigned to one of the new writers who have been hired for it, rather than to the series creator (although the creator would inevitably heavily

21 A "greenlight" is an order of a pilot or series to production that has cleared necessary corporate approvals and, while still subject to outstanding mutual approvals between studio and network (e.g., for budget or casting), is considered "firm" or "non-contingent" and leads to a rapid build-up in hiring, spending, and preparation for production. As streamers have expanded the development process with mini-rooms and additional pre-greenlight packaging, some platforms use phrases like "blue-light" or "flashing green light" to indicate that a project is "very close to" or "unofficially" greenlit, but without triggering the full financial obligations (e.g., pay-or-play status of series fees) or rapid buildup of a true greenlight.

22 The official logic of mini-rooms is that, by broadening the development process beyond the pilot episode of a series alone, they give the network assurances that a great pilot script will actually yield a great, well-plotted series (or at least season). In addition, many network executives staunchly and sincerely defend mini-rooms as a comparatively low-cost way to give new and returning shows that are "on the bubble" (or would otherwise be out of contention altogether) an opportunity to prove themselves and get the network to "yes." More cynical takes on such mini-rooms posit that they are a tool for network executives to defer difficult decisions; an institution forced upon studios by indecisive networks, but begrudgingly accepted in hopes of creating a "sunk costs fallacy" dynamic with networks by financially investing them much more heavily in a proposed series; a way for mid-level creative executives (who are generally loyal to and responsible for only their own projects) to play the same "pot commitment" game with their own bosses; a crutch sheepishly requested by struggling showrunners to get help figuring out their shows; a way for networks that never intend to order a show (or a second season) to obscure their decision and let valued creators down gently; and a mostly useless enterprise that generates unfilmable scripts but (along with straight-to-series rather than pilot-based ordering) reflects Netflix's "break stuff" ethos and the rest of Hollywood's "copy Netflix" ethos. All of these takes have at least one grain of truth (and sometimes many more) in them.

revise any such scripts, and many creators prefer to get high-level input from the other writers in the mini-room but to reserve the actual scriptwriting for themselves, at least at this stage of the process).

Non-broadcast platforms focused on complex serialized storytelling rapidly embraced mini-rooms over pilots as part of a heightened emphasis during development on understanding and crafting the entire first season of a series, as opposed to only its first episode. During their short existence, however, mini-rooms also quickly became intensely unpopular with writers due to their short working periods, the tendency of studios to pay no more than WGA scale weekly minimums for pre-greenlight rooms, the frustration of working extensively on something that might never come to fruition, potential alienation from the project if it does actually move forward, and the use by some networks of pre-greenlight mini-rooms even for second or subsequent seasons of existing series. Consequently, the initial refusal of the AMPTP studios to agree to meaningful new rules governing their use of mini-rooms was one of the key unresolved issues that sent WGA writers to the picket lines in 2023. Following the strike, the WGA's new Master Basic Agreement ("MBA") included several new safeguards and limitations for mini-rooms on both first and subsequent series seasons, including: (1) weekly scale minimums that are 25% higher than those applicable to post-greenlight rooms;²³ (2) a minimum guarantee of ten consecutive weeks of employment;²⁴ (3) a requirement that at least two writer/producers be engaged alongside the creator/showrunner;²⁵ and (4) a requirement that writer/producers engaged for a mini-room also must be engaged for any post-greenlight writers' room once the season is ordered to production.²⁶ In the months immediately following the implementation of these new rules, there has been some anecdotal evidence that mini-rooms have become less common—an outcome that surely pleases many writers who would have preferred to see them abolished altogether, but which has also likely contributed (alongside many other structural factors) to the anemic job market for television writers in 2024.

23 Unless the writers are guaranteed at least twenty weeks of employment, in which case the rules governing ordinary post-greenlight writers' rooms apply. See Section A.vi.

24 Previously, studios and networks had sometimes engaged mini-rooms for only eight, six, or even just four weeks of employment (after which the writers might be sent to work independently on assigned backup scripts, for which they would receive the requisite minimum compensation for such scripts, but no further weekly fees).

25 Prior to the 2023 WGA Master Basic Agreement, mini-rooms would sometimes be staffed (at least in part) with one or more entry-level Staff Writers (for whom scale minimums are much lower) and/or relatively junior Story Editors and Executive Story Editors (who were much easier to negotiate with for mini-rooms, given that they would be expected to work for scale minimums in a regular room, as well).

26 Such post-greenlight rooms were also made subject to several first-of-their-kind requirements in the 2023 WGA Master Basic Agreement. See Section A.vi.

Notably, such pre-greenlight mini-room requirements apply only once three writers (including the showrunner) have been convened before a series order. Thus, the new protections do not apply if the studio engages only the showrunner, alone or with only one collaborator, on a weekly (not just freelance basis) for such pre-greenlight development writing. It therefore seems likely that such *micro-room* arrangements will become more common as a way for studios/platforms to avoid the full expense of the now-WGA-regulated mini-room of three or more writers.²⁷

In the traditional broadcast model, however, such mini-rooms are largely unheard of, and the script development period is characterized primarily by the individual creator(s) working independently on version after version of their pilot script (and any other commissioned development materials), in consultation with and under the direction of non-writing producers and studio and network executives, until that material is finalized for the network's consideration as it determines which projects reach the next stage of the process—the pilot.

iv Pilot

A television pilot is assembled over a period of intense creative, production, and dealmaking activity, during which the key team behind a project is solidified, and the words on a page are translated into a full audiovisual product. Networks typically order pilots in batches, so that they can choose among a group of pilots, side-by-side, in determining which projects will make it to series production.²⁸ Although it is difficult to make precise estimates, and figures will vary

27 This will probably lead to some tricky conversations with creators/showrunners, who may be very sensitive to any effort to “circumvent” the new mini-room protections. Creators/showrunners tend to get significant deference from studios when it comes to the composition (if not the budgets) of their writers’ rooms, but because the 2023 WGA Basic Agreement does not *require* a third writer in these circumstances, a creator cannot truly compel the studio to hire one. On the other hand, if the studio did not prenegotiate terms for mini-room development as part of the creator’s initial deal, then opening a mini-room requires the studio to make a new deal with the creator for the step, which the creator may condition on the studio agreeing to hire a third writer. That said, while creators certainly have their own frustrations with mini-rooms as a further hoop to jump through to get to an order, from a purely financial perspective, mini-rooms have their appeal. Unlike the staffed writers in such rooms, creator/showrunners are already under at least some restrictions on taking other work for the duration of the network’s option period to order, whether or not a mini-room is convened. They are also virtually assured (regardless of WGA requirements) to be engaged for the full span of writing and production of any resulting series. Outside of mini-rooms, development work is only paid based on delivered writing steps, rather than on time spent. And studios and networks will continue to present mini-rooms as creators’ best path to getting their series ordered. If forced to choose between a micro-room collaboration with one other writer while receiving weekly fees, or no mini-room of any kind (and therefore no weekly development fees of any kind), the incentives are still lined up for at least some creators to acquiesce rather than hold out for a WGA-protected mini-room or nothing at all.

28 For broadcast network television projects, pilots are typically ordered in January and February, and produced between February and May.

depending on the year, the network/platform, and the overall health of the marketplace, approximately 10%–20% of developed projects may expect to earn a pilot order (although the percentage of scripts ordered to pilot has increased somewhat over time due to the declining volume of development projects per network, and the increasing volume of pilot commitments). Of these produced pilots, approximately 20%–40% may expect to earn series orders. Over the last decade, pilots have grown increasingly uncommon outside of the broadcast network context, and at times, some streaming platforms have eschewed them altogether in favor of mini-rooms.²⁹

For those projects that are meant to go through a pilot stage but are not ordered to pilot production, the process may be dead, or it may reset to an earlier stage. In most cases, broadcast networks have “two bites” to order production of a pilot based on a developed script; meaning that if a network initially declines to order a pilot, it may continue to develop the project and reevaluate that decision during its next window for pilot orders. In cable and streaming, where the development and production calendars are less consistent, the network’s option window is typically defined in months rather than “bites.” During this development period, the network may commission further revisions of the pilot script or additional written materials (such as the aforementioned backup scripts, formats, or bibles) to assist the network in further evaluating the project. If the network’s option has expired, or if it agrees to waive its rights and terminate its option early, the studio may seek a new network to take over development of the project, or perhaps proceed immediately to pilot production. For instance, AMC’s *Breaking Bad* was originally developed for FX; when FX declined to order a pilot, studio Sony Pictures Television made a new deal with AMC to keep the project alive, and the rest is history.

For those projects that are ordered to pilot production, the sprint is on. The first steps are typically to engage casting directors (who will assist in identifying and casting actors), line producers (who will assist in recruiting and engaging a production crew, and creating and managing a production budget), and, if not already attached, a pilot director (who will help set the stylistic template of the proposed series in the form of the pilot, and work with the producers to identify and hire key members of the cast and crew).³⁰ In addition, the studio and network will reengage in negotiating any major elements of the studio-network license agreement that had been left to future good faith negotiation (although even at this stage, they may elect to reserve finalization of the thorniest issues until after the pilot has been produced). Production executives and producers will work furiously to generate and refine a production budget and schedule, while the pilot script is continuously tweaked to respond to the demands of said budget and schedule (and vice versa).

29 See also Section A.ii.

30 See Chapter 7, Section A.i (pg. 271).

The casting process for the principal actors in a series, known as “series regulars,” involves a mix of so-called “straight offers” and “test options.” “Straight offers” are firm offers to actors to be engaged on the pilot (with options to be hired for a series, if ordered) and are generally reserved for highly experienced actors with significant stature and/or name recognition, usually in lead roles. Such offers may be conditioned on a meeting with producers and/or a “reading” by the actor of lines from the pilot script (for further evaluation by producers and executives), though many high-level actors refuse to audition for parts in any way and will only consider and negotiate an offer with no creative contingencies attached.³¹ Customarily, only one straight offer, to one desired actor, can be outstanding for a role at any given time.

Most major roles, however—especially on pilots, as opposed to straight-to-series orders—are cast via a series of test option deals, by which the studio simultaneously enters into agreements with multiple actors who are competing for a single part. The candidates have been vetted by casting directors and producers but are typically precluded from formally auditioning for studio or network executives (whether in person or via taped audition)³² until they have not only closed a substantive deal, but signed paperwork that gives the studio

31 The offer may nevertheless be subject to specified business contingencies, such as the studio concluding its license agreement negotiations with the network, if still outstanding.

32 In addition, during the Covid-19 pandemic, auditions were largely performed by videoconference, or by the actor taping themselves and submitting that audition tape to the casting directors. Increasingly, however, actors competing fiercely for even relatively minor roles felt pressure to invest more time and money to make their self-taped auditions as compelling as possible. At the same time, producers and casting directors often assigned these auditioning actors many pages of dialogue to learn and perform; made significant technical demands around the creation, editing, and submission of these tapes; offered very tight windows for the actors to prepare and submit their auditions; and sometimes pressured actors who they liked, but felt were not being represented at their best in an existing taped audition, to prepare and submit new ones (at the actor’s own time and expense, and without any compensation). And for many actors, these self-taped auditions seemingly disappeared into the void, with no feedback from casting directors or producers, even in response to proactive follow-up questions about whether a role had already been cast.

Self-taped auditions—which, because of their convenience, have remained very common even since the pandemic ended—thus became one of the major contested issues in SAG-AFTRA’s 2023 negotiations with the AMPTP, especially for the mass of aspiring and rank-and-file actors who could only hope to be meaningfully affected by some of the bigger-ticket items being negotiated. Although the AMPTP did not concede to the union’s initial demand for mandatory compensation for self-taped auditions, the studios did agree to several new limitations on the practice, including (1) a minimum of forty-eight hours to prepare a self-tape (or longer if over a weekend); (2) a maximum of eight pages of assigned dialogue for the first audition; (3) a requirement that producers provide opportunities for actors to interview or audition by videoconference or in person if they do not wish to prepare a self-tape (subject to availability on a first-come, first-served basis, with special accommodations for senior performers, minors, and actors with disabilities); (4) simplified and standardized technical requirements for self-taped auditions; (5) requirements for secure storage of self-taped auditions and a prohibition on their further circulation without the actor’s consent; and (6) a requirement that producers “endeavor” to respond to actors who are following up to find out if a role has already been cast.

the option to engage them for the pilot upon pre-negotiated terms. Usually, two to four actors at a time may compete for a role, although often none of the candidates are selected and a new batch is identified for a subsequent test. Consequently, for a single tricky role, ten or more separate deals could be made and negotiated to signature—often in windows of only twenty-four hours or less. Because of the volume and time pressures of this process, the negotiation of both deal terms and paperwork often relies extensively on non-negotiable terms and pre-negotiated cut-through paperwork forms.

Particularly during broadcast network pilot season, when literally dozens of pilots are in concurrent preproduction and production across the country, the competition for the best talent in every role is high, which further contributes to the need for the dealmaking process to proceed swiftly and decisively. For any given pilot, this process may continue at a frenzied pace until the very eve of commencement of photography (and, for lesser roles/elements that are not needed until later, into the period of pilot production). Eventually, however, a pilot is completed and delivered to the network, and the studio and talent wait to see if the network elects to order a series based on the pilot.

v Upfronts

The term “upfront” refers to an event thrown by a television network, attended by talent, press, and major advertisers, during which the network announces its newest series for the upcoming season.³³

In some cases, the network has already committed to production of a series, and the upfront is merely the public announcement and celebration of that decision. In other cases, however, a network may be on the fence about ordering (or “picking up”) a series or may be deciding among various competing prospective series, and will use the upfront period to gauge advertiser interest before making a final decision. In this climate of uncertainty, with much at stake in the form of a series order, the upfront period may include a frenzy of eleventh-hour dealmaking and renegotiation, during which networks and studios may revisit key terms of their agreements (or finally conclude negotiation on any issues that had been left unresolved up to that point) as they hash out at last which shows will make it to series production.

As at the pilot stage, a project that is not immediately ordered to series production may be dead, or it may be on hold or sent back a step. As with the pilot order, broadcast networks typically have “two bites” (or, for other networks, a negotiated period of months following delivery of the pilot) to order production of a series based on a pilot. An unsuccessful pilot may be subject to further development with the original commissioning network, which may

33 Broadcast television networks generally hold their annual upfronts in New York City in late May, in rapid succession to one another.

include rewrites of the pilot script, recasting of the actors, and/or engagement of additional or replacement writers, producers, or pilot directors. In addition, if a network decisively passes on an unsuccessful pilot (referred to as a “busted pilot” or sometimes “broken pilot”), the studio—often in a race against the clock of expiring actor option dates—may look to entice a different network to take over the project. For instance, Amazon’s *Sneaky Pete* was initially developed and produced as a pilot for CBS in March 2015, before CBS passed on the project and Amazon elected to commission reshoots of the originally produced pilot, eventually committing to production of a series based on that revised pilot (which ran for three seasons).

Historically, only broadcast (and occasionally basic cable) networks have substantially invested in or relied on upfronts. As the major streaming platforms have sought to build lower-cost advertising-supported tiers for their services, however, all of them have launched or significantly expanded their own upfronts events to help them create or deepen relationships with advertisers and ad buyers who are increasingly critical to these platform’s financial fortunes.³⁴

In any event, for those shows that are ordered to production, the process swiftly (and sometimes even semi-concurrently) moves into the final pre-production stage: staffing and writing.

vi Staffing and Writing

Although a television pilot is almost always the product of the mind of a single writer (or writing team), a television series is almost always a collaboration among a team of writers.³⁵ The next stage of the process is to engage a “writers’ room”—a group of writers and writer/producers who together will not only

34 Since 2008, the Interactive Advertising Bureau has also thrown an annual “NewFronts” event specifically for internet-based content providers. These NewFronts—which are notably smaller and less grandiosely produced than traditional network upfronts—primarily feature and support major ad-supported social media companies (like Snapchat and the platform-formerly-known-as-Twitter), user-generated video platforms (including YouTube and TikTok), and smaller, often FAST-based video content platforms (including Roku and Tubi). Nevertheless, they still attracted the participation of some of the major subscription streaming providers, including Amazon (in support of its Freevee FAST service) and NBCUniversal (for Peacock). As these premium streamers deepen their commitment to advertising, however, and compete directly for advertising dollars with traditional linear networks, they have largely migrated their focus and resources away from the NewFronts and toward bigger, independently staged, broadcast network-like upfronts events.

35 Notable exceptions include Taylor Sheridan (*Yellowstone*), Mike White (*The White Lotus*), David E. Kelley (*Big Little Lies*), and Craig Mazin (*Chernobyl*). These successful and powerful creator/showrunners (and a few others like them) sometimes work, consult, or occasionally co-write individual scripts with other writers, but generally prefer to personally write every episode of their own series. The existence of these few-but-prominent lone wolves complicated the negotiation of new terms governing writers’ rooms in the 2023 WGA Basic Agreement, and most of the new rules for writers’ rooms contained therein do not apply to series for which the creator/showrunner elects, at their own discretion, to write every episode themselves.

determine the story and write the scripts for the coming season, but also serve as key lieutenants to the showrunner and help creatively lead the production of the newborn television series.³⁶ As with network pilot season, immediately during and after broadcast network upfronts, there are a significant number of new series launching at the same time, which creates significant competition for desirable talent in these roles and drives a hot pace of dealmaking.³⁷

Despite having been the dominant mode of creative collaboration in television writing since virtually the dawn of the medium (and the foundation upon which many working writers have made their livings), in recent years, writers' rooms have become one of the most debated concepts—and biggest flashpoints of conflict—in the entertainment industry. As original series production became increasingly concentrated in streaming, the streaming platforms (whose data showed that seasons with fewer episodes, costing more per episode but less per season, were as effective as those with more episodes at attracting and retaining subscribers) moved steadily toward ordering shorter and shorter seasons—from a prevailing standard of twelve or thirteen episodes per season in 2013, to typically eight or at most ten (and sometimes even six) episodes per season in 2023. Initially, this created a problem of salary dilution for writers, who received the same episodic fees they always had, but received fewer and fewer of those fees, amortized over longer and longer work periods for increasingly complex productions, with longer and longer unpaid breaks between seasons (during which they remained contractually on hold for a potential subsequent season). Because the only guardrail on the classic system of episodic fee deals was the weekly scale floor, within a few years, virtually all writers, from Co-Producers to Co-Executive Producers,³⁸ were usually working for the same rate, regardless of their title or “on paper” compensation: weekly scale. Only the highest-paid creators and showrunners had fees large enough to remain north of scale when amortized over extended writing and production periods.

This became the dominant problem-to-be-solved of the 2017 negotiation between the AMPTP and WGA, which almost devolved into a strike until the AMPTP and WGA found their solution: “span protection.” From May 2, 2018 onward, for any new deal that guaranteed a writer less than a minimum threshold of compensation, an episodic fee would buy out no more than 2.4 weeks of work—e.g., up to twenty-four working weeks on a ten-episode order, just over nineteen weeks on an eight-episode order, etc. Additional work time beyond that bought-out “span” would be compensated at the rate of one additional

36 For broadcast network television projects, the staffing process typically begins in May or June, with writing commencing immediately in anticipation of series production beginning in late summer.

37 The relevant deals are described in further detail in Chapter 6, Section B (pg. 236).

38 The hierarchy of credits for television writers is also laid out in Chapter 6, Section B.ii (pg. 242).

episodic fee for every additional 2.4 weeks of work (prorated for lesser periods). The problem of pay dilution was solved. New problems inevitably followed.

As seasonal orders grew progressively shorter, writers found that studios and networks were not only hiring fewer writers for each “full” writers’ room to meet the reduced need for episodic scripts; they were also employing those writers for much shorter work periods.³⁹ Looking to mitigate the budget impact of the new span protection rules, studios began to employ most writers for only as many weeks as could be covered by their episodic fees without any over-age payments. This resulted in many writers’ rooms being disbanded prior to the completion of writing for all episodes, with the outstanding work being completed either by assigned writers working independently for only (comparatively modest) freelance episodic script fees, or simply absorbed by the showrunners.⁴⁰

At the same time, supervision of physical production was largely left solely to the showrunners and their most experienced and valued lieutenants, with most mid-level writers nominally rising through the ranks from show to show and from season to season, but without getting the producing experience that would be critical to their futures as creators and showrunners. Studios, in turn, grew increasingly unwilling to spend money on writers whose actual skills did not match their titles, resulting in a vicious cycle that further promoted the shrinking and shortening of writers’ rooms.⁴¹ As these trends deepened in the years after the introduction of the 2017 WGA Basic Agreement’s span rules, many writers came to view the ongoing decline of the writers’ room as inextricably linked with (or even an intentional studio effort to bring about) the decline of the writing profession.

Thus, as the WGA and AMPTP began their triennial collective bargaining in April 2023, “the preservation of the writers’ room” became a central theme of the WGA’s demands for the union’s new contract, as well as a powerful rallying cry to steel members for what was universally expected to be an extremely

39 A contributing factor here, beyond the shorter episodic orders in streaming, was the tendency of such shows to be more complex and serialized in their story structures. Compared to more episodically structured broadcast series (especially procedural dramas and multi-camera sitcoms), such shows require more singular authorship to maintain continuity over the season, and are more challenging to effectively assign out to individual writers working on their episodes (at least without more significant further rewrites needed from the showrunner).

40 These changes also contributed to, and are inextricably intertwined with, the rise of the hated pre-greenlight mini-room.

41 Many working writers experienced this as a bottleneck near the bottom of and top of the TV writing profession’s totem pole—for Staff Writers who struggled to make the leap to Story Editor (sometimes “repeating” the level over multiple jobs in search of that promotion), and for Co-Executive Producers (many of whom had risen through the ranks quickly over a series of shorter-term jobs) trying to make the jump to Executive Producer and showrunner (but finding themselves unable to compete with more experienced Executive Producers for showrunning opportunities, while now “priced out” of many staffing opportunities due to their higher fees).

contentious negotiation, from which a strike was widely seen as inevitable and unavoidable.⁴² It was also, at least at first, one of the themes least salient with studio executives, who largely dismissed the WGA's positions on writers' rooms as naïvely obsessed with past institutions in the face of fundamental transformation in the industry; too bluntly "one-size-fits-all" to enshrine as collectively bargained minimum requirements; and an intolerable impingement on the studios' general authority over business and creative matters. This standoff persisted for months, with the writers' proposed "minimum staffing" rules proving to be among the thorniest issues in a negotiation burdened with numerous complex and controversial matters on which the parties had sincere and significant differences of opinion.

Ultimately, the WGA won a new framework of rules that at least conceptually addressed all of its key demands around "minimum staffing," while the AMPTP agreed to a suite of new "minimums" that were close enough to existing custom and practice for them to be willing to accept.⁴³ Specifically, for "post-greenlight" writers' rooms⁴⁴ on series whose first episodes were written after December 1, 2023: (1) shows in their first seasons are required to employ at least three "writer/producers" (a category covering all ranks from Co-Producer to Executive Producer); (2) shows in their second or subsequent seasons are required to employ staffs of at least three writer/producers for series orders up to six episodes, and at least five writers (including no less than three writer/producers) for orders of seven to twelve episodes (representing the lion's share of "premium" TV production);⁴⁵ (3) the showrunner is included in each of the foregoing counts of minimum writer/producers; (4) the minimum staff must be guaranteed at least twenty weeks of employment or the full duration of the post-greenlight room (whichever is shorter); (5) writer/producers who had

42 One of the reasons for the perhaps self-fulfilling sense of inevitability about the strike was the expectation of many studio executives that the WGA, fired up and emboldened by its successful Agency Campaign, was spoiling for another fight and would be extremely uncompromising in the coming negotiations. See Chapter 1, Section B.vii.a (pg. 44). This (of course) contributed to the studios adopting an especially conservative approach to their negotiations with the WGA, which in turn (of course) widely infuriated WGA members and confirmed their own widespread beliefs that the studios did not take their concerns seriously and were fundamentally unwilling to offer them a fair deal without being forced to by a painful strike.

43 To many observers who, even while acknowledging the writers' legitimate concerns, had argued that "minimum staffing" would be a conceptual non-starter for the studios—including the author—this was one of the strike's most surprising outcomes.

44 As opposed to "pre-greenlight" or "development rooms," for which the debated issues and new rules arising out of the 2023 MBA negotiations are discussed in Section A.iii.

45 The new rules also mandate that, for seasons with thirteen or more episodes (now rare outside of broadcast network television), the studio employ at least six writers (including no less than three writer/producers). In broadcast, with its standard twenty-two-episode full seasons and often more episodic (as opposed to serialized) story structure, writers' rooms had not meaningfully declined in size or duration the way they had in cable and streaming television, and these minimums are rather easily met under prevailing norms.

been engaged for a pre-greenlight mini-room must be hired for the full writers' room;⁴⁶ and (6) for single-camera series made for streaming or pay TV⁴⁷ that are exclusively filmed in the United States and Canada, two writer/producers *in addition to the showrunner* must be employed for the lesser of twenty weeks of production or the duration of production. In addition, for the first time, the WGA Basic Agreement's schedule of scale weekly minimum compensation was expanded from two tiers—one for "Article 13" writers (a category comprising only Staff Writers) and another for "Article 14" writers (or "Writers Employed in Additional Capacities," a category that included every other rank of writer)—to three tiers (with the former upper tier for Article 14 writers now applying only for Story Editors and Executive Story Editors, and an enhanced third tier, with a 9.5% premium over the second, for "writer/producers.")

In addition to writers and writer/producers, studios may look to engage producer/directors (who will be expected to direct multiple episodes of the series and to work with other episodic directors to maintain a consistent look and feel for the series).⁴⁸ At this time, the studio will also hire replacements for any key elements engaged for the pilot (e.g., actors, line producers, casting directors) who for whatever reason (perhaps because they had been engaged for the pilot only, or because the studio and/or network elected to replace them) are not returning for the full season.

Over this period, the principal creative and production team will be locked in. Meanwhile, the writers' room will come together to "break the season" (i.e., to determine the overarching narrative and character arcs for the season, to the extent not settled in a pre-greenlight mini-room), after which the individual writers and writing teams are assigned specific episodes to write. As the show takes creative shape, the line producer and their team will determine a series production plan that takes into account a studio-determined budget as well as the creative content of the scripts being generated by the writers. The episodic writing of a series may still be in progress (hopefully with a significant head start) when, at last, the show moves into its mature creative phase: series production.

B Production

i Series Production (Generally)

Television series production involves a coordinated effort to generate a significant amount of content within a relatively short period of time. A full season

46 Weeks worked in the development room can be credited against the guaranteed weeks in the writers' room, but development room compensation cannot be credited.

47 While the term "Pay TV" most commonly refers generally to cable, satellite, and other traditional MVPD subscriptions, in the WGA and DGA Basic Agreements contexts, it refers more narrowly to premium pay networks (as distinct from "cable" or "basic cable").

48 See Chapter 7, Section B (pg. 279).

of a broadcast network television series is at least thirteen, usually twenty-two, and potentially up to twenty-six episodes. Outside of broadcast, a “full” season order is usually only eight episodes—down from a prior streaming standard of ten episodes per season, and before that, twelve or thirteen episodes per season in the heyday of basic cable originals and early years of streaming originals. That said, some platforms sometimes favor even shorter orders of six episodes (especially on limited series), while the final season of a successful series may be “super-sized” to twelve to twenty episodes (in such cases, usually released in two batches, several months apart).

To accommodate the exhibition calendars of traditional broadcast and cable television networks (particularly broadcast networks), such series typically enter production after only the first few episodes have been written. Writing of later episodes occurs concurrently with production of earlier episodes, and earlier episodes begin airing on television while later episodes are still in production. For more complex, shorter-order series in streaming, production may still begin while writing is ongoing, but many studios and networks prefer to have writing fully or substantially complete before cameras start rolling. Even in such instances, however, scripts are inevitably further revised over the course of production; and in some cases, major storylines across multiple episodes may be substantially rewritten if they do not appear to be working creatively as the series is being produced, which may necessitate a costly production hiatus to allow for significant reworking of scripts before production resumes (possibly with major reshoots). In any event, for shows that are “binge released,” exhibition must be delayed until all episodes have been fully produced, delivered, and (for worldwide platforms) localized.

The traditional series production process, as it still exists in broadcast television, generally relies on a rolling production schedule, with overlapping episodic production periods. For instance, episode #2 of a season enters pre-production as episode #1 is filming. When episode #1 completes filming, it immediately goes into post-production, while episode #2 begins filming. But at the same time, while episode #2 begins filming, episode #3 enters pre-production. In other words, at any given moment during production of a broadcast series, three episodes are likely in some phase of production at the same time—one in pre-production, one in production, and one in post-production. Meanwhile, a fourth, later episode may be in the process of being written, and a fifth, earlier episode may be airing on television that week!

This intense, overlapping production calendar involves very short production periods, particularly relative to theatrical feature film production, which typically takes at least several weeks, and often several months or even years for complex, effects-driven films, to yield a two-hour product. Multi-camera half-hour comedies typically involve two days of pre-production and five days of production (of which two days are dedicated to filming, and three days to rehearsal, blocking, and other preparatory work). Single-camera half-hour

comedies also usually require two days of pre-production and five days of production, all of which are dedicated to filming.⁴⁹ One-hour dramas have traditionally allowed seven days of pre-production and eight days of photography. However, for premium streaming series—with their larger budgets, tendency to feature larger casts and more varied locations, and longer episodic running times (facilitated by the lack of a precise daily broadcast schedule)—the production calendar may be extended to nine or ten days of photography per episode, or even longer for the most complex shows (e.g., a show with the scale of *Game of Thrones*, especially in its later seasons, might require twenty to thirty days per episode to produce).

Because of the tight, overlapping production and exhibition calendars of broadcast and basic cable series, going over schedule is seldom an acceptable option. Streaming shows may be afforded more latitude to go over schedule, given that they can be released at any time of year and that their release dates (even for new seasons of returning series) are seldom specifically advertised to the public well in advance. In television as much as in any other context, however, time is money, and few things can drive a project badly overbudget as quickly as delayed, extended, or interrupted production schedules.⁵⁰ And while most everyone in television is serious about getting shows right creatively, and creative excellence is certainly correlated with commercial success, budget and schedule overruns cannot be justified in television as easily as in theatrical feature films, where they may be seen as the cost of securing significantly higher (or avoiding significantly lower) box office receipts. In any event, on every platform, the high stakes of effective budget and schedule management drive the

49 Multi-camera comedies (a category that includes classic series like CBS's *The Mary Tyler Moore Show* or NBC's *Friends*) are the traditional form of television comedy. They have a more "old school" or "classic" feel to audiences than single-camera comedies, and are generally less expensive to produce. These shows are often filmed before a live studio audience (with multiple cameras simultaneously filming each take of each scene) and are recognizable by their use of a small number of stage-built sets and frequent reliance on laugh tracks. Single-camera comedies (such as *The Office* and *Modern Family*), however, are often perceived as more "premium" and have generally been more prominent and fashionable in recent years, particularly outside of the four major broadcast networks. These shows often involve more location (rather than stage) filming and eschew live audiences and laugh tracks. Some creators also favor "hybrid" comedy series, such as CBS's *How I Met Your Mother*, which combine and balance the creative elements and production methods of both multi-camera and single-camera comedies.

50 A variety of factors contribute to the costliness of running overschedule, including "penalties" payable to cast and crew for exceeding union-defined "maximums" on work hours per day or work days per week; penalties for violating union-defined "minimums" for meal periods, rest periods, and turnaround periods between production days; "hold fees" and other added compensation for cast and crew for additional days or weeks, pursuant to union-mandated "consecutive employment" requirements (which limit studios' rights to treat hiatuses as unpaid); added costs from extended leases or rentals for facilities or equipment; potentially dramatic rescheduling and/or reshoots that may be necessary to accommodate extremely limited availability of key actors or locations; and potential knock-on effects in post-production (e.g., for complex, costly, and time-consuming visual effects work).

television industry's strong historic preference for proven, experienced writers and producers leading every production.

The principal cast and crew of a television series are engaged at the outset of production for the season and, for the most part, stay with the show through the completion of production of that season. Shows often also attempt to maintain crew continuity from season to season, although only the highest-level “above the line” personnel (actors, writers, producers) are actually subject to contractual studio options for their services in subsequent seasons. While there may be further high-level dealmaking activity over the course of production of a season, most deals at this stage are negotiated by the high-level series staff who have already been hired by the studio, in accordance with the studio-approved budget. For instance, line producers negotiate most deals for crew department heads, who in turn negotiate deals for the members of their teams; production managers and coordinators engaged by the senior producers negotiate location and lease agreements; casting directors negotiate deals for guest and recurring actors; etc. Studio business affairs executives may be called upon throughout this process to assist the production team, coordinate necessary approvals from co-production partners and/or network licensees, and obtain additional financial contributions from network licensees to offset unusual major expenses designed to enhance the show (such as large acting fees for major guest performers, or additional production costs for large-scale, major event episodes).

ii Production of Subsequent Seasons

High-level dealmaking activity may ramp up between seasons, as major new elements in various capacities are added (such as new actors), replaced (such as mid-level writer/producers or producers/directors), or have their contracts renewed prior to or upon expiration (particularly showrunners, whose initial agreements usually expire after two seasons have been produced, unless the showrunner has already entered into a lucrative multiyear overall deal with the studio).⁵¹ In addition, when a series is especially successful, studios will often entertain renegotiation of terms with actors who are still under contract, by which the actors may increase their episodic fees or acquire (or expand) a share of profits from the series—even if the actors are still technically under contract for years to come. For instance, in 2012, the adult cast of ABC's *Modern Family* famously banded together to renegotiate their agreements prior to production of the series' fourth season (a typical window for such renegotiations), going so far as to jointly sue studio 20th Television to void their contracts when negotiations stalemated. (The parties settled, and the actors returned to the show with

51 See Chapter 10 (pg. 390).

substantial raises.)⁵² Traditionally, such lucrative cast renegotiations did not take place until the fourth or fifth season of a series, when it became clear that the show's longevity and success would open the door to potentially massive revenues from syndication.⁵³ For especially long-lived broadcast series, like NBC's *Friends* (ten seasons), CBS's *The Big Bang Theory* (twelve seasons), and ABC's *Grey's Anatomy* (twenty seasons and counting!), leading cast members might get second or even third opportunities to renegotiate their deals. Because the economic value of a streaming series is not tied directly to longevity the way it is for a broadcast series, however, and because even very successful streaming series are now generally viewed as unlikely to be renewed beyond their fourth seasons, such cast renegotiations have crept steadily toward earlier seasons and shorter intervals. For example, the cast of Netflix's *Stranger Things*—many of whom received relatively modest fees in the show's first season, as is typical for young actors with short resumes—negotiated significant increases in their compensation packages before the breakout hit's third season, with substantial pre-negotiated bumps for its fourth season, and then renegotiated again for even more dramatic salary increases for the show's fifth and final season.⁵⁴

As series make their way into later seasons, backend participants may also seek to receive advances against their contingent compensation (also referred to more casually as “profit participation”) if the show has proven successful enough that it seems certain to show profits under the defined formula.⁵⁵ In addition, key actors who did not originally participate in backend may seek to do so on a going-forward basis (and the studio may look to existing participants to reduce their allocated backends into order to “make room” for the new participants). In short, when a television series succeeds, the principal contributors to that success will seek to be rewarded for that success as the series matures, and the studio must balance the growing cost pressure created by those rewards (or else it might find that even the most successful series can no longer justify its own ballooned cost of production).

52 To be clear, the *Modern Family* example notwithstanding, these renegotiations usually are not driven by the threat of actors voiding or opting out of their contracts (though such threats may be used by actors' representatives looking to squeeze every ounce of value out of a renegotiation). Instead, they are primarily a matter of industry custom and practice, and are justified by the need to “reward partners in success” and/or to “keep the talent happy,” even where a multi-year contract remains firmly in place. Some studios rely on such early renegotiations to obtain long-term security, tying these early raises to extensions of the talent's deals beyond where those agreements are currently set to expire.

53 See Section C.i.a.

54 These renegotiations, however, have sometimes come at the expense of the lowest series regulars on the call sheet, whose roles have occasionally been downgraded to recurring guests (or altogether eliminated) to partially offset the increased expense of the top leads.

55 See Chapter 9 (pg. 351).

iii Tax Incentives and Production Planning

The rapid growth of the television industry over the last ten years has created significant opportunities for all of the industry's stakeholders. But at the same time, the uniquely competitive marketplace has also put enormous cost pressures on all the major players, with shows trying to achieve elusive "must watch" status by, among other strategies, courting costly top-tier on-camera talent, attracting and empowering wildly ambitious and creative directors and producers, and offering viewers production values on par with premium theatrical motion pictures.

The primary tool that studios have used to mitigate these ballooning costs is the tax credit. And in turn, the tax credit has turned nontraditional entertainment centers like Vancouver, Toronto, New Orleans, Pittsburgh, Atlanta, and Albuquerque into hotbeds of production, with Vancouver and Toronto even competing for the nickname "Hollywood North." Today, the availability and value of tax credits is arguably the single most impactful factor influencing the essential decisions behind a television production—not only where a show is produced, but how it is produced, for how much money it is produced, and in some cases, whether it makes sense to produce at all.

An ongoing television series production is a large business, which employs not only traditional "talents" such as writers, directors, actors, and producers, but also literally hundreds of tradesmen and craftspeople, from carpenters to caterers, for months at a time. In addition, beyond the jobs created by the production itself, the cast and crew who descend upon a location to participate in the production of a television series spend significant dollars with local businesses. As a result, to incentivize studios to produce films and television series in their jurisdictions, government authorities at all levels—municipal, state/provincial, and national—employ a variety of incentive programs, usually structured through each jurisdiction's tax code, designed to lure producers with the promise of costs savings and economic efficiencies. In turn, such incentive programs dramatically impact studio decision-making with respect to where to produce a series and how much to spend on its production.

Production incentive programs take a variety of forms and vary widely by jurisdiction (both within the U.S. and around the world). Common incentive programs include:

- **Production rebates**, by which a government authority directly reimburses a studio for some percentage of the studio's production expenditures within the jurisdiction;
- **Tax credits**, by which a government authority credits against a studio's local tax obligations some percentage of the studio's production expenditures within the jurisdiction. These tax credits may be transferrable (meaning that the studio can sell the tax credit to a third party that may be better

able realize it) or non-transferrable (meaning that the studio cannot sell the tax credit, and therefore must have enough direct income tax liability in the jurisdiction in order to be able to realize the credit's benefits for itself);

- **Tax rebates**, by which a government authority refunds to a studio some portion of the studio's income, sales, value added, or other taxes, after such taxes have already been paid by the studio;
- **Tax exemptions**, by which a government authority exempts a studio in advance from paying certain taxes (typically sales or value added taxes) which would otherwise be due in connection with the studio's activities in the jurisdiction;
- **Direct government financing**, by which a government authority actually contributes funds toward the production of a series;
- **Subsidized production resources**, such as production stages and warehouses, owned by the government authority and leased to productions at favorable rates; and
- **Film commissions and film offices**, by which a government authority provides logistical support services to studios short of direct economic subsidies (such as assistance with obtaining film permits, scouting locations, and hiring local crew), in order to make it easier for the studios to do business within the jurisdictions.

Such programs are often subject to extremely specific conditions, including:

- **Limitations on the types of eligible productions** (e.g., theatrical feature films vs. television series; scripted vs. unscripted productions; dramas vs. comedies);
- **Budget requirements** (both floors and ceilings), which may be designed to appeal particularly to smaller or larger productions, according to the policy goals of the authority operating the program;
- **Local expenditure requirements**, which have the effect of requiring a production to spend a meaningful portion of its total budget within the local jurisdiction in order to access an incentive program (thereby limiting the value of such credits to productions that make only token investments in the local economy);
- **Local content requirements** (such as local story, character, and location elements), which are common in direct government financing programs operated at the national level and designed to promote the cultural goals of the authority operating the program;
- **Local talent requirements**, which require a production to make significant efforts to engage local cast and crew in production, rather than importing cast and crew from outside areas; and
- **Local content ownership**, to promote the further development of meaningful local film and television industries.

Government authorities may offer any one of the aforementioned programs, or a combination of multiple such programs, to lure studios to produce projects within their jurisdictions. Each program may be subject to specific and varying conditions. Depending on where it is produced, a production may concurrently enjoy access to multiple incentive programs offered at various levels of government—e.g., a municipal film commission office, a state or provincial tax credit, and a national production grant. For instance, a television production in Vancouver may simultaneously enjoy benefits from the municipal Vancouver government, the provincial British Columbia government, and the national Canadian government.

Perhaps the most prominent and impactful form of production incentives are tax credits, which are typically valued at between 20% and 35% of the studio's production expenditures within the jurisdiction. The studio is required to maintain exhaustive records of its expenses to support the claimed value of its tax credit, and the value of the credit may be capped based on the studio's ingoing production budget, as reflected in the studio's initial application for the credit. Where tax credits are transferable, secondary markets have emerged to facilitate the transfer of tax credits from the originating studios (who often have too little local tax liability to fully realize such credits) to local businesses or high net-worth individuals, who can save thousands or even millions of dollars by purchasing such credits at 85–95 cents on the dollar and pocketing the difference. Tax credit agents act as middlemen, connecting buyers and sellers in exchange for a percentage (usually 2%–3%) of the value of the credits. Some jurisdictions, such as Louisiana, offer direct buy-back programs, essentially allowing studios to monetize their tax credits more quickly and easily by selling them back to the state for 88–90 cents on the dollar (depending on market conditions). In any event, between the application, recordkeeping, and reporting processes, as well as the annualized tax cycle in each jurisdiction, studios must typically wait several months, or sometimes even years, to realize the benefit of these tax credits.⁵⁶

Some jurisdictions offer tax incentives on an unlimited basis, to as many productions as are qualified and willing to avail themselves of the programs. Other programs—notably those in New York and California (traditional centers of entertainment production), presumptively popular yet looking to staunch the exodus of productions induced by the availability of favorable incentive programs elsewhere—are subject to annual caps that are insufficient to meet the

56 Larger producers can cover production expenses from available cash and withstand the wait for these credits to pay off in due course. Smaller producers with more immediate cash flow needs may obtain bank loans, secured against the tax credits (and with value carved out to cover the interest and fees on these loans), to monetize the credits immediately and apply the proceeds against the studio's cost of production as spent.

total theoretical demand from producers, and are therefore allocated based on lotteries or other application processes used to distribute these scarce resources.

Successful tax incentive programs in states such as New Mexico, Georgia, Louisiana, Pennsylvania, and Virginia have had the effect of building up meaningful local production economies and resources in areas that were previously devoid of substantial production activity. In addition, significant government subsidies from countries such as Canada and France, in the form of both tax credits and direct government financing, have helped turn these countries into major centers of film and television production.

A key characteristic of these tax incentive programs, however, is their perishability. These programs are very much political questions. They usually come into existence with great fanfare, a substantial commitment of public funds, and promises of major economic stimulus. But the overall value of these programs to the sponsoring jurisdictions—weighing loss of tax revenues against the gains from local economic stimulus and job creation—is hotly debated. After a period of a few years, such programs often meet stiff political resistance from those opposed to “paying Hollywood millionaires with hard earned taxpayers’ dollars.” When this occurs, governments may rescind existing incentive programs with little or no notice, and with few protections for studios that depended on those programs in deciding where to produce a series. (By this time, some other jurisdiction will have likely decided to jump into the game with a new incentive program of its own.) As a result, studios often skeptically consider the long-term stability of tax incentive programs in deciding where to produce their series (including whether to change production locations between seasons).

In determining the economic risk and profit potential of a television production, major studios pay close attention to the availability, security, and value of tax credits and other incentive programs. Budgets are typically generated to reflect both “gross” and “net” spends, and these “net budgets” are often the basis of calculating license fees and modeling a series’ economic prospects.⁵⁷ Based on its business projections, a studio may determine a maximum “net” spend it is willing to commit to a production, and the overall gross cost (and, accordingly, production value) of the series may therefore vary substantially depending on whether or not the studio can obtain a tax credit to offset its production costs. These calculations can prove determinative of not only where a series is physically produced, but also of the creative content of a series, as well as the threshold decision of whether it is produced at all.⁵⁸

⁵⁷ See Chapter 11, Section A.iv.b (pg. 414).

⁵⁸ For instance, AMC’s *Breaking Bad* was, in its early development, set in California’s Inland Empire, east of Los Angeles. When attractive tax incentives lured the production to New Mexico, the show was creatively reset in Albuquerque in order to preserve the verisimilitude of the setting.

C Distribution

It is often said that a copyright is a “bundle of rights,” whose divisibility is limited only by the availability of markets and the creativity of lawyers. This divisibility provides the foundation of the distribution and profit-making strategy of the television studio (and really, of copyright owners in every creative industry). For each project, the studio owns a single key asset—a television series, whose property value is embodied in the copyright of that series and each episode thereof. The business of a television studio is to sell that same product over and over, enough times to enough buyers, to recoup its investment in the cost of production and finally make a profit. In other words, a television studio makes money by using the divisibility of its copyrights to maximize revenue across media, territory, and time.

In keeping with this book’s understanding of streaming as a form of television rather than a wholly distinct medium or business, the first two sections of this chapter do not feature separate sections for “traditional television” versus “streaming television.” Instead, they use the norms of traditional television as a framework to explore both the “old” way of doing things, and how contemporary streaming series retain, evolve, or altogether jettison those old ways. While addressing streaming as an exhibition window for “traditional” television, however, this section uniquely breaks out its discussion of the distribution of streaming originals into a separate subsection from the “classical model.” That is because original content in streaming has so completely broken the old business model of television, at the level of the individual television series, of the television studio, and of the industry as a whole. And that wholesale break has had innumerable consequences for all players in the television business and is largely at the heart of the conflict and disruption that characterizes the industry today.

i The Classical Model of Television Distribution

a Media

The network on which a television series first airs is the show’s first exhibition medium, but in success, it is never the show’s last.⁵⁹ As technology and business models evolve, new opportunities emerge.

59 To date, this has not necessarily been true of streaming originals, which, in the medium’s relatively short life to date, have generally remained exclusive to their initial platforms. (One notable exception is Netflix’s *BoJack Horseman*, produced and owned by Tornante Co., which was sold to Netflix before its deals had evolved to fully reflect the platform’s voracious appetite for exclusivity, and which was later licensed by Tornante for linear exhibition on Comedy Central.) As discussed in the Conclusion, however, this seems likely to change in the years to come, and hits from streaming may eventually get the same kind of long, multiplatform lives long enjoyed by the hits of linear television.

The classic secondary medium for a television show is simply elsewhere in television—exploitation that is generally referred to as “off-network” or “syndication.” Syndication licenses for content that has already appeared on a network can involve a variety of buyers and a variety of modes of exhibition. A license may provide for once-a-week exhibition of episodes by the licensee, or multiple-times-a-week (known as “strip” exhibition). The licensee may be a cable network, or one or more broadcast stations (or broadcast station groups). Conventional wisdom holds that the syndication market is most robust for: (1) half-hour shows (which are easier to schedule than one-hour shows); (2) episodic, non-serialized comedies (which are easier to enjoy on a one-off basis than serialized shows with continuing plotlines); (3) shows that originally aired on broadcast television (which are both more familiar to viewers and would be all-new to the cable market, compared to cable series); and (4) shows with at least 100 episodes (which can fill a five-times-a-week exhibition schedule without dipping into repeats for at least twenty weeks).⁶⁰ Classic syndication success stories include multi-camera comedies such as NBC’s *Seinfeld*, Fox’s *The Simpsons*, and CBS’s *The Big Bang Theory*. However, procedural dramas (such as CBS’s *CSI* and *NCIS* franchises, and NBC’s *Law and Order* franchise) have also enjoyed successful cable syndication runs, as have some more serialized comedies with more limited runs, such as HBO’s *Entourage* and *Sex and the City*. Due to a combination of contractual holdbacks in the initial network license and the need to stockpile a sufficient quantity of episodes, exploitation of a broadcast series in syndication typically begins three years (i.e., sixty-six episodes) to four years (i.e., eighty-eight episodes) after the series’ premiere on its original network.

Although its overall importance in the industry has diminished in recent years, home video remains a significant downstream market for television distribution. Physical home video distribution (these days in the form of DVDs or Blu-rays) typically occurs on a season-by-season basis, following the end of the broadcast season during which the featured episodes were initially exhibited, with the precise timing of the release often coordinated to coincide with and support the launch of the following season. In more recent years, permanent digital downloads of television episodes (so-called electronic sell-through, or “EST”), through online retailers such as iTunes (which launched its video download services for television series in 2005), Google Play, and Amazon, have largely supplanted the traditional home video market.⁶¹ Although EST exploitation may also be held back until the end of a given season’s run on its

60 The historical minimum “magic number” for series to access syndication was three seasons of twenty-two episodes each—i.e., a total of sixty-six episodes—which enables thirteen weeks of reruns at the rate of five exhibitions per week before episodes are repeated.

61 In fact, EST licenses are often handled by the same distribution executives who manage traditional home video and are accounted for as home video transactions.

home network, individual episodes are often made available for paid download only hours after their network premieres. And, just as the “obsolete” medium of vinyl records has recently enjoyed a resurgence of popularity among hipsters and enthusiasts, the DVD/Blu-ray market has found some renewed life as a specialty market for collectors (though it will never return to the heights of the pre-streaming 1990s and 2000s, when physical home media was one of the principal economic engines for all of film and television).

The most important new market to emerge in the television industry in recent years, of course, is digital streaming. Long before Netflix, Amazon, and Hulu came to dominate original series production, they served as new homes for both recent and classic television series that were originally exhibited on traditional television networks.

Conventional wisdom holds that the streaming market is most robust for serialized, one-hour dramas—programming that is prone to “binge viewing” sessions in which customers consume several episodes in a single sitting to keep up with an engrossing ongoing story. Although in the early days of the streaming market, the applicable holdbacks against streaming exhibition often mirrored the holdbacks against “off-network” or syndicated television exhibition, the more common recent practice is for each season of a television series to become available on a streaming service shortly before the debut of the subsequent season, a strategy that has proven valuable in attracting new audiences for such series (and their original networks).

The classic second-window streaming success story is AMC’s *Breaking Bad*. Although it is now one of the most successful and celebrated television series of all time, for its first three seasons, the show was a critical darling with a very limited audience. The show narrowly avoided cancellation after its third season, and shortly before the fourth season’s premiere, the first three seasons were made available for streaming on Netflix, where it was soon discovered—and hungrily consumed en masse—by a new, younger audience. That audience eventually followed the show to its home network, where ratings for the fourth and fifth seasons soared on the strength of the viewers who had discovered the show on Netflix (where audiences were able to immerse themselves in three seasons of backstory in time for the network premiere of the show’s fourth season). The success of *Breaking Bad* was vital in defining and enhancing AMC’s brand as a new destination for premium original content. Meanwhile, the complementary relationship between the show’s exhibitions on AMC and Netflix helped redefine the industry’s prevailing assumptions about the impact of streaming services on traditional television markets.

For several years, competition among the three major streaming providers had led to a steep rise in streaming license fees for existing series. This was true both for beloved and highly rewatchable library hits with long runs, such as NBC’s *Friends* and *The Office* (which, to this day, are still among the most-watched shows in streaming), and for new and ongoing series for which recent

seasons licensed in streaming helped drive viewers back to the original networks for new episodes (most famously *Breaking Bad*, but also several others, such as NBC's *The Blacklist* and Fox's *Gotham*).

For a brief period around 2013 to 2017, the newly emerged and increasingly lucrative “streaming one” window for new linear series—for which studios could command north of \$1 million per episode for even the first season of a new one-hour drama—altogether upended traditional assumptions about risk and reward in TV production. Studios had long assumed that their shows needed to make it to their fourth seasons (or beyond) to become profitable. Suddenly, however, these studios found that, between their initial network license fees and these out-of-season streaming fees, one-hour dramas could achieve profitability after just two seasons. Promising shows that secured lucrative pre-sales for out-of-season streaming rights could even show profitability based on a single produced season.

In the years after *House of Cards*, however, the market for second-run streaming licenses cooled significantly. As legacy studios began withholding (and foregoing revenue from) the licensing of their library series to build up exclusive content libraries for their own planned streaming services, the tech streamers doubled down on their investments in original content.

In those early years of streaming, variation among streaming providers in their specific business models (e.g., subscription-based vs. ad-supported) allowed licensors to narrowly define the scope of streaming licenses in hopes of facilitating multiple streaming sales—for example, when Hulu was still primarily a subscription-less ad-supported service, a studio could theoretically sell exclusive subscription streaming rights to Netflix and exclusive ad-supported streaming rights to Hulu for the same season of television at the same time. Such opportunities also largely disappeared as once purely ad-supported services increasingly embraced subscription-based offerings, and vice versa.

Nevertheless, the licensing of existing television series for second-run exhibition in streaming seems poised for a renaissance.⁶² The arrival of advertisers in the streaming ecosystem has placed a premium on comforting, reliable shows with deep catalogs that can engage viewers—and expose them to advertising—for hours (or weeks) at a time. In addition, while splashy originals are what principally drive new subscriptions for the streamers, licensed library titles are more often what keep existing subscribers consistently engaged with (and paying for) these services. One of the biggest success stories of 2023 was *Suits*, a USA drama epitomizing in budget, style, and sensibility the pre-streaming model of a basic cable original series. During the summer of 2023, *Suits*—a show whose last new episode had aired in 2019, and which had been available (without great fanfare) on other streaming services for years—was made

62 See Chapter 2, Section B.vi (pg. 89).

available for the first time on Netflix. Netflix's uniquely enormous userbase and powerful recommendation engine catapulted the series to new heights of popularity, making it the most-watched series on any platform for months.⁶³

Netflix no doubt scored a huge return on its investment in *Suits*, whose age and history of availability likely made it relatively inexpensive to license. At the same time, while the show's producer/owner Universal Content Productions ("UCP")⁶⁴ might have wondered if it could have charged a little more for Netflix's latest runaway hit, it will also benefit from the show's resurgence in the form of improved revenue from other/future downstream and ancillary exploitation of the series—including a newly announced Los Angeles-based spinoff from series creator Aaron Korsh. Peacock—the (much smaller) NBCUniversal-owned streamer affiliated with UCP—also retained co-exclusive streaming rights for the series, even after it debuted on Netflix in June 2023, and saw its own (much smaller) spike in engagement once the show took off. To NBCUniversal as a whole, *Suits* is likely worth far more to it on Netflix than it would have been had it remained exclusively available only on Peacock.

Despite its lack of the "premium" sheen common to streaming originals, in many ways, *Suits* was the perfect show for Netflix in 2023—well-acted, written, and produced, light-hearted in tone, at once "bingeable" and "snackable," and boasting a deep library of episodes that could keep viewers coming back for weeks or even months.⁶⁵ The conspicuous "win-win" of its success on Netflix offers a reminder of the wisdom that had been inherent in the industry's traditional approach to windowed, multiplatform content exploitation. And the characteristics that made *Suits* so successful are not at all unique to it, suggesting that there is another *Suits*-like success waiting to be discovered (and another after that, and another after that . . .).

b Territory

Although local entertainment industries have emerged throughout the world, the United States remains the number one producer and exporter of entertainment content worldwide, and the U.S.'s entertainment exports are a cornerstone

63 Over the same period in 2023, the WGA and SAG-AFTRA strikes functionally paralyzed production of new series altogether.

64 Formerly Universal Cable Productions. For clarity, this book will consistently identify this studio by its abbreviation (UCP) or its current (as of its writing) name, Universal Content Productions, even when referring to the studio in relation to shows or events that took place while it was still operating under its prior name.

65 It certainly did not hurt that, since the show ended its original run, co-star Meghan Markle had gone on to marry England's Prince Harry and become the Duchess of Sussex, and then found herself in the middle of an international press firestorm over the estrangement of "the Sussexes" from Harry's royal family (popularly known as "Megxit," although Prince Harry has argued that the term is misogynistic).

of the country's cultural and economic power across the globe. A successful American television series will be licensed for exhibition in dozens of territories, both English-speaking and non-English-speaking (where shows may be distributed with subtitles or dubbed into the local language). Most networks operate specifically in a single country, especially in North America and Western Europe (although there are a number of regional networks that serve multiple countries in Latin America, Africa, and Southeast Asia), and most content licenses define a limited exhibition territory. Consequently, a single television series can be sold dozens of times to buyers across the world, and the pattern of multiple sales across media and time can, in success, be replicated on a country-by-country basis. U.S. networks are typically guaranteed worldwide premiere rights with respect to each episode of a television series, but international exhibition may otherwise be nearly concurrent with American exhibition.

Conventional wisdom holds that the international market is most robust for one-hour dramas, especially action-oriented and procedural dramas, which are most universally appreciated across cultural and linguistic lines. A number of broadcast network-style comedies, such as *The Big Bang Theory* and *Two and a Half Men*, have also found success abroad.⁶⁶ The financial prospects of a series in international markets are heavily influenced by the identity of the commissioning American network (with shows that are exhibited on U.S. broadcast networks generally commanding the highest international license fees), and a general correlation between a show's budget and/or the "prestigiousness" of its initial U.S. network and that show's value abroad.⁶⁷ The value of international licenses can vary dramatically depending on the population sizes, economic capacities, and interest levels of various territories, but in general, the most valuable international markets for American television series are the United Kingdom and Germany. Canada, France, Spain, and Australia may also be economically significant. For some years, despite high levels of intellectual property piracy there, China began to emerge as an increasingly important market for major American shows. This trend seems to have faded, however, in the face of rising geopolitical tensions between the United States and China, tightening Chinese governmental restrictions on the (official) distribution and exhibition of Western content, and the rapid rise in production values and sophistication

66 In addition, while situation comedies (or "sitcoms") often "translate" badly into foreign languages and cultures, television "formats" may successfully traverse international borders, becoming the basis for local adaptations (reflecting local sensibilities) of successful comedies from the United States (or for American adaptations of successful comedies from other countries). Such international format licenses can prove highly lucrative for the producers of the original series. See Chapter 5, Section C (pg. 207).

67 More recently, the flow of television series between the U.S. and the international marketplace has become a two-way street, with British series such as BBC's *Sherlock*, Channel 4's *Black Mirror*, and ITV's *Downton Abbey* finding audiences on U.S. public broadcasting stations and on streaming services like Netflix.

of local Chinese-language productions, which have increasingly dominated the attention and interest of Chinese audiences.

c Time

With few exceptions, every license is finite, allowing the licensee to enjoy rights for a specified period of time (and, where applicable for the platform, for a limited number of runs). In every territory, in every media, a successful television series may be licensed again and again over time, with multiple successive licenses over a span of years in the various exhibition media. This long tail for revenue generation creates significant asset value in successful library television series and contributes to the industry's historical structural reliance on a small number of mega-hits that, over time, subsidize the development and production of a large volume of unsuccessful or only marginally successful series.

d Allied and Ancillary Rights (Music/Derivatives/Merchandising)

As the owner of the copyright in a television series, the studio controls a variety of “allied and ancillary” rights, which it may exploit directly or via licensees who specialize in the relevant businesses.⁶⁸

The first category of such “allied and ancillary” rights is “derivative” or “subsequent production” rights. The most obvious of these is the right to produce and exhibit (or authorize the exhibition of) spinoffs, sequel/prequel series, and/or feature films based on an established series. A studio would typically expect to exploit any such rights directly, though the original network for a series typically negotiates for a series of holdbacks and first negotiation/first refusal rights to allow it to secure any such major new productions without allowing them to be being licensed to a competitor. “Derivative” or “subsequent productions” may include non-audiovisual productions such as stage plays (straight-play or musical) based on a series, or the right to adapt the “format” of an existing series into a new local-language production—for example, Fox’s first major comedy hit, *Married . . . with Children*, has been adapted to local versions in at least a dozen countries, while AMC’s *Breaking Bad* was recreated episode-by-episode for the Latin American market as *Metastasis*.⁶⁹

68 All such rights would be subject to holdbacks (specific to each enumerated type of allied/ancillary right) in favor of the commissioning network in the initial license agreement for the series. See Chapter 11, Section A.viii (pg. 443).

69 Existing international series, from both English and non-English-speaking countries, are also frequently adapted into new American shows. For example, Showtime’s *Homeland* was based on an Israeli series called *Prisoners of War*, while NBC’s *The Office* and Netflix’s *House of Cards* were both based on well-liked UK series of the same names. The deals for such “inbound” format licenses are discussed in Chapter 5, Section D (pg. 208). Although (thanks to streaming) such international

The second category of “allied and ancillary” rights is music rights—particularly soundtrack and music publishing rights. The value of such rights can vary widely from series to series. Soundtrack and music publishing rights are all but valueless on many, if not most, original scripted series, but a show like Fox’s *Glee* can generate many millions of dollars in revenue by fully exploiting music rights.⁷⁰ While some series might pay thousands or even millions of dollars to license a recognizable pop song as the show’s theme song (such as the use of several songs by The Who as themes for the various installments of CBS’s *CSI* franchise), a show that commissions and owns its own theme song and can launch it to popularity can instead generate millions of dollars of revenue from public performance royalties (which are automatically payable on all publicly exhibited series) and synchronization licenses to other programs.⁷¹ Music-driven series like ABC’s *Grey’s Anatomy*, Fox’s *The OC*, and Netflix’s *Arcane* have all been accompanied by one or more extremely successful soundtracks featuring major tracks from the shows.

Perhaps the most lucrative of these “allied and ancillary” rights, however, is licensing and merchandising, by which the studio licenses manufacturers to incorporate elements of the studio’s series (such as its logo, key art, or character likenesses) into consumer products, which may include T-shirts, mugs, posters, toys, physical board games, video games across all technological platforms, companion comic books, collectible figurines, Halloween costumes, branded apparel, lottery games, slot machines, theme park attractions, and special-edition beers and alcoholic spirits. While relatively few series support meaningful licensing and merchandising programs, those that do can generate literally millions of dollars in ancillary revenue.

In general, studios enter into licensing relationships with product manufacturers, by which they grant such manufacturers the right to incorporate the studio’s intellectual property into specified product categories.

These arrangements are generally structured as copyright and trademark licenses, with defined scope (i.e., licensed product categories), exclusivity,

hits are now more available for direct viewing in the United States than ever before, the preference of audiences for hearing their own languages and accents has made for a strong ongoing market for format rights. Netflix in particular has expressed interest in adapting its self-produced/wholly owned hits into multiple local-language versions on its own service.

70 In addition, music-based reality competition series such as *American Idol* and *The Voice* can sometimes support extremely lucrative side businesses selling contestants’ musical recordings or staging ticketed live tours featuring fan-favorite performers from the shows. The participant agreements for such series typically require contestants to agree in advance to grant the studio and network the requisite rights for such music sales, and to participate in tours for relatively modest flat compensation if required by the producer/network.

71 Legendary game show producer Merv Griffin, who created and eventually sold the rights to *Jeopardy!* (among other well-known game shows), famously made more money from his reserved rights in the show’s iconic “Think Music” (which he had composed, and which his estate licenses to the show for ongoing fees to this day) than he did from the sale of the *Jeopardy!* series itself.

territory, and term. Like any trademark licensor, studios retain significant creative and quality controls over licensed products. Because most studios outsource the production and distribution of their licensed products, they also outsource the risk associated with these efforts. Manufacturers bear substantial production and distribution expenses in full and are fully responsible for seeking retail distribution for their products. The studios are compensated with royalties, calculated as a percentage of the licensee's wholesale revenues from the distribution of licensed products—typically between 5% and 15% of the licensee's revenues, depending on the product category and the desirability of the intellectual property. Manufacturers may pay significant up-front guarantees (against these royalties) to obtain licenses, particularly when multiple manufacturers are competing for a single license.

To grant and monetize such merchandising rights, the studio must take care to ensure that it controls all the underlying rights it seeks to exploit. When a series is based on an underlying piece of intellectual property, such as a book or short story, the studio must explicitly obtain merchandising rights in that underlying work (and may negotiate fine distinctions between so-called “classic merchandise” that is based solely on the underlying work, versus “series merchandise” that is based on the derivative series).⁷² In addition, in order to incorporate an actor's likeness in licensed products, the studio must expressly obtain this right from the actor himself.⁷³

e Portfolio Management and Diversification

From the perspective of a large independent studio, managing a slate of shows across a variety of networks is a bit like managing an investment portfolio: the key to long-term success is diversification.

Traditionally—and especially before the advent of streaming—television has been a business of cross-collateralization.⁷⁴ A substantial majority of the television series produced over the history of the medium have lost money.

72 See Chapter 5, Section A.vii (pg. 197).

73 See Chapter 8, Section A.xi (pg. 318). That said, studios can find creative ways to work around this. In 2015, Sony Pictures Television authorized a limited-edition release of “Heisenberg Blue Ice” vodka, referring to the lead character played by Bryan Cranston in *Breaking Bad* and his trademark “Blue Ice” methamphetamine. Perhaps because actor agreements granting studios the right to use an actor's name and likeness and merchandising customarily require specific approval (which an actor could condition on a lucrative additional royalty or rights payment) for certain potentially “controversial” product and service categories, including alcohol, the bottle for Heisenberg vodka featured a silhouette of a male figure wearing the Heisenberg character's distinctive sunglasses and porkpie hat. Although the reference to the character (and, by implication, to Cranston) was clear, the lack of facial features or other elements specific to Cranston himself (as opposed to the character of Heisenberg) meant that the studio technically was not using Cranston's own name or likeness, likely saving Sony the effort and expense of obtaining his consent.

74 The same has historically been true of the feature film and music industries.

Some of them have lost *a lot* of money. The “cash deepwater” for a broadcast series—that is, the point in time at which the studio’s spent expenses most exceed its collected revenues—was usually sometime in the middle of its third season. In other words, a show that was canceled after a single season definitely lost money, but a show that was canceled after two seasons probably lost *even more money* than if it had never been renewed, and a show canceled midway through its third season was likely the biggest financial debacle of all. But across many projects over many years, a small number of successful and profitable series would throw off so much profit that they could cover the losses from the much larger mass of unprofitable series, pay for the studio’s ongoing overhead expenses, and provide the company with its operating profit. The most long-lived and wildly successful of series—shows like *ER*, *Friends*, *Seinfeld*, *The Office*, *The Big Bang Theory*, *Two and a Half Men*, *Cheers*, *Frasier*, *Law and Order*, *CSI*, and the like, as well as major first-run syndication hits like *Jeopardy!* and *Wheel of Fortune*—could functionally “keep the lights on” at a studio for years, if not decades.

Shows produced for different types of platforms tend to have different risk profiles. At one extreme, broadcast series carry major risk (high deficits) and major upside (lots of retained rights; huge international and second window revenue potential). They are the stocks in a studio’s portfolio. Well-managed, they can make an investor rich; recklessly managed, they can bankrupt one. At the other extreme, series produced for major international streaming platforms are very low-risk (upfront license fees exceed production costs) but relatively low yield (off-network revenue opportunities are severely diminished, and initial profit is not high enough to cover major losses from unsuccessful projects). These shows are the high-yield bonds in a studio’s portfolio. An investor may never go broke investing in high-yield bonds, but they probably will not retire to a private island, either. In between are cable series, which offer a middle ground of risk (relatively lower deficits) and reward (substantial, but less valuable, reserved rights), with the occasional chance for a runaway smash success. These are the mutual funds in a studio’s portfolio.

Smaller independent studios with good expertise and relationships but limited access to at-risk capital tend to focus primarily or exclusively on producing for major streaming platforms. For a small studio, the deficit-free (and therefore relatively risk-free) nature of such productions is appealing, and the capped returns can still be substantial enough for the company to operate a healthy and profitable business, as long as it avoids big losses and maintains very low overhead.⁷⁵

75 Such smaller studios may also have limited capacity to distribute reserved rights in any event, and so there is less institutional pressure to hold onto these rights (and less perceived loss from granting extensive rights to a streaming platform). On the other hand, large studios with well-staffed distribution operations face more institutional pressure to preserve a supply of reserved rights for their distribution teams to work with.

For larger, better-capitalized studios, however, diversification across networks allows the studio to manage its level of risk, balancing steady cash flow from reliably low-risk series with riskier investments that can yield moonshot returns. At the same time, cultivating relationships with as many networks as possible reduces a studio's dependence upon (and therefore loss of leverage to) a single network partner. This also puts the studio in a better position to weather the natural tendency for networks to shift over time from ordering series primarily from third-party studios to relying more heavily on their in-house or affiliated studio arms.⁷⁶

ii How Streaming Originals Upended the Classical Model of Television Distribution

The basic distribution and monetization model laid out here was the foundation of the television business through 2019 (give or take). Since then, it has collapsed in two ways, much as Ernest Hemingway wrote about bankruptcy in *The Sun Also Rises*: “Gradually, then suddenly.” This is the dealmaker's story of how, in part, we broke Hollywood.⁷⁷

Traditionally, scripted television licensing was based on a deficit model, meaning that the initial license fee that a domestic network paid to a studio to commission a series was less than the full cost of production. That difference between cost and initial license fee was known as the “deficit,” and it represented the studio's at-risk investment in the series. The classical model of maximization of value across media, territory, and time described earlier was the basis on which a studio recouped its deficit and earned its profits on an original scripted series. That model originated in broadcast television but had, with modest variations, remained the prevailing paradigm throughout most of linear television into the first years of the streaming era.⁷⁸

Streaming's entry into original content production almost immediately offered an alternative to this traditional model, but did not immediately supplant it altogether. In the earliest years of the streaming originals era (2013–14), Netflix, Amazon, and Hulu—then the only buyers for original content in streaming—broke into the business largely by adapting traditional licensing models. Compared to those in linear television, these early license deals for streaming originals featured unusually long license terms and significant

76 See Chapter 1, Section B.iii (pg. 27).

77 In the aggregate, it all seems pretty stupid in hindsight. At the time, virtually every time, it seemed like the only thing to do.

78 The main exception has always been unscripted programming, which has traditionally been commissioned on a work-for-hire basis from production companies that physically produce each series at the network's sole expense (including, within the budget, an approved production fee for the responsible company). Chapter 12 (pg. 465) contains a broad overview of the particular structures and customs of the unscripted television business.

exclusivity against other streaming exhibition, but granted rights that were largely specific to each service's then-prevailing business model (e.g., SVOD vs. AVOD vs. FVOD) and provided for traditional syndication holdbacks for linear exhibition.⁷⁹ And crucially, because all three major streamers then operated only in the United States and a small selection of additional territories, these first-generation streaming deals—whose license fees were usually calculated as a percentage of the production budget for each series—required studio deficits while reserving to the studios significant international and secondary window rights. For these first streaming originals, the pre-sale of key territories like the United Kingdom and Germany and then-speculative international and secondary markets for series originating in streaming created some question about these shows' long-term economic prospects. But with the streamers eager to close these deals and quickly ramp up their original content production, studios were able to negotiate license deals that provided for much more modest deficits (as a percentage of budget) than in broadcast or cable television—around 2%–10% of net budget. Thus, these deals offered a plausible path to profitability together with meaningful upside, and virtually every major television studio soon worked out a licensing template with all the major streamers.

Almost as soon as these templates were set, however, they began to evolve to reflect the streamers' expanding appetites and, after a short “golden age” for studios in such deals, their expanding leverage. As the streamers began to chart their international rollout plans, they began negotiating for first negotiation/first refusal rights to protect their access to exhibition rights in other territories. Before long, these “FN/FR” rights gave way to firm options to license equivalent rights in additional territories for pre-negotiated fees (usually further percentages of the production budget). First these options covered specified territories. Then they came to include catch-alls for the “rest of world” (covering all lower-value territories that weren't covered by specific options). Then some of the optional territories became part of the initial territory for each deal (and the associated optional license fees for those territories became part of the initial license fee—but perhaps with a couple percentage points shaved off the aggregated total).

Within a few years, only Hulu—which had made a brief and unsuccessful foray into Japan and long had unfulfilled designs on Latin America—retained its domestic-only licensing model and deficit licensing structure.⁸⁰ As Netflix and Amazon prepared for their nearly worldwide rollouts in 2016, however, the default licensed territory for their deals became the whole world, and their growing appetites for exclusivity across these now-worldwide footprints choked off outside revenue generation opportunities for their partner studios. As a

79 See Chapter 11, Section A.viii (pg. 433).

80 Or it did at the time, anyhow. Eventually, Disney launched Disney+, rolled it out internationally alongside the Star brand, consolidated its control of Hulu, and began demanding expansive international rights on Hulu original series for the benefit of its international services.

result, those studios had to negotiate license fees that compensated them for those lost licensing opportunities in international and other secondary markets. The cost structures of Netflix and Amazon's deals with their studio suppliers thus quickly evolved from deficit-based to "cost-plus," with the streamers paying license fees well in excess of the cost of production of each commissioned series. The amount by which a show's license fee exceeded its cost came to be called the "premium" (which could be stated as a percentage of budget or in flat dollar terms). Most studios entered these cost-plus deals conservatively assuming that the initial license fee represented all lifetime revenue they reasonably expected to earn from these series.

As the streamers competed with traditional television and with each other for desired originals, these premiums rapidly grew—20%–45% of the budget for a one-hour drama, and as high as 75% for the most competitive projects. In these 2013–14 deals, percentage-based premiums were usually uncapped, meaning that they increased linearly as production costs rose. Studios were therefore incentivized to present the largest defensible budgets they could, in hopes of securing the most robust bases on which to calculate their premiums. Following these incentives, studios began to abrogate their historical roles as sober checks on the appetites of their talent partners. Even more remarkably, in many of these early deals, a show's premium was calculated on its *actual* budget, not its *incoming approved budget*, meaning that a studio that ran up overages on a production actually stood to financially benefit from such overages. The studio's traditional role as protector of the budget thus also began to erode.

These days of studio leverage over hungry streamers, however, were short. Once shows like *House of Cards* and *Transparent* began commanding significant attention and awards, talent increasingly pressured their studio partners to sell their cherished projects to streamers, seduced by promises of the highest fees, hugest budgets, and the most creative freedom. There was little pushback on this from the studios, for whom the rapid growth of license fee premiums had quickly transformed streamers from risky experiments to first choice buyers for their most attractive and ambitious projects. And once the streamers had talent and studios alike clamoring to be in business with them, rather than the other way around, they immediately began paring back the producer-friendly deals that had lured the studios into business with them in the first place.

It started with noneconomic terms. The streamers began negotiating for more flexibility across SVOD-, AVOD-, and FVOD-based distribution models, without meaningfully repricing their license fees to compensate for the expanded grants of rights. Studio-reserved linear television rights got pushed farther and farther back, as well as encumbered by first negotiation rights allowing the streamers to "buy out" these rights to effectively prevent their originals from appearing on linear television (which they sometimes did). Reserved TVOD rights became subject to longer holdbacks and further limitations that meaningfully limited their value.

Streamers also began to rein in their generous economic terms, though initially with relatively uncontroversial “tweaks” designed to address some unintended consequences of the early cost-plus license fee structures. Percentage-based license fees stayed high but were limited to approved ingoing (rather than actual) budgets, closing the loophole of production overages enriching the studios with enhanced premiums.⁸¹ The streamers also eliminated the studios’ financial incentives to submit inflated production budgets by pre-negotiating theoretical budget “caps,” appropriate to the nature and content of each series, in each new deal. In practice, streamers often eventually approved production budgets well over such ingoing “caps”—but the studios’ percentage-based license fee premiums remained subject to those pre-negotiated caps, even if the budgets themselves did not.

The streamers’ market power continued to grow as they invested heavily in developing their own studio operations. Traditional entertainment conglomerates had long recognized the advantages of paying a bit more to own rather than “rent” their own content, an insight reflected in the linear networks’ preferences for shows from affiliated studios, and in the prevalence of “forced co-productions” with outside studios.⁸² But for the streamers with their cost-plus license models, “owning” a self-produced original series was actually significantly *less* expensive than “renting” it from an outside studio. Still expanding rapidly and competing fiercely with one another, the streamers never turned away from working with outside studios altogether. But because of the strong economic incentive against licensing shows from third parties, the platforms were emboldened to “raise the bar” for what projects they were willing to buy from outside studios, and to negotiate more conservatively (or, one might say, more demandingly) for the projects they pursued.

Confident in their ability to produce their own projects at scale, the streamers also made a crucial tactical shift—from competing with one another for

81 Other seemingly “perverse” incentives and surprising or intuitively “wrong” outcomes persist. For example, a studio for a streaming series that is engaging in a cast renegotiation typically coordinates closely with the streamer in these negotiations, making sure that the network approves all proposed compensation increases and commits to fully finance them in the network-approved budget. See Section B. Except for rare instances when a studio agrees to contribute financially (essentially from its own premium) to bridge a gap between talent demands and network approvals, such cast renegotiations are fully borne by the streamer. Intuitively, then, one would assume that the cast negotiations are revenue-neutral to the studio; but in fact, they can be revenue-*positive* to the studio. That is because, while the actual cost of the additional cast fees may be covered dollar-by-dollar by the streamer, those additional costs are still taken into account when calculating interest and overhead deductions as part of a defined contingent compensation formula. See Chapter 9, Sections B.iv–v (pg. 369). So, while these enhanced fees are initially “cash-neutral” to the studio, they are also borne in part by profit participants in the form of devalued contingent compensation, thus resulting in the studio functionally profiting from the cast renegotiation.

82 A “forced co-production” is a co-production arrangement between a supplier studio and a network’s studio affiliate that is “forced” upon the seller studio by the network as a condition of making a deal for a series. See Chapter 11, Section B (pg. 444).

the best shows from outside studios, to competing with one another *and* those same studios to acquire desirable rights and packages at the initial pitch phase. The streamers deployed their superior resources to secure for their own studios many of the most sought-after projects with the highest-end auspices. Moreover, because producing their own series was so much more economically efficient for the streamers than licensing them from outside suppliers, these streamers could aggressively “overpay” for the hottest projects, confident that it was still a better deal for them than paying license fee premiums to an outside studio for the same show.⁸³

With their superior resources, the streamers could secure for their own studios, at the pitch stage, many sought-after projects with high-end auspices. And because the premiums not paid to outside studios were so substantial, the streamers could spend lavishly while still saving significant dollars in the aggregate, and the market soared for creators and showrunners (including overalls), rightsholders, and actors. The legacy companies strained to keep up with the streamers’ aggressive moves in the development deal market, making selective big swings on major packages, but were ultimately left with fewer top-tier projects to pitch to the streamers (where they would compete against the platforms’ own high-end originals).

All of this placed downward pressure on the studios’ license fees, reflected across the various measures used to calculate and define them in each license agreement. Percentage-based premiums declined from their 2013–14 heights and remained subject to budget caps, which were sometimes artificially deflated to reflect the streamer’s actual financial appetite for the deal, rather than to reasonably approximate likely production costs).⁸⁴ Flat license fee premiums declined, for some half-hours to the point that the studios’ episodic premiums were lower than the episodic fees for individual executive producers on higher-budget projects.⁸⁵ The arrival of the aggressive and deep-pocketed Apple TV+ in 2017–19 slowed or perhaps briefly reversed this trend, but once Apple established itself in the market, it was soon mostly content to compete for projects on market terms (rather than with the overwhelming force of its vast resources).

83 That said, the same logic left room for lavish spending in production budgets generally, and it is not clear that, in the aggregate, the streamers saved significant amounts by this strategy (or that cost savings weighed heavily on the streamers’ decisions during this period).

84 See Chapter 11, Section A.iv.c (pg. 415).

85 At the same time, as part of their broader campaigns to consolidate their businesses into “walled gardens”—a business strategy in which a large, vertically integrated conglomerate seeks to exploit its wholly owned content across a variety of affiliated consumer-facing platforms in various media and territories, while intentionally limiting the company’s efforts to sell original or library content to third-party platforms or acquire it from third-party studios—platforms became increasingly aggressive and strident about bumping smaller studios (with less leverage) out of their studio positions and into high-level non-writing executive producing deals.

Meanwhile, as the studios had less and less financial upside in their own series, they increasingly looked to their streaming partners to cover any and every expense. In the deficit model, a studio might contribute to breakage—the cost of selective enhancements to a series, such as high-level guest casting, major action sequences, location changes, etc.—because those enhancements increased the value of its reserved rights. The studio and the network were in a more meaningful financial partnership as co-investors in the success of the series. But with their upside capped and network partners that almost uniformly refused to renegotiate premiums for highly successful series (as they did the fees for actors and creators), the studios had little reason to voluntarily take on any further expense. Given the circumstances, that was a—perhaps *the*—sensible business strategy. But the streamers were often frustrated by their impression that the studios were treating them like piggy banks and taking minimal financial responsibility for their own series.

In any event, through around 2018, the cost-plus model of streaming was part of a broader marketplace of business models with which independent studios could engage. Its risk-free quality became the lynchpin of several small-but-successful independent studios that developed and produced exclusively for the streaming market, generating hits like Apple’s *The Morning Show* (Media Res) and *Severance* (Fifth Season, formerly Endeavor Content), and Amazon’s *Jack Reacher* (Skydance Television) and *The Summer I Turned Pretty* (wiip). These studios generally have little or no appetite for deficit financing, and in many cases rely on revolving credit lines (rather than in-house treasury) for production financing. But for scaled independent studios like Sony Pictures Television and Warner Bros. Television, streaming was one of multiple business models that they could seek out on the market. The broadcast business had grown increasingly tight, as networks claimed ever more expansive digital rights in new license deals without meaningfully increasing their license fees (even to account for inflation), but remained viable, especially in drama. Basic cable had died down from the heady moment when scripted content looked poised to expand across increasingly secondary (and even tertiary?) networks, but it remained a viable business at the Turner (TNT, TBS), NBCU (USA, Syfy), Fox (FX),⁸⁶ and Disney (Freeform) networks. These networks’ license templates borrowed from developments in broadcast and streaming dealmaking, while remaining recognizable as “basic cable.” As immediately popular and pervasive as it had become, cost-plus streaming was—at least at first—just one of the “asset classes” in a television studio’s portfolio.

Then the “Streaming Wars” really heated up as Disney+, (the service now known as) Max, Paramount+, and Peacock joined the party. In a perfectly functioning market, perhaps the explosion of new buyers could have resulted in

86 Although FX’s business with non-Fox studios was always limited.

a diverse and dynamic marketplace for cross-selling, as well as the renewed creative energy needed to revive a “Golden Era of Television” that seemed to be fading into an overwhelming mass of “content”⁸⁷ that had expanded far more than human attention could possibly absorb, as the industry collectively eased itself into a “soft landing” in which series production volume and budgets made a “return to normalcy” and the legacy media companies could finally figure out a strategy for competing with the impossibly vast and well-resourced tech invaders that had come and reshaped the ground under their collective feet.

The entertainment industry is not a perfectly functioning market.

As the studio streamers went into business over 2019 and 2020, they each reflected in their dealmaking the idiosyncrasies of their respective corporate owners and corporate affiliates (with which they were often forced into uneasy partnerships, or even total staff mergers). But, just as the tech streamers had followed in the footsteps of the linear networks, the studio streamers followed in the footsteps of the tech streamers, adopting license agreements that largely mirrored or adapted those that the tech streamers had been using with their studio affiliates for years.

At first, studios celebrated as their new license templates with the studio streamers recalled the glory days of the early Netflix/Amazon/Hulu years, when studios could sell high-priced shows for only or mostly domestic exhibition with minimal deficits and significant reserved rights. And just as the tech streamers had gobbled up shows en masse a few years before, the new studio streamers opened up their money cannons (with whatever “water pressure” each could bring to bear) and quickly set to building their own premium slates to compete head-on with the tech incumbents. The enormous expense of the Streaming Wars ramp-up accelerated existing trends toward “walled garden” strategies in which platforms specifically favored buying and producing content from their affiliated studios, but there was always meaningful business being done between the new streamers and studio units affiliated with their competitors (as well as with independent studios). Volume continued to rise. These briefly felt like good times for the television business, even if most people realized a reckoning was inevitably due.

For the dealmakers, this was truly “peak TV.”

In lieu of a reckoning, the industry got a full-on existential crisis in the form of the coronavirus pandemic,⁸⁸ which immediately forced the entire community to wonder who and what would survive, and what the new “normal” would look like. For theatrical exhibition, it was a catastrophe from which the industry is still struggling to recover. For feature film production, it was a destabilizing shock

87 A word that this book uses liberally—but not proudly—simply in the interest of clarity and readability.

88 Of which a whole history of the industry’s response and recovery should be written, but not by me.

that forced an unprepared reckoning with the industry's collective digital future. But for the television and streaming business, it was—at least at first—a stay of execution. Even then, no serious business leader or investor believed the market could sustain the full slate of competitors in the Streaming Wars—Netflix, Amazon, Apple TV+, Hulu, Max, Disney+, Paramount+, and Peacock. But the pandemic forced millions of people indoors, where—having few other options—they voraciously consumed all manner of content online to fill their many hours of quarantine. It was evident from the beginning that the rapid growth of streaming audiences and engagement during the pandemic was a situational fluke. It might not recede too badly once Americans and international audiences returned to normal life,⁸⁹ but it at least represented an “advance” on future growth. But in the destabilized climate of the pandemic, it was rare good news, and it was enough to breathe life (and capital) into many of the combatants that needed it as they painfully and expensively slogged their ways back into production.⁹⁰

Meanwhile, as far as the dealmakers could see, what remained of the business for cable originals withered away. As programming decisions and budgets consolidated for the studio streamers and their affiliated cable networks (Hulu with FX, Disney+ with Freeform, Peacock with USA/Syfy, Max with TNT/TBS), cable license agreements as they had existed for twenty years began to disappear from the marketplace. Instead, mandates from on high dictated that the more rights-expansive streaming templates also be used for most or all new license agreements for linear television, to secure as much flexibility as possible for the exercise of rights across each company's full portfolio of platforms. Even the tech streamers began claiming linear rights in license deals—in particular, Amazon, for the benefit of its MGM+ (formerly Epix) pay cable channel.

And as all of this had been taking place, in the broadcast industry—on the dealmaking side—virtually nothing had changed. The networks had continued their slow, years-long advance on digital rights, claiming more and more such rights for seldom-growing compensation with every passing broadcast year, but other than that, the deals looked pretty much the same as they always had. That might sound like good news for the studios, who had during this period gone through the progressive deterioration of the quality of their streaming business. But among the things that did not change were license fees, which remained virtually flat, even as production budgets floated upward from general market pressure and to absorb costs from the pandemic (and later, inflation). Meanwhile, international and syndication markets continued to degrade under pressure from streaming and the maturation of international production industries. Even Sony Pictures Television, whose sizable portfolio of network hits spanned

89 An admittedly crass and reductive way to describe the billions of people whose lives were upended by the pandemic in myriad ways.

90 And volume *still* continued to rise. So yes, “dealmakers’ ‘peak TV’” is not necessarily everybody’s “peak TV.”

decades, announced in 2020 that it would be exiting the market for broadcast comedies.

From the studio perspective, then, by 2021 or 2022, not only had the once-appealing cost-plus streaming deal become a diminished version of itself; it (or one of its close cousins or descendants) was now also largely the only game in town. And as they faced these diminished prospects, the studio affiliates of the studio streamers remained ambitious and possessive of their own corporate identities, but were under corporate pressure to sell to their sister platforms (who were, in turn, under pressure to buy from their sister studios), and had less and less good cause or opportunity to resist those corporate mandates.

The classical model of television distribution is to maximize revenue across media, territory, and time, and the traditional deficit-based network license agreement is a co-investment as financial partners in the success of that venture. The streaming deal consolidated all that monetization into a single agreement that eliminated the studio's risk and offered meaningful, predictable, collateralizable returns. But in doing so, it also eliminated the opportunity for true "home runs," compromised the studio's position as a meaningfully invested stakeholder, and rendered scores of distribution jobs redundant. It also did so at spectacular cost to the streamers themselves, who took on all the risk they once shared with studios while buying rights they did not need (or could not use), and securing holdbacks against third-party exploitation that probably would not materially harm them.

The classical model of television distribution is one of portfolio management, with studios maintaining working relationships with a wide diversity of networks with distinct business models to both broaden their buyer bases and diversify their risk across a variety of "asset classes" of deal types. But with the stagnation of the broadcast business and the functional consolidation of the cable business into the streaming business (at least from a dealmaking perspective), there is little meaningful diversity left in the business models, licensing arrangements, and risk profiles represented in the marketplace.

Television is a business of cross-collateralization, in which a small number of enormously successful and remunerative hits sustain a studio through a far greater number of costly failed series and unsuccessful development efforts. But while the prevailing low-risk/low-return model can keep the lights on at a reasonably sized business, on its own, it cannot sustain a thriving and dynamic climate of investment, experimentation, and risk-taking.

That is how streaming originals upended the classical model of television distribution—and in so doing, contributed to the destabilization of the entire industry.⁹¹

91 This is, of course, not the *only* story of how the broader "we" broke Hollywood, nor does it fully represent the perspectives of the different participants in this history. But it is the slice of a wider story of collective self-sabotage in the face of real market challenges that television studio business affairs executives like the author have had the opportunity to bear witness to personally.

4

THE INTELLECTUAL PROPERTY CONTEXT OF TELEVISION (OR, WHEN DO YOU NEED TO ACQUIRE UNDERLYING RIGHTS?)

With the basic structural landscape of the television industry established, we can begin working our way toward the key deals in the life cycle of television development, production, and exhibition. The first category of such agreements goes to underlying rights—the acquisition of preexisting intellectual property for adaptation into a television series. In an increasingly crowded television landscape, buyers look more and more to preexisting intellectual property for a long-term creative plan—and a built-in audience. Many of the most celebrated (and most watched) hits of the “peak TV” era were adapted from preexisting underlying IP from comic books (AMC’s *The Walking Dead*) to fantasy novels (HBO’s *Game of Thrones*) to military thrillers/beloved ‘90s action flicks (Amazon’s *Jack Ryan*) to Regency romance novels (Netflix’s *Bridgerton*) to survival horror video games (HBO’s *The Last of Us*). These and other major hits speak to the power of underlying rights in the marketplace. Before we tackle the details of the deals by which studios acquire rights to such properties, however, it is useful to first understand the basic framework of intellectual property and privacy law doctrines that govern these issues, and the essential question: when do you need to acquire underlying rights at all? Sections A–C provide primers on the American law governing copyrights, trademarks, and life rights. Section D discusses how the First Amendment limits the rights described in Sections A–C. Section E explores practical considerations for potential licensors of underlying rights for television productions.

A Copyrights

A copyright is the core intellectual property asset of the television industry, and indeed of all content industries. In the language of the U.S. Copyright Act, copyrights protect “original works of authorship fixed in any tangible medium

of expression.”¹ In other words, copyrights protect creative works that are tangibly recorded.

The owner of a copyright exclusively enjoys four basic rights (which include the exclusive right to authorize others to exploit these rights): (1) to copy or reproduce the copyrighted work; (2) to prepare derivative works based upon the copyrighted work; (3) to distribute the copyrighted work;² and (4) to publicly perform or display the copyrighted work.³ It is these first two rights, the right of reproduction and the derivative works right, that are implicated when one considers adapting or otherwise drawing material from an existing work as the basis for a new one (such as a television series).⁴

i Copyrightability

The Copyright Act identifies eight categories of works that are subject to copyright protection: (1) literary works; (2) musical works, including any accompanying words; (3) dramatic works, including any accompanying music; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works;⁵ (7) sound recordings;⁶

1 See 17 U.S.C. § 102.

2 Lawyers often refer to copyrights as “a bundle of rights,” which can be divided and subdivided in a variety of useful ways. This is certainly true of the basic categories of copyright rights—for example, a copyright owner may grant a third party a license to reproduce the owner’s work, but not to modify it (to create a derivative work) in any way. Critically, this type of subdivision is equally prevalent and important within each of the core copyright rights. A party may get the right to create a television adaptation of a copyrighted work, but still be prohibited from creating a theatrical feature film adaptation; this is a viable (and relatively common) subdivision of the derivative works right. Similarly, grants of distribution and public performance/display rights are typically specifically limited in territory, media, and time. This subdivision, in turn, creates the basic economic model for the television industry. See Chapter 3, Section C.i (pg. 129).

3 See 17 U.S.C. § 106.

4 The Copyright Act defines a “derivative work” as follows: “[A] work based upon one or more pre-existing works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a ‘derivative work’.” See 17 U.S.C. § 101. In other words, a new copyrightable work that recasts, transforms, or adapts an existing copyrighted work, or which otherwise substantially incorporates protectable elements of an existing work into a new copyrighted work, is a “derivative work.”

5 This category includes television programs, and the studio’s ownership of the copyright in its productions is the legal basis of the studio’s exclusive right to control the distribution of its series. The focus of this chapter, however, is how copyright principles apply to other works that may be adapted as the basis for a television series (and therefore how they impact studio decisions about whether to acquire rights), not on how studios can use copyright law to defend against others’ infringement of their rights in their television series.

6 Prior to 1978, when the currently governing 1976 Copyright Act went into effect, sound recordings did not enjoy any copyright protection independent of the underlying musical compositions.

and (8) architectural works. While this list looks simple enough on its face, because there are several nuances to copyrightability (any of which may be contested in a lawsuit), a basic understanding of these nuances is helpful when considering the question posed at the top of this chapter: when do you need to acquire underlying rights?

a Formalities

Modern American copyright law has substantially eliminated formalities that creators historically needed to comply with in order to secure and continue copyright protection for their works. For copyrightable works created on or after January 1, 1978 (the date on which the current 1976 Copyright Act became effective), copyright protection applies instantaneously and automatically from the moment a work comes into existence.⁷ No formal registration or notice is required, although these may be necessary down the line in order to pursue certain types of legal claims and damages under the Copyright Act.⁸

b Creativity

In order to qualify for copyright protection, a work must be “creative” (although only a small amount of creativity is required) and “original” (meaning independently created and not the product of “slavish copying”). In general, courts look to avoid judging whether something is “art” or “worthy” of copyright protection. As long as the basic requirements of creativity and originality are satisfied, courts do not require novelty, artistic quality, or an intent to be original. Individual words and short phrases are not eligible for copyright protection, nor is the title of a work by itself (although, in some circumstances, titles may be protected as trademarks).⁹

7 More precisely, copyright protection arises at the moment that the work is “fixed in a tangible medium of expression,” i.e., when the work is written down. (Being typed into a computer file suffices.) For example, a poet may engage in the “creation” of a poem in his or her mind, and may even complete, memorize, and recite the poem to audiences, but copyright protection does not attach until the poet puts the poem on paper or has one of the poet’s performances captured on video. Or, to use a more television-specific example, a writer/producer may develop a detailed and elaborate pitch for six seasons (and a movie!) of a proposed television series, but that pitch is technically unprotected by copyright until it is typed out.

8 The rules are all considerably more complex for works created before January 1, 1978 (the effective date of the 1976 Copyright Act), which are governed by the 1909 Copyright Act. The 1909 Copyright Act had substantially more rigorous formality requirements, which also evolved over the nearly seventy years the Act was in effect. Ascertaining the current copyright status of pre-1978 works can be a complicated process, requiring time-consuming research and analysis by copyright law specialists.

9 See Section B.

Although matters of authorship and creativity are seldom at issue in copyright disputes, the rapid rise of artificial intelligence-created “generative art” has made them suddenly salient again. The official position of the U.S. Copyright Office on the copyrightability of works using AI-generated material, as laid out in a policy statement published in March 2023, is to evaluate on a case-by-case basis whether AI contributions result from “mechanical reproduction” or from a human author’s “own original mental conception.”¹⁰ Emphasizing the necessity of human involvement in a work’s creation, the U.S. Copyright Office has refused to register standalone images created by AI tools like Midjourney and Stable Diffusion, a decision upheld by a federal district court in Washington, D.C., which held that fully AI-generated works are not eligible for copyright protection, even if they were the product of a user’s specific, detailed, and iterative prompts.¹¹ On the other hand, when a work is composed of substantial human-authored as well as AI-generated elements, the former may be protected, but not the latter; for example, the Copyright Office granted a limited copyright registration to a comic book written by a human author and illustrated using lightly-edited images from Midjourney, protecting the comic’s text and selection and arrangement of the AI-generated images, but not the individual images themselves. While unsurprising to most lawyers, these early decisions have largely disappointed futurists and technologists (who have likened them to nineteenth-century jurisprudence that questioned the applicability of copyrights to the then-new technology of photography),¹² but generally delighted artists (many of whom view these new generative AI systems as an existential threat to their professions and livelihoods). This new area of the law will develop significantly as cases like these work their way through the court system in the years to come (potentially all the way up to the U.S. Supreme Court).¹³

10 U.S. Copyright Office, Copyright Registration Guidance: Works Containing Material Generated by Artificial Intelligence, 88 Fed. Reg. 16190 (Mar. 16, 2023)

11 *Thaler v. Perlmutter*, 2023 WL 5333236 (D.D.C. Aug. 18, 2023).

12 In the most significant such case, *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53 (1884), the U.S. Supreme Court held that a thoughtfully staged photograph of Oscar Wilde qualified for copyright protection, while acknowledging that “ordinary” photographs may not merit protection if they are “mere mechanical reproduction[s]” of real-life scenes.

13 In addition, although this chapter concerns itself solely with U.S. law, the availability of copyright protection for AI-generated material may be decided differently by courts in other countries applying their own local statutes and precedent. Although U.S. law on this subject will likely be highly influential worldwide (both legally and practically), should major inconsistencies arise in these determinations across multiple influential and/or economically significant countries, it could have a substantial impact on the real-world exploitation of AI-generated and/or AI-assisted creative works.

c *Ideas vs. Expression*

Although qualifying a work for copyright protection is relatively easy, not every individual element of a copyrighted work is protectable. This becomes critical when courts consider claims for alleged infringement due to unlawful copying. In such cases, plaintiffs typically assert that a defendant's work is substantially similar to theirs because it unlawfully incorporates many elements that were taken from the plaintiff's work without permission. The courts must then parse out in detail which allegedly copied elements of a plaintiff's work are copyrightable (and can therefore support an infringement claim) and which are not.

The first essential distinction made in copyright law is between ideas and expression: ideas are not protected by copyright, but the expressions of those ideas are. Practically, this means that the extent of copyright protection is partially a function of detail and abstraction. The concept of "six friends living in New York, dealing with life, love, and careers" is too vague and too abstract of an idea to be protectable under copyright. But if you name those six friends Ross, Rachel, Chandler, Joey, Monica, and Phoebe, give them distinct personalities and backstories, and pair them off with each other in specific dramatic ways, you have a show called *Friends* that is undoubtedly protectable under copyright law. The range of potential detail in between represents a wide range of judgment calls about where exactly "ideas" end and "expression" begins. However, the entertainment industry is rife with examples of dueling pairs of conspicuously similar projects that no one regarded as examples of copyright infringement—for example, asteroid disaster film *Armageddon*'s nearly concurrent release with comet disaster film *Deep Impact* in 1998, or the consecutive releases of shopping mall security guard hero comedies *Paul Blart: Mall Cop* and *Observe and Report* in 2009.

d *Scenes a Faire Doctrine*

An extension of the idea/expression distinction is the *scenes a faire* doctrine, which provides that "stock scenes," archetypal characters, and other elements that are expected for a particular genre are not protectable under copyright. Such elements are necessary and predictable, in that they grow organically out of activities or circumstances common to a genre (like cowboys, horses, and gunfights in a Western). This doctrine was used by the estate of Alex Haley, the author of *Roots*, to successfully defend a claim brought by an author who claimed that *Roots* infringed on his copyright in *Jubilee*, a novel that also tracked an African American family through generations.¹⁴ In finding for Haley's estate, the court noted that general elements of black folk culture were in the public domain, and that common scenes between the works of attempted

14 See *Alexander v. Haley*, 460 F.Supp.40 (S.D.N.Y. 1978).

escapes pursued by baying dogs, sorrowful or happy slave singing, and the buying and selling of humans were unprotectable as *scenes a faire*, because they were so closely connected to the common genre of the works that they were necessary to make the stories recognizable to a reader.

e Facts

As some lawyers like to say: “Facts are free.”¹⁵ Facts are definitively excluded from copyright protection, even if the research to uncover those facts was long and arduous, and even if the facts are being published for the very first time.¹⁶ To be clear, non-fiction literary works are still protected by copyright, which protects the author’s choices of language, narration, and presentation.¹⁷ But the copying or use of pure facts collected or unearthed by an author, devoid from context or expression of presentation, would not constitute copyright infringement. This may be true even where the defendant uses a particular theory or interpretation of historical facts. So, for instance, a historian who had developed a theory, based on his own exhaustive research, that the 1937 crash of the Hindenburg was a result of sabotage could not sustain a copyright infringement claim against the producers of a film that was centered around that theory of the historical event.¹⁸ Similarly, a playwright who wrote a play framing the death of Pope John Paul I as a murder by powerful Vatican insiders was found not to have infringed the copyright in a non-fiction book that first researched, developed, and espoused the same theory.¹⁹ Ultimately, as with the idea/expression distinction, the line between unprotectable fact and protectable expression of fact may be difficult to draw in any given situation.

f Characters

On the other hand, certain vital creative elements of a work may qualify for copyright protection on their own, even outside the context of the aggregate

15 In the *Roots* case, in holding for Haley, the court also expressly declined to give weight to commonalities between *Roots* and the plaintiff’s novel that were elements of historical or contemporary fact.

16 American courts have repeatedly rejected the so-called “sweat of the brow” theory of copyright, which would extend copyright protection to works and their elements primarily or solely on the basis of the effort that went into creating them.

17 Even highly literal and factual materials like maps, phone books, and compilations, or collections of individually uncopyrightable elements (like databases), can enjoy “thin” copyright protection as to discretionary original elements of selection, color, coordination, or arrangement. See *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340 (1991). But these elements must still satisfy the basic requirements of creativity and originality to be protected. Thus, extremely obvious or functional choices like pagination and alphabetization would not qualify for copyright protection.

18 See *A.A. Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972 (2d Cir. 1980).

19 See *Crane v. Poetic Productions Ltd.*, 593 F.Supp.2d 585 (S.D.N.Y. 2009).

work. Most significantly, distinctive characters can qualify for separate copyright protection. The classic test used by courts is whether the character amounts to the “story being told.” Applying this test, courts have denied copyright protection to the literary character of detective Sam Spade²⁰ and granted it to the theatrical version of the character of super-spy James Bond.²¹ In the Bond case, the court actually noted that the fact that “many actors can play Bond is a testament to the fact that Bond is a unique character whose specific qualities remain constant despite the change in actors.” More recently, instead of asking whether the character is the “story being told,” courts have usually applied a “distinctive delineation” test, articulated in three parts: (1) the character must generally have physical as well as conceptual qualities; (2) the character must be sufficiently delineated to be recognizable as the same character whenever it appears; and (3) the character must be especially distinctive and contain some unique elements of expression.²² In this analysis, courts deny protection to “vague or stock characters” but grant it to those that are “distinctive,” “finely-etched,” and “unusual” in visual style, persona, and otherwise.²³ Practically, this “distinctive delineation” test is formulated in a way that makes it easier to obtain copyright protection for graphical/visually depicted characters than for purely written ones (although there is nothing explicitly in the doctrine that says a text-based character cannot be sufficiently “distinctively delineated” to qualify).

ii Copyright Term and Termination

Copyrights have long, but finite, terms. Under the 1976 Copyright Act, the term of copyright for any work created on or after January 1, 1978 (the 1976 Act’s effective date)²⁴ is the life of the author plus seventy years for works created by a known individual;²⁵ or, for works-for-hire, ninety-five years from the year of the work’s first publication or 120 years from the year of its creation,

20 See *Warner Bros. Pictures v. Columbia Broadcasting System*, 216 F.2d 945 (9th Cir. 1954).

21 See *Metro-Goldwyn Mayer, Inc. v. American Honda Motor Co.*, 900 F.Supp.1287 (C.D. Cal. 1995).

22 “Considering the character as it has appeared in different productions, it must display consistent, identifiable character traits and attributes, although the character need not have a consistent appearance.” *Blizzard Entertainment v. Lilith Games (Shanghai)*, 149 F.Supp.3d 1167 (N.D. Cal. 2015).

23 See *DC Comics v. Towle*, 989 F.Supp.2d 948 (C.D. Cal. 2013) (extending copyright protection to the Batmobile as a character); *Titan Sports, Inc. v. Turner Broadcasting Systems, Inc.*, 981 F.Supp.65 (D. Conn. 1997) (holding that the professional wrestling character of Diesel, as portrayed by Kevin Nash, may qualify for copyright protection); *Pokemon Company International, Inc. v. Jones*, 2016 WL 1643989 (W.D. Wash. 2016) (applying copyright protections for Pokémon characters); *Toho Co., Ltd. v. William Morrow and Co., Inc.*, 33 F.Supp.2d 1206 (C.D. Cal. 1998) (extending copyright protection to the character of Godzilla).

24 Works created before January 1, 1978, are generally governed by the 1909 Copyright Act.

25 Where the work was created jointly by two individual authors, the seventy years run from the death of the last-surviving author.

whichever expires first. A work whose copyright has expired (or perhaps been terminated for technical reasons applicable to older works) is said to be “in the public domain” and may be used freely by any member of the public without permission from or compensation to the original copyright owner.

Recognizing that the authors of creative works frequently lack negotiating leverage, and that the full value of a copyrighted work (and all of its potential derivatives) may not be obvious at the time a work is sold, Congress included in the 1976 Copyright Act provisions to allow some authors to terminate previously negotiated grants of rights.²⁶ Known as “copyright termination,” this non-waivable,²⁷ non-transferrable²⁸ right gives qualifying authors (or their heirs) a “second bite at the apple” to recapture previously transferred copyrights once they have proven valuable. Grants executed on or after January 1, 1978, may be terminated during a five-year period that begins thirty-five years after the grant’s execution;²⁹ thus, the first such grants became eligible for termination starting on January 1, 2013. The five-year window for terminating pre-1978 grants opens fifty-six years after the date that statutory copyright protection was originally secured. Thus, the last such grants will become eligible for termination by the end of 2033. In both cases, the Copyright Act requires that written notice of termination be given at least two years, and no more than ten years, before the effective date of termination (which must fall within that five-year window).

Copyright termination has grown increasingly significant in recent years, as the film and television industry has favored producing more and more new films and series that are prequels, sequels, remakes, or reimaginings of beloved films and television series from the past—many of which were themselves based on books, articles, comics, or other preexisting source material. A terminated licensee/grantee (or its successors in interest) can continue to exploit derivative works created under the authority of the prior grant of rights, but after

26 The termination of transfers made after the 1976 Act’s effective date on January 1, 1978, is governed by 17 U.S.C. § 203, while pre-1978 transfers are covered by 17 U.S.C. § 304(c).

27 In modern long-form agreements for the acquisition of rights in underlying source material, many studios require that authors grant them a formal right of first negotiation to reacquire any terminated rights. While the legality of such “first opportunity” rights has never been tested against language in the Copyright Act that gives authors and their heirs the right to terminate “notwithstanding any agreement to the contrary,” given the practical context in which such terminations occur (including the right of the original grantee [or its successor] to continue to exploit derivative works created prior to the effective date of termination), that original grantee (or its successor) is arguably the most natural buyer for the reacquired rights.

28 This notion of “non-transferability” is currently being tested and reconciled with unrelated laws in a number of interesting contexts, including bankruptcy (in a case involving 2 Live Crew) and community property/divorce settlements (in a dispute between Cher and the widow and children of her ex-husband Sonny Bono).

29 If a grant covers the right of initial publication, the termination period begins at the end of thirty-five years from the date of publication of the work under the grant or at the end of forty years from the date of execution of the grant, whichever term ends earlier. 17 U.S.C. § 203(a)(3).

the effective date of termination, can no longer create or exploit new derivatives (including derivatives of existing derivative works that retain copyrightable elements from the original underlying source material for which the grant of rights has been terminated). Thus, in 2023, Paramount was sued by the widow and son of Ehud Yonay—whose 1983 article about the Navy Fighter Weapons School was the credited source material for the 1986 film *Top Gun*—over the 2022 release of its long-awaited sequel, *Top Gun: Maverick* (which went on to gross nearly \$1.5 billion in worldwide box office).³⁰

Crucially, copyrighted works created as works-for-hire are not eligible for termination at all. That exclusion sits at the heart of many disputes about copyright termination, including several cases involving attempted terminations by the estates and heirs of the comic book writers and artists behind characters like Superman, Spider-Man, Captain America, and other characters that have (particularly in recent years) grown into economic powerhouses as well as cultural icons. In each of these cases, the creators (who had all been paid more or less meagerly for their original work) or their estates have sought to reclaim the copyrights for the characters, which would allow the families to strike lucrative new deals to “re-sell” those characters to their current owners. And in each of these cases, the current owners have argued—usually successfully—that the characters had been created as works-for-hire for the original comic publishers, and were therefore ineligible for copyright termination.³¹

The next major front in copyright termination disputes concerns the use by writers and other creative professionals of loan-out corporations, entities by which artists “loan out” their own personal services to employers. These legal fictions provide their artist-owners with tax benefits (including more favorable rules on expense deductions, lower corporate tax rates, and access to qualified pension, profit-sharing, and employer medical reimbursement plans) and potentially limited personal liability. To satisfy all of the requisite legal formalities

30 Yonay’s heirs exercised their right to terminate the grant of rights in the article in 2018, thirty-five years after Yonay first sold it to Paramount. When Paramount released *Top Gun: Maverick* in 2022, Yonay’s heirs sued, claiming that the sequel was still functionally based on Yonay’s 1983 article, and that Paramount therefore did not have the right to make and release the film without making a new deal with Yonay’s heirs. In April 2024, a judge dismissed the suit, agreeing with Paramount that *Maverick* contains no copyrightable expressive material from Yonay’s original article (at best, merely a non-copyrightable “idea”), and that the studio could therefore make and release the new blockbuster, notwithstanding the termination by Yonay’s heirs of Paramount’s rights in the article.

31 While most such cases have ended in defeat for the creators (or their estates), in 2023, Marvel settled copyright termination disputes with the estates of four artists (and with one living one!) who had, among them, created or co-created the superheroes Iron Man, Ant-Man, Captain Marvel, Spider-Man, and Doctor Strange. Marvel itself had actually initiated these cases, seeking declaratory judgments that the copyright termination notices it had received from the defendants were invalid. Such preemptive lawsuits by major companies for declaratory judgments invalidating artists’ copyright termination notices can make it confusing to keep track of who is the “plaintiff” and who is the “defendant” in these cases.

for a loan-out corporation, artist-owners generally enter into a written employment agreement with their own corporation; and to vest in the loan-out corporation all of the rights it needs to be able to transfer those rights to a buyer on the artist-owner's behalf, that employment agreement frequently specifies that all results and proceeds of the individual's works are deemed to be a work-for-hire for the employer corporation. Even in the absence of such an express work-for-hire clause, copyright and employment law generally dictate that, absent any agreement to the contrary, all material created within the scope of a worker's employment is automatically deemed to be owned by the employer, as a work-for-hire. The technical legal status of an artist's work as a work-for-hire, owned from inception by the artist's own loan-out corporation, appears to render it ineligible for copyright termination, even though the work's status as a work-for-hire is part of a tax-managing legal fiction. Surprisingly, given the ubiquity of loan-out corporations and the ever-growing rate of copyright termination notices being filed around town, it was not until June 2023 that this question was even teed up to be determined by a court, when Sony's Columbia Pictures filed a lawsuit challenging the termination of an assignment by George Gallo and Robert Israel, who co-wrote a 1985 story called "Bulletproof Hearts" that, after a decade of Hollywood "Development Hell," eventually became the 1995 movie *Bad Boys*.³² If the case does not settle, it will provide the first real judicial guidance on the impact of loan-out corporations on their artist-owners' copyright termination rights.³³

32 Although the *Bad Boys* litigation is the first such case to make it to the courts, for several years, studio lawyers have been sending stern letters challenging copyright termination notices from loan-out corporations. Many artists, whether because they are convinced that their claims are weak or because they simply lack the emotional or financial appetite for litigation, end up quietly withdrawing their claims. In the rare instances when the stakes are low enough, and some complicating factor gives the studio pause about the strength of its position on the work-for-hire question, some studios—wary of setting bad legal precedent by letting a case with particularly bad facts end up in front of a court—have occasionally quietly settled such disputes for modest amounts (which may be contingent, in whole or in part, on a new film or television series based on that source material actually being produced).

33 While, as the prior footnote notes, studios have been wary of allowing a copyright termination dispute with particularly bad facts to be the first to be decided in court, in this case, Sony/Columbia evidently had no problem with it being a particularly complex one. Only one of the two co-authors involved in the *Bad Boys* litigation, Gallo, granted his share of rights via a loan-out corporation. The other, Israel, contracted as an individual, so his copyright termination rights are safe. *But*, as Aaron Moss noted (without the author) in his Copyright Lately blog, in the case of a jointly-authored work, a termination can only be effected by a majority of the authors who executed the grant—and one out of two does not count as a majority, unless a court somehow interprets section 203(a)'s majority provision as applying only to natural persons.

iii *Infringement: Access, Copying, and Substantial Similarity*

As noted at the beginning of this chapter, the alleged unauthorized adaptation of a copyrighted work primarily implicates two core rights under copyright, the right of reproduction and the derivative works right. There are generally two key issues in play in a claim for copyright infringement based on these rights: (1) copying and (2) improper appropriation.³⁴

The requirement of “copying” means that, to be liable for copyright infringement, an alleged infringer must have actually seen and drawn upon the plaintiff’s work. If a defendant can show that he or she created his or her work totally independently, and that the similarities between the defendant’s and plaintiff’s works are therefore purely coincidental, then there is no liability for copyright infringement, no matter how similar the works may be.³⁵ On the other hand, in litigation, the burden is on the plaintiff to prove copying, which the plaintiff can do in four basic ways:

- Direct evidence of copying, i.e., an admission by the defendant, or testimony by witnesses, of actual copying;
- Common errors, e.g., by showing that factual, grammatical, or typographical errors from a source work (which may have been placed there inadvertently, or intentionally as a trap for copiers) also appear in an allegedly copied work;
- Access and substantial similarity, i.e., a mixture of evidence that the defendant had access to the plaintiff’s work and that the works are similar enough to each other that one can infer that the defendant copied the plaintiff’s work; or
- “Striking similarity,” i.e., the concept that, even in the complete absence of evidence that a defendant had access to the plaintiff’s work, the disputed work is *so* similar to the plaintiff’s work, and so unlike anything in the public domain, that the only reasonable conclusion is that copying occurred.³⁶

34 In addition, many copyright infringement cases (especially in the context of the entertainment industry) also involve the First Amendment-based affirmative defense of “fair use.” This important doctrine, alongside other applications of the First Amendment to the areas of law examined in this chapter, is explored in detail in Section D.

35 This distinguishes copyright law from, for example, patent law, where “independent creation” (as this concept is usually called) is not a valid defense to a claim of infringement.

36 See *Ty, Inc. v. GMA Accessories, Inc.*, 132 F.3d 1167 (7th Cir. 1997) (affirming a finding of copyright infringement by a manufacturer that allegedly copied the design for Ty’s highly distinctive “Squealer” stuffed pig Beanie Baby, even absent evidence of access; the court emphasized that the stuffed pig designs were unlike anything in the public domain, contrasting the situation against a hypothetical dispute over two nearly identical photos of Niagara Falls taken from the same place at the same time of the day and year and in identical weather, where the shared subject matter of the photos is simply the real-life, public-domain setting and vantage point).

Defendants typically deny any act of copying. Consequently, in most cases, the dispute ends up focused on the third of these means of proving copying: access and similarity. Courts may infer a defendant's access to a plaintiff's work from the widespread dissemination of that work,³⁷ and even subconscious copying is actionable.³⁸ Access and similarity are on a sliding scale, relative to one another, in an analysis of copying; the more similarity between two works, the less compelling evidence need be presented of access, and vice versa. This is sometimes referred to as the "inverse ratio rule,"³⁹ and the "striking similarity" concept is its extreme manifestation.

Proof of copying alone, however, is not enough to establish copyright infringement. Rather, the *amount* and *nature* of what was copied, and how it was copied, must be great enough to amount to an improper appropriation of the plaintiff's work. The key question here is whether the defendant's work is "substantially similar" enough to the plaintiff's to amount to an act of infringement. In practice, courts take a variety of approaches to measuring substantial similarity, with the specific choice being influenced by the precedents of the courts in each jurisdiction and the particular nature of the works being analyzed.

While some courts consider and compare the totality of the disputed works in an infringement case, many courts first apply a "filtration" analysis, identifying and discarding from their consideration of each work all unprotectable elements (facts, ideas, *scenes a faire*, etc.), and then comparing only the "protectable expression" that remains in each work. The landmark case on filtration dates back to 1930, when a court determined that Universal Pictures' *The Cohens and the Kellys* did not infringe the copyright in playwright Anne Nichols's *Abie's Irish Rose*, a similar story about forbidden romance between the children of Jewish and Irish families in New York City.⁴⁰ In reaching this conclusion, the court found that all of the shared elements of the stories were non-protectable public domain concepts and that the remaining protectable elements of the stories were not substantially similar.

37 See *Three Boys Music Corp. v. Bolton*, 212 F.3d 477 (9th Cir. 2000) (upholding a jury's determination that Michael Bolton's "Love Is a Beautiful Thing" infringed the copyright in an Isley Brothers song by the same name, without any direct evidence of access, but based on evidence that the song was popular on radio when Bolton was growing up, and that he may have subconsciously copied the music, which was of a genre that he liked).

38 See *ABKCO Music, Inc. v. Harrisongs Music, Ltd.*, 722 F.2d 988 (2d Cir. 1983) (upholding a copyright infringement verdict against George Harrison for his "subconscious copying" of the Chiffons' "He's So Fine" in Harrison's composition of "My Sweet Lord").

39 The inverse ratio rule has been heavily criticized, and in 2020, the Ninth Circuit formally abrogated it. *Skidmore v. Led Zeppelin*, 952 F.3d 1051 (9th Cir. 2020).

40 See *Nichols v. Universal Pictures Corp.*, 45 F.2d 119 (2d Cir. 1930). Technically, the word "filtration" does not appear in the case and was coined by later legal scholars to describe the court's "abstraction-filtration-comparison" method.

Beyond the filtration process, courts apply a variety of definitions and tests for “substantial similarity.” Federal courts in New York primarily consider “whether an ordinary observer, unless he set out to detect the disparities, would be disposed to overlook them, and regard [the] aesthetic appeal as the same.” A New York court, applying this “ordinary observer” or “aesthetic appeal” test, held in 2011 that ABC’s *Modern Family* did not infringe the copyright in an aspiring television writer’s treatment and pilot script for a proposed project called *Loony Ben*, even where the defendants’ access to the plaintiff’s materials was undisputed.⁴¹ When the analysis requires parsing out protectable elements from non-protectable public domain ones, these courts may also consider whether a “more discerning observer” would find the “total concept and feel” of the contested works to be the same.⁴²

In California, courts apply a two-part “extrinsic/intrinsic analysis” for determining substantial similarity. The “extrinsic test” examines objective articulable similarities between two competing works, including elements such as plot, themes, dialogue, mood, setting, pace, characters, and sequence of events, and excluding non-copyrightable elements like facts, mere ideas (short of “expression”), and *scènes à faire*. Courts applying the extrinsic test may consider expert evidence about the alleged similarities, and judges can dispose of infringement claims without submitting them to a jury if they determine that the plaintiff’s case fails the extrinsic test. The second step, the “intrinsic test,” is a subjective consideration of whether an “ordinary reasonable person” would feel that the two works share a “total concept and feel.” If a plaintiff can clear the “extrinsic test” with the judge, the “intrinsic test” question typically goes to the jury.

The federal courts in California first developed and applied the extrinsic/intrinsic test in 1977, holding that McDonald’s series of McDonaldland commercials infringed the copyright in the now iconic (and arguably psychedelic) 1969 *H.R. Pufnstuf* children’s television series.⁴³ More recently, a California court applying the extrinsic/intrinsic test held that NBC’s *My Name Is Earl* (a comedy about a thief and slacker who decides to become a better person by doing nice things for people he once wronged) did not infringe the copyright in an aspiring writer’s feature screenplay called *Karma!* (a drama about a dirty cop making amends for past wrongs).⁴⁴ Another California court following the test concluded that a series of Fox network specials featuring a masked magician uncovering the secrets behind famous magic illusions did not infringe the

41 See *Alexander v. Murdoch*, 2011 WL 2802899 (S.D.N.Y. 2011).

42 See *Boisson v. Banian, Ltd.*, 273 F.3d 262 (2d Cir. 2001).

43 See *Sid & Marty Krofft Television Productions, Inc. v. McDonald’s Corp.*, 562 F.2d 1157 (9th Cir. 1977).

44 See *Gable v. National Broadcasting Co.*, 727 F.Supp.2d 815 (C.D. Cal 2010).

copyright in a preexisting straight-to-video production with the same basic concept called *The Mystery Magician*.⁴⁵

Again, as with many areas of this law, the applicable legal standards are broadly stated and highly flexible, and the lines between what is inappropriately similar blurry enough, that the outcome of any given dispute can be difficult to predict, even for experienced observers.

B Trademarks

Most people have an intuitive understanding of the concept of a trademark, even if they are unable to precisely define the term. A trademark is a limited property right in a particular word, phrase, or symbol that is used to identify an individual or company as the source of a given product or service. So, for example, “Pepsi,” “Toyota,” and “Microsoft” are all prominent examples of trademarks; all three words signify that a specific company is behind a given soft drink, automobile, or device/software product, respectively. Trademark protection can apply to product and service names, even if they do not repeat or contain the name of the company itself (e.g., “Xbox” for Microsoft’s gaming consoles). Slogans can acquire trademark status, once they have developed sufficient notoriety and affiliation with a particular brand (e.g., “*Don’t leave home without it*” for American Express). Graphical logos are also commonly protectable as trademarks. Unlike copyrights, trademarks never expire as long as they remain in use and the trademark owner makes appropriate efforts to enforce its exclusive trademark rights against infringers.

In special circumstances, a given image can be subject to both copyright and trademark protection at the same time (albeit on distinct legal grounds). For example, the character of Mickey Mouse is copyrighted and, in many ways, is a classically copyrightable piece of intellectual property: an original character with a distinct voice and personality, as well as a unique and creative artistic form. At the same time, however, Mickey serves as the mascot for the entire Disney corporate empire, and in that regard, he is also a trademark: the image of Mickey signifies that the real Disney is involved with any given product or service. Mickey thus enjoys dual status, as a copyright and a trademark. But the thing that makes him copyrighted (i.e., the creativity in his character and image) is not the thing that makes him trademarked (i.e., his use as a representative of all of Disney), or vice versa. The original copyright for the character of Mickey Mouse, as he first appeared in the 1928 film *Steamboat Willie*, expired at long last (and with a fair bit of media fanfare) on January 1, 2024,⁴⁶ but as

45 See *Rice v. Fox Broadcasting Co.*, 330 F.3d 1170 (9th Cir. 2003).

46 For many years, anytime *Steamboat Willie* came uncomfortably close to falling into the public domain, Congress always seemed to re-extend the term of U.S. copyrights, pushing the expiration of the *Steamboat Willie*-style Mickey’s copyright to another day, and ultimately making U.S.

long as Disney continues to use him as a mascot, he will enjoy trademark protection.⁴⁷ Conversely, Disney could stop using Mickey in commerce altogether or stop policing other parties' use of Mickey, and thus lose trademark protection for the character, even as he remained protected by copyright.

Trademarks are protected under the federal Lanham Act, as well as a variety of state statutes and common law doctrines. Trademark law is an offshoot of consumer protection law; although trademarks are granted to (and enforced by) the companies that create and use them, the essential legal basis and purpose of trademark protection is not necessarily to protect the trademark *owners*, but rather, to protect *consumers* from being confused or misled by counterfeiters about what they are buying. For that reason, the central question in any trademark dispute is whether the defendant's actions (e.g., its use of a plaintiff's trademark or of something very similar to that trademark) are likely to cause

copyrights terms among the longest in the world. The last such extension, 1998's Sonny Bono Copyright Term Extension Act, was sometimes derisively referred to as the Mickey Mouse Protection Act, and resulted in no copyrighted works newly falling into the public domain in the United States until 2019. Thanks to growing hostility toward Disney among some lawmakers, overall legislative dysfunction in Washington, and a general sense that copyright term extensions might have gone too far, it seems unlikely that the term of copyright protection will be further extended in the United States, at least for the foreseeable future.

47 Also, for now, it is only the version of Mickey that appears in *Steamboat Willie* that has fallen into the public domain. That version doesn't speak, has a longer rat-like nose, a long thin tail, and simpler, beadier eyes than the fully realized Mickey of today. His trademark (pun intended) red shorts, white gloves, rounder frame, and distinctive voice (originally performed by Walt Disney himself) were all introduced in later shorts and films that remain protected by copyright. Thus, the company will still be able to rely on copyright law to protect against third-party depictions that involve many of the modern Mickey's most recognizable elements for years to come. The next major milestone will be 2031, when Mickey's first full-color appearances (from 1935) fall into the public domain, including elements such as Mickey's red shorts with oval white buttons and more pear-like body shape. (Bonus fun fact: in Mickey's first color appearance, 1932's *Parade of the Award Nominees*, his shorts are green.)

Disney already has some experience managing such fine distinctions: A.A. Milne's 1926 children's book, *Winnie the Pooh*—and with it, the original version of the Winnie the Pooh character embodied therein—entered the public domain in 2022. (His iconic red shirt wasn't added until 1930, meaning that the red-shirted Pooh will enter the public domain in 2026.) The same year, young filmmaker Rhys Waterfield produced and released a low-budget slasher film called *Winnie-the-Pooh: Blood and Honey*, in which a feral Pooh commits some rather unspeakable and decidedly un-Disney-like murders.

In addition, both the expired and unexpired (from a copyright perspective) Mickeys remain closely identifiable with the Disney company—indeed, perhaps planning ahead for 2024, the company incorporated “Steamboat Willie” Mickey into the logo of its Walt Disney Animation Studios division. Therefore, any third parties who wish to use Mickey, especially as those other elements also fall into the public domain (when the creative materials in which they first appeared do the same) will have to take care to avoid giving the impression that their work is produced, distributed, or authorized by Disney.

confusion among ordinary consumers as to the source, sponsorship, affiliation, or approval of the defendant's goods/services.⁴⁸

Formal trademark registration is not a prerequisite for protection under the Lanham Act or comparable state laws. A trademark-type claim, styled as "false designation of origin" or "false endorsement," may be viable based on a defendant's alleged misuse of material (again, a product or corporate name, slogan, logo, or other text or visual identifiers) that is publicly identifiable with the plaintiff and its business but that is not actually registered as a trademark. For examples, celebrities litigating the unauthorized use of their name or likeness in commerce frequently assert Lanham Act claims for "false designation of origin" and/or "false endorsement." The essential theory underlying such claims is that, while the celebrity's likeness is not a registered trademark, its use in commerce implies endorsement, sponsorship, or some other form of authorization by the celebrity. These claims arise out of similar facts but exist alongside and in addition to traditional state law "right of publicity"-type claims.⁴⁹

Because a trademark by itself typically has relatively minimal creative content, it usually does not serve as the essential basis of a new television series.⁵⁰ To the extent that this occurs, it is more commonly in the context of unscripted series.⁵¹ On the other hand, studios frequently register the titles and logos of their series as trademarks. In general, the title of a single standalone book, film, or other such work does not qualify for trademark protection. But, if the title is attached to an ongoing series, and/or if the user of that title also builds a licensing and merchandising program around the property, trademark protection can apply.

Most commonly, trademarks come up in the course of "clearing" material (i.e., obtaining licenses or making a legal determination that a license is not needed) that appears on-camera, such as real-life company names featured in plot and/or dialogue, or logos on wardrobe, props, and/or set dressing. Such

48 Although the precise legal test for consumer confusion varies slightly from jurisdiction to jurisdiction, the elements considered by the court in determining "likelihood of consumer confusion" generally track an eight-part test set out by the Second Circuit (the federal appellate court that covers New York, Connecticut, and Vermont) in a landmark case called *Polaroid Corp. v. Polarad Electronics, Corp.*, 287 F.2d 492 (2d Cir. 1961) (the so-called "Polaroid" factors): (1) the strength of the plaintiff's mark; (2) the similarity of the marks; (3) proximity of the products and their competitiveness with one another; (4) evidence that the plaintiff might "bridge the gap" by developing a product for sale in the defendant's market; (5) evidence of actual consumer confusion; (6) evidence that the defendant adopted or used a mark in bad faith; (7) the respective quality of the parties' products; and (8) sophistication of consumers in the relevant market.

49 See Section C.iii.

50 That said, cautious lawyers will take care to address trademark rights in the course of selling or acquiring rights to adapt other intellectual property, such as a copyrighted book series with a preexisting merchandising program associated with it that might simultaneously be subject to trademark protection.

51 See Chapter 5, Section D (pg. 208) and Chapter 12, Section D.ii (pg. 477).

clearance activity is generally handled by lawyers and clearance specialists, and does not generate significant up-front dealmaking activity at the business affairs level.⁵²

C Life Rights

Where a television series is inspired by or based on the life of a real, living human being, the studio will typically enter into a “life rights” agreement with one or more of the individuals at the heart of the story. However, the term “life right” is a bit of a misnomer. Unlike a copyright (which is a form of intellectual property created and protected under the federal Copyright Act, and a variety of corresponding laws in other countries) or a trademark (which is a form of intellectual property protected under both the federal Lanham Act and a patchwork of state statutes and legal doctrines, as well as a variety of corresponding laws in other countries), strictly speaking, there is no such thing as a “life right” under any form of property law in the United States.

52 This book does not seek to provide a comprehensive guide to legal clearance, but a few observations may still help illustrate how such intellectual property is treated in everyday practice.

Where trademarked material (such as the identity of a specific corporation) is central to the storyline or setting of a series, particularly one that is not specifically based on a true-life story, clearance attorneys may require that the studio obtain a license, or replace the real corporate name with a fictional one. Writers (on advice of counsel) may go so far as to establish the separate existence of the real company in the fictional universe, in order to defeat the implication that the fictional company is a thinly veiled stand-in for the real thing.

Where trademarked material appears or is referenced more incidentally, many lawyers take the position that, so long as an item is being used as generally intended, no clearance is necessary; but if the item is being abused in any way (either through excess use or improper use), then real-life logos must be obscured, avoided, or licensed. For instance: want to show your main character responsibly enjoying a single Heineken at a bar? Okay. Want to show your main character irresponsibly drinking twelve Heinekens and then breaking a Heineken bottle over another patron’s head? Cover the logo or get a license.

Even where usage may be technically legally permissible, some studios prohibit the use of any recognizable trademarks without a specific agreement with the trademark holder, not for liability reasons but in order to protect and promote a robust market for product integration deals, by sending the clear message that no brand gets the free advertising of an onscreen mention or appearance without compensating the studio. See Chapter 1, Section B.vi.b (pg. 40).

Clever and creative attorneys can be valuable contributors to the creative process here. For example, USA’s *Mr. Robot* was able to use an only slightly modified version of the logo for Enron (the real-life disgraced energy company whose 2001 collapse led to a nationwide recession and the passage of new corporate governance laws) as the logo for its fictional corporate antagonist “E Corp” (referred to by the main character as “Evil Corp”) because Enron had been out of business and had not used its logo in commerce for more than a decade. The non-use of the still-recognizable logo offered practical comfort (no functioning company means no likely plaintiff) as well as legal comfort (even if the Enron Creditors Recovery Corporation formed to compensate Enron’s creditors sued, the non-use of the mark in commerce may compel a finding that trademark protection in the logo had lapsed) to studio Universal Content Productions in its decision to use the logo.

Instead, a grant of “life rights” is actually a promise by the grantor not to sue the grantee under any of several legal theories that could potentially support a lawsuit arising out of the depiction of that person and his or her life.⁵³ Consequently, the hallmark feature of a “life rights” agreement is a broad waiver of claims, all of which arise within the general arena of privacy law.⁵⁴ Although the list of such claims is theoretically limited only by the creativity of the lawyer devising a complaint on behalf of an aggrieved plaintiff—and therefore the waiver of claims contained in a life rights agreement is written as broadly as possible⁵⁵—the most common potential claims contemplated by a life rights agreement are summarized here.

i Defamation and Related Claims

“Defamation” is the general term for a legal claim involving injury to an individual’s reputation arising out of the publication of false statements about the individual. Although non-lawyers sometimes refer to “slander” (which refers to spoken defamation) or “libel” (which refers to written or otherwise fixed and recorded defamation), as a technical legal matter, both of these terms are

53 It bears noting that, unlike copyrights (which are governed exclusively by federal law) and trademarks (which are governed by a mixture of state and federal law, but which are most often interpreted by reference to federal law), the patchwork of claims that fall under the banner of “life rights” are all governed by state law. Consequently, the precise elements and contours of these causes of actions may vary, depending on the state in which a claim arises and/or a lawsuit is filed. However, these doctrines have long histories in common law and are therefore applied reasonably similarly from state to state. On the other hand, the applicable legal doctrines at issue under the heading of “life rights” may vary dramatically from country to country; consequently, in considering its potential liability under these various legal theories, a studio that does business worldwide and intends to distribute a project internationally may need to analyze its potential liability separately on a country-by-country basis.

54 It is the risk of these claims from someone who sees themselves as being depicted in a putative work of fiction that also motivates producers of even fictional original material to include in the credits a disclaimer to the effect of: “This is a work of fiction. Names, characters, businesses, places, events, locales, and incidents are either the products of the author’s imagination or used in a fictitious manner. Any resemblance to actual persons, living or dead, or actual events is purely coincidental.”

55 Some lawyers actually prefer drafting that is broad but more circumspect. Defamation is considered an “intentional tort,” a category of torts that describes a civil wrong resulting from an intentional act on the part of the alleged wrongdoer. Courts are often skeptical of releases that purport to exculpate a party in advance from subsequent intentional torts, and may construe such releases very narrowly or treat them as altogether void. For example, at least one court in California has held that a reality television waiver used on *The Real Housewives of Orange County*, which specifically waived any defamation claims, could not be used as a license for people “to defame one another with impunity.” *Rossi v. Photoglou*, No. G0482026 (Cal. Ct. App. Sept. 29, 2014). For this reason, some attorneys prefer to draft the waivers in life rights agreements to cover “all claims” generally, but without specifically identifying defamation or other intentional torts as being among the waived claims. Such cautiously drafted waivers may go on to state the studio’s affirmative right to change, modify, add to, or subtract from the individual’s life story in ways that may not conform to reality.

merely plain language variations of the same thing: defamation. Under U.S. law, privacy-based torts such as defamation can only be pursued by living plaintiffs—or, as a common legal adage goes, “you can’t defame the dead.”

Although the legal elements of defamation were defined in an era long before the advent of television, they can be easily interpreted and applied in the television context (or that of other entertainment products, such as theatrical motion pictures). These elements—and a few key nuances of these elements as related to television production—are as follows:

- **The defendant published the statement.** For purposes of defamation law, a television production (and any depiction of a real-life individual contained therein) constitutes a “statement” which could be the basis of a defamation claim. Notably, an individual or entity that has been accused of defamation cannot avoid liability by arguing that it was merely repeating someone else’s statement; in practical terms, this means that a network may be liable if a show that it broadcasts proves to be defamatory, even if the show was actually produced by a third-party studio.⁵⁶
- **The statement is about the plaintiff.** In order to give rise to liability for defamation, a statement or depiction need not identify a person by name. Rather, it is sufficient if the statement or depiction includes enough identifying information to make the person being depicted reasonably identifiable. For this reason, a studio could not avoid defamation liability from the depiction of real-life individuals simply by changing the characters’ names. Individuals may be considered identifiable by virtue of their professional positions, their specific personal or familial relationships, or other information or context (even if unstated) that could reasonably cause a viewer to specifically identify the person being portrayed. In addition, a blanket statement about a reasonably small group of people—many courts use statements directed at groups of twenty-five or fewer people as a rough guideline—could be understood to refer to (and thus give rise to potential liability to) every member of that small group. An individual who seeks to file a so-called “libel in fiction” claim based on a fictionalized, unnamed portrayal of himself has a delicate tightrope to walk. To succeed, such a plaintiff must prove that they are similar enough to a fictional character that the audience will think the television program has portrayed them, but at the same time that they are different enough from the portrayal that their reputation is harmed by it. (As in, “everyone is going to think that alcoholic, unethical, promiscuous character is me, even though I’m not alcoholic, unethical,

56 That said, the license agreement between studio and network will likely include representations, warranties, and indemnities, which would make the studio fully financially responsible for the network’s damages, if the show delivered to the network by the studio proved to be defamatory and exposed the network to liability.

or promiscuous.”) Lawyers also disagree about the liability-reducing (or increasing?) impact of composite characters (i.e., fictional characters that share attributes with, and stand in for, two or more real-life counterparts). On the one hand, combining two real-life individuals into a single fictional character distances the fictional character from each of its individual real-life counterparts, which arguably reduces potential liability. On the other hand, the composite character may be considered to refer identifiably to *both* real-life counterparts, each of whom may feel they are defamed if the unsavory actions or characteristics of the other is ascribed to them in the public’s perception.

- **The statement damaged the plaintiff’s reputation.** In order to be defamatory, a statement must be damaging to the reputation of the person being depicted. For instance, a television production may depict a real-life individual as an unrepentant philatelist—that is, a dedicated stamp collector—without exposing the producer to liability (as the implication that one is a stamp collector is not damaging to one’s reputation, even if it may suggest that one is a bit boring at dinner parties). Because the question of whether a statement is injurious to one’s reputation depends on community standards, a statement that is defamatory in one era may not continue to be defamatory in an era when social norms have changed. For example, an untrue allegation that an individual was a homosexual would have undoubtedly constituted defamation in 1950; with changing social attitudes trending toward normalization of homosexuality, however, some courts no longer consider allegations of homosexuality to be injurious to one’s reputation, which means such allegations would no longer sustain a defamation claim. In addition, the element of damage to one’s reputation requires that the plaintiff have a good enough reputation in the first place that it could suffer damage. Individuals whose reputations are so tainted that they can no longer sustain claims for defamation are sometimes referred to as “libel-proof.” For instance, the reputation of an individual who is known to have murdered five people may be so compromised that an allegation that the same individual murdered a sixth person, even if untrue, would not be deemed damaging to that person’s reputation. On the other hand, an individual whose reputation has been compromised in one respect, however severely, may not be left without a remedy for further reputational harm of a different type. For example, that same convicted murderer may be able to bring a claim for defamation against an individual who falsely alleges that the murderer also sexually abused minors (an entirely different sort of allegation that goes to a different aspect of the murderer’s reputation).
- **The statement is false.** The depiction of demonstrably true facts about an individual can never be the basis of liability for defamation, regardless of how embarrassing those facts may be. Or, more simply, a true statement can never be defamatory, no matter how injurious it is to an individual’s

reputation.⁵⁷ (Of course, the truth of a particular allegation may be hotly disputed.) However, the fact that a work is explicitly presented as fictional (e.g., via a disclaimer) would not preclude a claim of defamation if a character being depicted so closely resembles a real person that the audience could reasonably understand that the character is intended to portray that real individual. The law generally requires only “substantial truth,” meaning that a statement or depiction need not be perfectly accurate in every conceivable way in order to be immune from defamation liability. (For instance, if it was undisputed that an individual committed murder, a television production would not defame the murderer if it took creative license with incidental details in its depiction of how the murder was committed.) In addition, as a corollary to the requirement that a statement be literally false in order to be considered defamatory, statements of pure opinion are not defamatory. Rendering a value judgment about an individual, as by deeming them “stupid,” a “jerk,” or a “failure,” constitutes a statement of opinion and therefore cannot be the basis of a defamation claim. A speaker cannot shield himself from liability just by couching a factual assertion in opinion-based terms—e.g., by saying, “In my opinion, Frank murdered his wife.” As a practical matter, a defamatory statement must generally go beyond a mere value judgment to state or imply that an individual said or did some particular thing. The line between “fact” and “opinion,” however, can sometimes prove murky at best.

- **The defendant suffered damages.** In order to succeed on a defamation claim, a plaintiff must demonstrate that he or she was actually damaged by the defamation. This damage is typically demonstrated with evidence of the loss of a job or other economic opportunities, although many states allow a plaintiff to claim damages for mental anguish associated with the defamation. Several states also presume damages and recognize as defamation “per se” untrue statements that impugn an individual’s professional character or standing; statements that allege serious sexual misconduct (such as extramarital affairs or allegedly “deviant” sexual behavior); allegations that a person has a sexually transmitted disease (amusingly and anachronistically referred to in many states as “loathsome diseases”); and allegations of immoral criminal conduct.

“False light” is a privacy-based claim closely related to “defamation”; in fact, not all states even recognize it as an independent claim. In states that recognize the claim, a statement generally gives rise to “false light” liability if it is published widely; identifies the plaintiff; places the plaintiff in a “false light” that would be highly offensive to a reasonable person; and the defendant was at

57 It may, however, give rise to a claim for “public disclosure of private facts.” See Section C.ii.

fault in publishing the information. Many states understand “false light” claims to be based on implications, rather than outright factual statements. The classic example of a “false light” scenario is a true article about sex offenders, illustrated with a stock photograph of an individual who is not, in fact, a sex offender. The subject of that photograph could claim that the presentation of the photo implied (even without any direct factual statement that would support a defamation claim) that the subject was also a sex offender.

Claims for defamation are also commonly accompanied by claims of “intentional infliction of emotional distress.”⁵⁸ The elements of such a claim are (1) an intentional act by the defendant;⁵⁹ (2) the defendant’s conduct was extreme and outrageous (beyond the standards of civilized decency); and (3) the plaintiff suffered severe emotional distress (as manifested by physical symptoms, a demonstrated lack of productivity, or a medically diagnosed mental disorder) that was caused by the plaintiff’s act. The classic example of an “intentional infliction of emotional distress” is sending a letter to an individual falsely informing the person that a beloved friend or family member had died in an accident. Although such claims are often separately articulated alongside defamation claims, in the defamation context, any effective defenses to defamation liability would likely simultaneously preclude liability for intentional infliction of emotional distress.

ii Public Disclosure of Private Facts

While a statement or depiction that is true can never give rise to liability for defamation, it may, under certain circumstances, lead to a claim for “public disclosure of private facts.” Because “public disclosure of private facts” is another expression of the legal right to privacy, the claim can only be brought by living individuals; the estates and descendants of deceased individuals cannot assert such claims on behalf of the dead. The elements of such a claim are as follows:

- **The defendant’s disclosure was public.** In order to give rise to liability for “public disclosure of private facts,” a statement or depiction must be just that—public. A private communication to a single individual or small group would not suffice. However, the exhibition of a television series would undoubtedly satisfy this element.

58 A related claim of “negligent infliction of emotional distress” exists in situations where a defendant owed a plaintiff a legal “duty of care,” and the defendant’s negligent breach of that duty resulted in the plaintiff’s severe emotional suffering. In general, no such special relationship is likely to exist between a television studio and an individual depicted in a television series, rendering this cause of action generally inapplicable.

59 This element refers to an intentional act, not necessarily intent to cause harm. A public statement, such as the depiction of an individual in a television program, would undoubtedly be considered an intentional act, whether or not the speaker (i.e., the producing studio) intended to cause emotional distress to an individual being portrayed within the series.

- **The fact disclosed was private.** The facts disclosed must be private and intimate, and not generally known. Common examples of private facts include sexual orientation, medical conditions, and private financial information. Photos can be considered “facts,” if taken in a private setting. In order to sustain a claim, however, the facts at issue must be broadly private, and not just unknown to a particular group. For example, publicizing an individual’s homosexuality could give rise to a claim for a “public disclosure of private facts” if the subject had kept his or her sexuality a carefully guarded secret from all but their closest relations; such a publication would not give rise to liability if the individual had been “out” and public about his or her sexuality throughout the gay community, even if the fact had otherwise been kept secret from certain friends or family members. Similarly, the publication of a photograph could almost never support a claim for “public disclosure of private facts” if the image was captured in public, even if few third parties were actually present when the photography was initially taken. Because liability requires that the fact at issue had been private prior to its publication, *republication* of a disclosure that has already been made by a third party cannot create liability for the speaker; only the initial disclosure is actionable. This is a key difference from the law of defamation, in which the repetition of defamatory statements initially made by others is still actionable.
- **The publication was offensive to a reasonable person of ordinary sensibilities.** A plaintiff bringing a claim for “public disclosure of private facts” must show that a reasonable person would have considered the disclosure to be highly offensive. The law does not protect individuals with “thin skins” from the publication of banal facts about their lives. For example, just as alleging that an individual is a notorious philatelist (again, a stamp collector), even if untrue, is not defamatory because it is not damaging to the subject’s reputation, publicizing an individual’s status as a philatelist, even if the individual jealously guarded the secrecy of their hobby, would not create liability for “public disclosure of private facts” because a reasonable person (without unusual sensitivities) would not consider the publication of that fact to be highly offensive.
- **The facts being published are not newsworthy.** The First Amendment protects the publication of facts that are “newsworthy” (sometimes stated as “matters of legitimate public concern”), even if all of the other foregoing elements are satisfied. Although the scope of this exception is difficult to define and predict, many courts apply it broadly, and in a fashion that arguably exceeds the scope of what might, in conventional journalistic terms, be considered newsworthy. Virtually any topic that concerns public affairs, crime, and recent events that occurred in a public setting, and nearly all details of the lives of prominent public figures (whether politicians or entertainment or athletic celebrities), may be treated as “newsworthy” for purposes of this element.

iii Right of Publicity

The right of publicity is a commercial right that emerged out of the more general right of privacy. In many states, including California, it exists pursuant to both statute and common law.⁶⁰ Whether the right of publicity survives death and is inherited by an individual's heirs (and if so, for how long after the individual's death the right survives) varies from state to state—for example, the right of publicity survives for seventy years after death in California, but is not inheritable at all in New York. While the details of the elements of a right of publicity claim also vary from state to state, the typical elements are as follows:

- **The defendant uses the plaintiff's identity.** The most obvious elements of a plaintiff's identity are his or her name and likeness, and the classic right of publicity claim involves the unauthorized use of an individual's name and/or likeness in commercial advertising. However, the right of publicity has been interpreted to protect against the use of numerous alternative indicia of identity, including the catchphrase "*Here's Johnny*" to refer to Johnny Carson,⁶¹ and the distinctive appearance of race car driver Lothar Motschenbacher's race car.⁶² In addition, "use" does not require a literal depiction; courts have entertained claims based on look-alikes (of Woody Allen),⁶³ sound-alikes (of Bette Midler and Tom Waits),⁶⁴ and even a robot evoking the classic evening-gowned look of game show co-host Vanna White.⁶⁵ There is no question that an actor's identifiable portrayal in a television series of a real-life individual, even under an alternative name, would constitute a "use" of the individual's "identity" for purposes of a right of publicity claim.
- **The defendant appropriated the plaintiff's identity to the defendant's advantage, commercially or otherwise.** Some state laws and statutes require "commercial use" of a plaintiff's identity in order to sustain a right of publicity claim; others, such as California's common law right of publicity, make actionable any use to the defendant's advantage, even if not specifically commercial. Without question, a studio's lucrative exploitation of a

60 The right of publicity works alongside the Lanham Act in protecting an individual's property rights in his or her identity, and most plaintiffs who assert right of publicity claims concurrently assert corresponding claims for false endorsement or false designation of origin under the Lanham Act. While the right of publicity itself is primarily concerned with harm to the plaintiff from misappropriation of his or her identity, however, the Lanham Act is primarily concerned with harm to the public from confusion. See Section B.

61 *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831 (6th Cir. 1983).

62 *Motschenbacher v. R.J. Reynolds Tobacco Co.*, 498 F.2d 821 (9th Cir. 1974).

63 *Allen v. National Video, Inc.*, 610 F.Supp.612 (S.D.N.Y. 1985).

64 *Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988); and *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093 (9th Cir. 1992).

65 *White v. Samsung*, 971 F.2d 1395 (9th Cir. 1992).

television series that incorporates an individual's identity would be "to the advantage" of the studio. Even applying the stricter requirement of "commercial use," a television series is both a work of art and a commercial product, and the incorporation of a real-life individual's identity into a series would generally be understood to qualify as a "commercial use."

- **The plaintiff did not consent to the use.** This element is self-explanatory (and can be reasonably assumed where there is no life rights agreement in place and a plaintiff has complained). However, this element may prove significant where an agreement between the plaintiff and defendant exists, but the parties dispute the scope of the rights and waivers granted pursuant to that agreement.
- **The plaintiff was injured.** A plaintiff's harm under a right of publicity claim may include the unrealized fair-market commercial value of the defendant's use of the plaintiff's identity; injury to the plaintiff's future professional standing, goodwill, and publicity value; emotional distress; and, in some states (including under California's right of publicity statute), attorneys' fees.

On its face, the right of publicity would appear to pose a significant challenge to a studio's ability to produce a television series depicting, in a direct or fictionalized way, a real individual without a "life rights" agreement in place. However, the First Amendment provides a near-complete defense to such claims.⁶⁶

D The First Amendment

The spectrum of potential claims under copyright law, trademark law, and the array of claims generally bundled together under the heading of "life rights," on its face, seems to present significant barriers against the incorporation of preexisting material or true-life elements into television productions (at least without the widespread negotiation of licenses authorizing the use of such material). There is, however, one significant legal concept that serves to substantially limit these rights, and to generate space for creators to draw upon the world around them in creating new works: the First Amendment.

The First Amendment famously forbids laws "abridging the freedom of speech," and courts have long interpreted creative works (including television series) as constituting "speech" that is subject to First Amendment protection. Where any creator (including, relevant to our purposes, a television studio) faces limitations on the content of its "speech" (for our purposes, a television series) on copyright, trademark, right of publicity, or other grounds, those limitations must be balanced against the protections and interests enshrined in the First Amendment. In practice, this balancing act manifests as a series of "affirmative defenses," which serve to create exceptions to copyright, trademark,

66 See Section D.iii.c.

and other legal property rights and theories of liability. The First Amendment therefore limits the rights of potential plaintiffs, and offers legal pathways for studios to draw on preexisting work and true-life material without necessarily obtaining a license.⁶⁷

i Copyright Claims

Because copyright law, by its nature, concerns original works of creative expression, it occupies a conceptual space directly adjacent to the First Amendment. Copyright protection and First Amendment principles are, in some sense, directly at odds with one another: copyright serves to limit the public's use of particular creative material, while the First Amendment protects creative speakers from restrictions on their speech. These two competing goals are balanced through one doctrine, which is so fundamental to the function of Copyright Law that Congress elected to draft it right into the text of the Copyright Act: fair use.

Section 107 of the 1976 Copyright Act provides:

[T]he fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

67 Courts have held, in a variety of legal contexts, that “commercial speech” enjoys less robust First Amendment protection than “non-commercial speech.” Like other creative industries, television series do represent a fusion of art and commerce, and their creation is unquestionably motivated by the opportunity to monetize the “speech” of the television series for millions of dollars. Many plaintiffs have therefore sought to characterize films, television series, and comparable works as “commercial speech” that enjoys limited First Amendment protection. While recognizing the commercial character of such works, however, courts have consistently differentiated between films, television series, and other creative works on the one hand, and traditional advertising or other speech “proposing a commercial transaction” on the other hand. With this distinction, they have generally afforded such creative works robust First Amendment protection.

Where one party sues another for copyright infringement based on the defendant's unauthorized copying (violating the right of reproduction) or adaptation (violating the right to create derivative works) of the plaintiff's copyrighted material, the fair use doctrine offers an essential line of defense.

Courts have generally held that the first and fourth factors are the most impactful in a fair use analysis, and some courts have looked to that first factor—"the purpose and character of the use"—as being virtually dispositive in itself. Although the text of the Copyright Act refers to "criticism, comment, news reporting, teaching . . . , scholarship, or research," the fair use doctrine's application is much broader than that, and can immunize the adaptation of existing copyrighted material into new commercially exploited creative work. As one court has articulated: "[W]hen a second author uses another's protected expression in a creative and inventive way, the result may be the advancement of learning rather than the exploitation of the first writer."⁶⁸

In evaluating "the purpose and character" of a defendant's use of copyrighted material in a new commercially exploited creative work, the court's analysis generally turns on one key concept: transformation. In a 1994 decision concerning the rap group 2 Live Crew's adaptation of Roy Orbison's classic "Oh, Pretty Woman" into a profane new "Pretty Woman," the U.S. Supreme Court explained:

[T]he central purpose of this [factor] is to see . . . whether the new work merely "supersede[s] the objects" of the original creation . . . or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is "transformative."⁶⁹

The Court further held that, because "the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works[.]" the "more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use." In that case, the U.S. Supreme Court ultimately held that 2 Live Crew's new song was a fair use because, with its unexpectedly shocking lyrics, it could reasonably be understood as commenting on and criticizing the blandness and banality of Orbison's original.

Courts following the Supreme Court's decision in the 2 Live Crew case have drawn a distinction between parody (i.e., using a preexisting work to comment on that original work), which they have consistently found to be protected fair use, and satire (i.e., using a preexisting work to comment on something unrelated to the original work, such as a different work or on society generally),

68 See *Maxtone-Graham v. Burtchaell*, 803 F.2d 1253 (2d Cir. 1986).

69 *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994).

which they have often held not to be protected fair use. So, for example, the Ninth Circuit (which covers California and much of the western United States) ruled in 1997 that a novelty book called *The Cat NOT in the Hat*, which appropriated the artistic style and rhyme scheme from Dr. Seuss's *The Cat in the Hat* to relate the saga of the O.J. Simpson trial, was not a fair use because it made no comment on the original work (and therefore was not protected as a parody), and made "no effort to create a transformative work with new expression, meaning, or message."⁷⁰ The Second Circuit (which covers New York, Connecticut, and Vermont) similarly found that artist Jeff Koons's sculptural appropriation of a copyrighted photo of a smiling husband and wife holding a litter of charming puppies was not a fair use because, although it may have been a commentary about modern society, it had nothing to say about the original photograph.⁷¹

In more recent years, courts in the Ninth and Second Circuits have sometimes taken less restrictive views of what constitutes "transformation" for purposes of a fair use analysis, deemphasizing the requirement that a new use of copyrighted material comment on that original material, and instead focusing on the presence of a genuine creative rationale for the borrowing and of transformation in meaning, aesthetic, or otherwise as part of the new work.⁷² With this updated style of analysis, in 2006—fourteen years after its opinion against Koons in the *Rogers* case—the Second Circuit held on very similar facts that one of Koons's later works *was* a fair use in its appropriation and transformation of preexisting copyrighted material, even without directly commenting on that material.⁷³ And it looked briefly like the Ninth Circuit might make a similar reversal from its case history with Dr. Seuss as the Second Circuit had with Koons: in 2017, a trial court in California expressly found that "mash-ups" of creative elements from two unrelated copyrighted works—in that case, a Kick-started kids' book hybrid of Dr. Seuss and Star Trek called *Oh, the Places You'll Boldly Go!*—were "transformative" for purposes of a fair use analysis.⁷⁴ This decision, however, was reversed on appeal by the Ninth Circuit (which held that *Oh, the Places You'll Boldly Go!* was *not* a protected fair use of Dr. Seuss's *Oh, the Places You'll Go!*),⁷⁵ and the latest U.S. Supreme Court precedent on fair

70 *Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394 (9th Cir. 1997).

71 *Rogers v. Koons*, 960 F.2d 301 (2d Cir. 1992).

72 See, e.g., *Adjmi v. DLT Entertainment Ltd.*, 97 F.Supp.3d 512 (S.D.N.Y. 2015) (allowing a playwright to put on a play that was an "upside-down, dark" take on *Three's Company* as a fair use); *Seltzer v. Green Day, Inc.*, 725 F.3d 1170, 1177 (9th Cir. 2013) (the band Green Day's use of a photograph of copyrighted artwork, as part of a four-minute video backdrop for one of its songs in its stage show, was a fair use); *Cariou v. Prince*, 714 F.3d 694 (2d Cir. 2013) (finding that several works by an "appropriation artist" who painted over a series of published photographs in a wildly different artistic style were sufficiently "transformative" as to qualify as fair use).

73 *Blanch v. Koons*, 467 F.3d 244 (2d Cir. 2006).

74 *Dr. Seuss Enters., L.P. v. ComicMix LLC*, No. 16CV2779-JLS (BGS) (S.D. Cal. June 9, 2017).

75 *Dr. Seuss Enters., L.P. v. ComicMix LLC*, 983 F.3d 443, 451 (9th Cir. 2020).

use (discussed later) similarly seems to have reinforced the requirement that an unauthorized derivative claiming fair use must in some way comment on the original work.

With respect to the fourth factor—“the effect of the use upon the potential market for or value of the copyrighted work”—courts examine not only the extent to which a defendant’s use of copyrighted material directly impacts the market for the original, but also whether the defendant’s use may harm the *potential* markets (whether or not actually exploited by the plaintiff) for other uses of the original (including authorized derivative works). Given the robust market for paid licenses to adapt copyrighted material for television series (and other audiovisual) production, this factor would frequently weigh against a defendant who tries to rely on fair use to adapt existing copyrighted material.

While fair use is a critical and ubiquitous component of copyright law, it seldom commands significant interest from the general public. In 2023, however, the doctrine suddenly took on renewed prominence when the U.S. Supreme Court applied it in a case brought by the estate foundation of artist Andy Warhol against photographer Lynn Goldsmith⁷⁶—the first time that the nation’s highest court had substantially looked at fair use in a creative or artistic context since the 2 Live Crew/“Pretty Woman” case in 1994.⁷⁷ The Warhol Foundation had sued Goldsmith for a declaration of non-infringement in connection with its commercial license to Condé Nast of *Orange Prince*, a silkscreen painting by Warhol of the legendary musician Prince, for a special tribute magazine published after Prince’s death in 2016. The painting had been based on a photograph taken by Goldsmith, which *Vanity Fair* had licensed for Warhol to use as the basis of a magazine cover published after the release of *Purple Rain* in 1984. The artist, however, went on to use the photo as the basis for his *Prince Series* of artworks, which Goldsmith discovered only after seeing *Orange Prince* used in the 2016 tribute magazine.

In a 7–2 decision, the U.S. Supreme Court held that the Warhol Foundation’s license of *Orange Prince* to Condé Nast was not transformative, with the majority decision (written by Justice Sonia Sotomayor) emphasizing the commercial nature of the Foundation’s license, which it held was “of a commercial nature” and “share[d] substantially the same purpose” as Goldsmith’s original photograph. In a scathing and combative dissent, Justice Elena Kagan argued passionately that the majority had misunderstood the transformative nature of Warhol’s work (and of fine art more broadly), and especially criticized the Court’s conclusion that *Orange Prince* and Goldsmith’s photograph had the same “essential nature.”

76 *Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. ____ (2023).

77 The Court’s only other examination of fair use since 1994 was a rather technical case about software APIs (application programming interfaces) decided in 2021. *Google LLC v. Oracle America, Inc.*, 141 S.Ct. 1183 (2021).

Scholars will debate the significance of the Court's decision in the Warhol case for years to come, and it will take years to appreciate how the case will impact lower courts' applications of the fair use doctrine. Although the Court has certainly left the door open for fair use defenses based primarily on "transformative use," it seems to emphasize a secondary work's objectively observable modifications to the original over authorial intent about meaning or message, and to consider commerciality as part of the transformativeness analysis (rather than as part of the fourth fair use factor, which the Court altogether declines to separately consider). The Court's opinion also seems to give renewed significance to the "parody vs. satire" distinction that had been established in the 2 Live Crew case in 1994, but had been applied less strictly in more recent cases assessing fair use defenses for unauthorized derivatives.⁷⁸ Crucially, the Court's decision addresses only the commercial licensing of *Orange Prince* to Condé Nast, and not Prince's use of Goldsmith's photograph in the underlying work of fine art. Nevertheless, it does appear that the Court has at least somewhat raised the bar for successful fair use defenses, especially in the context of unauthorized derivative works and appropriative art.⁷⁹

The most significant looming battleground in fair use law is the unauthorized use of copyrighted works to "train" generative artificial intelligence systems like chatbot ChatGPT, image generators Midjourney and Stable Diffusion, and other current and future generative AI tools that can create not just text and images, but also musical and non-musical audio, video, 3D models, or virtually any other form of media.⁸⁰ These "GenAI" systems work by being fed massive volumes of data, from which they can eventually learn to interpret user prompts

78 In his Copyright Lately blog, Aaron Moss offered four principal takeaways from the Warhol case: (1) "the first fair use factor [i.e., purpose and character of the use] focuses on the justification for a secondary use, not merely its meaning and message"; (2) "each particular use needs to be considered on its own"; (3) "factor one [i.e., purpose and character] continues to swallow factor four [i.e., effect on market for or value of the original]"; and (4) "transformative use is still alive."

79 On the other hand, UCLA Law School Assistant Professor Xiyin Tang has persuasively argued that the *Warhol* decision's practical impact on fine art, including contemporary appropriative art, is likely to be less significant than feared (by scholars and in Justice Kagan's dissent) given prevailing ethical, moral, and creative norms around unauthorized copying and appropriation.

80 This controversy also extends beyond the courts. One of SAG-AFTRA's goals, when it went on strike in 2023, was to compel the members of the AMPTP to file lawsuits challenging the use of studio-owned copyrighted works to train such AI systems. Actress/computer scientist Justine Bateman was especially vocal on the issue, arguing that the interests of the legacy studio and tech company members of the AMPTP were fundamentally misaligned, and that the studios were facilitating their own eventual destruction by not taking strong action before the advent of even more powerful GenAI tools that could inexpensively create entire films. The AMPTP's eventual deal with SAG-AFTRA did not include such a commitment, however, and Bateman led a faction against the union's ratification of the new agreement because it lacked more robust protections around AI. In large part due to Bateman's campaign, the new SAG-AFTRA deal was ratified with a comparatively anemic 78% of members in favor (compared to 99% of WGA members who voted to ratify the deal that ended the writers' strike a few months before). The major entertainment companies have thus far continued to take a wait-and-see approach on the issue.

and generate responsive outputs that sample or extrapolate from the ingested material. To date, these systems have often been trained on material scraped from the internet en masse, without the knowledge and consent of the owners of such material. The companies behind these tools have argued that both the copying of such source material and its integration into new AI-generated output are protected by the fair use doctrine.⁸¹ Those claims will be tested by several ongoing⁸² cases, including multiple class action lawsuits brought against Microsoft and OpenAI, initiated or joined by several bestselling and Pulitzer Prize-winning authors, challenging the unauthorized use of their works to train ChatGPT. Similar suits have also been filed by visual artists against the companies behind imagemakers Midjourney and Stable Diffusion. It will likely be several years before these legal questions are settled.

Ultimately, there are two key practical observations to make about the fair use doctrine, particularly as it relates to the decision to acquire underlying rights versus proceeding without a license with respect to the adaptation of preexisting copyrighted material in a new television project.

First, the fair use doctrine is extremely unpredictable in application. Its four factors are broadly stated, and because fair use is considered a “mixed question of fact and law,” there is an extremely wide body of cases applying those factors in all sorts of ways. The practical effect is that judges who instinctively find a defendant’s activity to be objectionable or unobjectionable can usually chart a course to finding that the fair use doctrine does or does not protect the defendant from liability, and two judges looking at identical facts could easily reach opposing conclusions. As a result, when someone asks, “Is this fair use?” it is usually hard to offer a more definitive answer than “probably” or “probably not” (a response that offers only limited comfort to risk-averse industry attorneys looking to protect their employers).

Second, it is hard to imagine a studio relying on fair use alone to justify adapting preexisting material wholesale as the entire foundation of a new series. Certainly, fair use can justify the borrowing of specific elements, particularly where the effect is to parody a whole genre—consider, for example, Comedy Central’s *The Colbert Report*’s adaptation of recognizable elements of Bill O’Reilly’s *The O’Reilly Factor* as part of its comedic take on conservative cable news, or Fox’s *The Orville*’s visual references to classic space series (and space spoofs) like *Star Trek* and *Galaxy Quest*. In addition, a studio might rely on fair use, rather than a license, to produce a single standalone episode of a

81 In 2009, the Fourth Circuit held that the unauthorized digital archiving of student papers by Turnitin, a software tool marketed to universities to help detect and prevent plagiarism, was permitted by the fair use doctrine. *A.V. v. iParadigms, L.L.C.*, 562 F.3d 630 (4th Cir. 2009). In 2015, the Second Circuit similarly held that fair use protected Google’s unauthorized digital copying of entire books as part of its Library and Google Books Projects, for the benefit of libraries and similar institutions. *Authors Guild v. Google*, 721 F.3d 132 (2d Cir. 2015).

82 As of April 2024.

series that clearly references and pays homage to existing work (such as, for example, themed episodes of ABC's *The Goldbergs* referencing classic '80s films like *Ferris Bueller's Day Off* and *Risky Business*). But where a proposed television series is based substantially or entirely on preexisting copyrighted material, even if its take is parodic or otherwise critical of the original, few studios would consider relying entirely on fair use rather than obtaining a license or release.

ii Trademark Claims

The First Amendment also serves to limit the scope of trademark protection. Most significantly, courts recognize that it is virtually impossible to refer to particular products or services without using protected trademarks—for instance, how could a character reasonably refer to an Apple iPad in dialogue without using the words “Apple” or “iPad”? For this reason, the law allows the public to freely use a protected trademark nominatively, i.e., to describe the product or service underlying the mark, often in the only way that makes any sense. This is often referred to as “nominative fair use.” The Ninth Circuit uses a three-part test for nominative fair use: (1) the product or service in question must be one not readily identifiable without use of the trademark; (2) only so much of the mark may be used as is reasonably necessary to identify the product or service; and (3) the user must do nothing that would, in conjunction with the mark, suggest sponsorship or endorsement by the trademark holder.⁸³ As a practical matter, “nominative fair use” probably would not provide a defense toward altogether basing a series on a trademarked property, given the potential inference of sponsorship and affiliation that would be involved in such circumstances, but it does inform clearance decisions related to lesser references to and uses of trademarked names and logos on camera.

In addition, courts have permitted trademarks and indicia of identity to be incorporated into the titles of creative works where there is a legitimate creative

83 Legal history includes a number of interesting cases reflecting the notion that the law does not require one to go out of one's way to make some oblique reference to something that is conveniently identifiable only by its trademarked name. For example, former Playboy Playmate Terri Welles successfully fended off a lawsuit brought by Playboy, which sought to block her from referring to herself on her website as a former “Playboy Playmate of the Year” (two trademarks in that phrase). Why? Because she was a former Playboy Playmate of the Year, and the law did not require her to refer to herself as “the Erstwhile Most Prominent Model for a Certain Well-Known Men's Publication Featuring Highly Airbrushed Disrobed Ladies.” See *Playboy Enterprises, Inc. v. Welles*, 279 F.3d 796 (9th Cir. 2002). Similarly, boy band version 1.0 New Kids on the Block could not stop a group of newspapers from conducting surveys about which NKOTB member was the best and most popular, because the newspapers were using the NKOTB trademark to describe the band's services rather than their own, and because they could not even ask the question in any meaningful way without using the “New Kids on the Block” mark. See *New Kids on the Block v. New America Publishing, Inc.*, 971 F.2d 302 (9th Cir. 1992).

basis for the use of the name, and the title does not explicitly denote authorship, sponsorship, or endorsement. In many cases involving creative enterprises that are clearly at the heart of First Amendment protections (such as films, musical compositions, and television series), courts apply a similar, but two-prong test: (1) whether the defendant's use of the plaintiff's trademark is relevant to the underlying work and (2) whether the use of the mark explicitly misleads as to the source or the content of the work. Under this test, the Second Circuit rejected a claim brought by noted actress and dancer Ginger Rogers, who objected to the title of Federico Fellini's 1986 film *Ginger and Fred* (which was about a pair of Italian cabaret performers whose routine impersonated the more famous pairing of Fred Astaire and Ginger Rogers).⁸⁴ The Ninth Circuit later applied the same test to determine that the Danish band Aqua's 1997 song "Barbie Girl" did not infringe Mattel's Barbie trademarks.⁸⁵

iii Life Rights Claims

The First Amendment also provides defenses to the various claims encompassed within the waiver associated with "life rights," seeking to protect both the public's right to be informed of matters of public concern, and the rights of artists and speakers to incorporate real-life elements in their creative works.

a Defamation and Related Claims

Often, the individuals worth depicting in television series and other entertainment works are not merely private citizens, but rather, are people who are already well known to the public, either for their professional accomplishments or their well-publicized personal deeds (or misdeeds). For such individuals, the First Amendment may provide an additional bar to a successful claim for defamation (or other closely related privacy-based claims).

Where a would-be plaintiff is a public official or figure, in order to successfully bring a claim for defamation, the plaintiff must show that the defendant acted with "actual malice"—that is, that the speaker made a statement (which, again, can be in the form of a depiction in an audiovisual work) that the speaker knew was false, or that the speaker acted with reckless disregard for the statement's truth or falsity. In making this determination, the court considers evidence of the speaker's actual, subjective state of mind when making an otherwise (allegedly) defamatory statement. The "actual malice" standard is so difficult to meet, it usually proves insurmountable for would-be plaintiffs who must prove it (and, as a result, often deters potential plaintiffs from filing claims in the first place). For instance, the availability of virtually any source for a

84 *Rogers v. Grimaldi*, 875 F.2d 994 (9th Cir. 1989).

85 *Mattel, Inc. v. MCA Records, Inc.*, 296 F.3d 894 (9th Cir. 2002).

factual allegation—even an anonymous or not particularly credible source—likely precludes a finding of actual malice. (This explains why tabloids such as the *National Enquirer* can publish sensational news stories about celebrities that are widely understood to be likely false. As long as they can point to any sources for their allegations, they can reasonably argue that they did not *know* their stories were false.) As a result, there have been only a handful of defamation claims over the years that have effectively overcome the “actual malice” requirement, most significantly the case brought by Dominion Voting Machines against Fox News for its anchors’ knowing promotion of false conspiracy theories about changed votes in the contested 2020 presidential election (which Fox News ultimately settled on the eve of trial for nearly \$800 million).⁸⁶

The “actual malice” requirement applies for any plaintiff who is a “public official,” an “all-purpose public figure,” or a “limited purpose public figure.” The “public official” category encompasses politicians, high-ranking government officials, and even civil servants with substantial responsibilities. The “all-purpose public figure” category covers high-level celebrities, athletes, and titans of business; not all members of these professions necessarily rise to the level of “all-purpose public figure” (e.g., recognizable but not readily nameable character actors, or wealthy but little-known corporate executives, likely to do not qualify), but virtually any broadly known “name” would likely qualify. The “limited purpose public figure” category includes individuals who voluntarily become key figures in particular public controversies (such as outspoken experts or critics on specific issues), and individuals who have gained prominence in a particular, limited field, but whose celebrity has not reached an all-encompassing level (such as mid-level journeyman actors or athletes). The “actual malice” standard would govern defamation claims for statements involving virtually any aspect of the life of a public official or an all-purpose public figure; for a limited purpose public figure, however, the “actual malice” standard would apply only to subject matter related to the controversy or field in which the individual is prominent, but not to other aspects of the individual’s private life.

86 Prior to the scheduled trial, the judge in the Dominion case had already found that several statements made on the air by Fox News anchors were factually and objectively false, leaving the trial to address only the question of actual malice by Fox anchors and executives. While the eleventh-hour settlement deprived everyone of a formal legal decision on the matter (and Fox itself neither apologized nor conceded liability on actual malice), the size of the settlement—as well as the fact that Dominion successfully negotiated for it to be made public rather than confidential—speaks to the weakness of Fox’s legal position, as well as the likely embarrassing nature of the evidence and testimony that a trial would have revealed. Notably, Fox News did acknowledge “the court’s rulings finding certain claims about Dominion to be false,” and, shortly after settling, fired its biggest (and perhaps most controversial) star, firebrand pundit Tucker Carlson—one of a few on-air personalities whose statements and beliefs were directly at issue in the case—based in large part on material discovered during the discovery process for the litigation.

b Public Disclosure of Private Facts

The principles of the First Amendment are integrated into the very elements of a claim for “public disclosure of private facts,” in the form of the requirement that the published facts are not newsworthy. To the extent that facts are newsworthy, the First Amendment recognizes a legitimate public interest in the discussion of these facts and precludes liability for “public disclosure of private facts.”⁸⁷

c Right of Publicity

Although the right of publicity would seem to provide a major risk to a studio that seeks to depict a real-life individual in a series without that individual’s consent, in practice, the First Amendment provides a substantial defense against any such claims.⁸⁸

Most courts nationwide have followed the California Supreme Court in adopting a balancing test between the right of publicity and the First Amendment, known as the “transformative use” test. Under this test, a court determines whether a work that depicts a celebrity has sufficiently “transformed” that celebrity’s identity, and is therefore immunized by the First Amendment from right of publicity liability, by considering five factors: (1) whether the celebrity likeness is one of the raw materials from which an original work is synthesized; (2) whether the work is primarily the defendant’s own expression if the expression is something other than the likeness of the celebrity; (3) whether literal and imitative or creative elements predominate in the work; (4) whether the marketability and economic value of the challenged work derives primarily from the fame of the celebrity depicted; and (5) whether the artist’s skill and talent has been manifestly subordinated to the overall goal of creating a conventional portrait of a celebrity so as to commercially exploit the celebrity’s fame.⁸⁹

This test is so general and subjective as to be highly unpredictable in application. But, although the test has never been applied in court to a television series based on or inspired by real individuals, courts applying it in the extremely similar context of theatrical motion pictures have consistently found that First Amendment protections trump the right of publicity. For instance, several years ago, the heirs of some of the fishermen who died aboard the *Andrea Gail* sued Time Warner, alleging that the portrayal of their family members in the 2000 Warner Bros. film *The Perfect Storm* violated the fishermen’s rights of publicity. The Florida Supreme Court dismissed their claims, citing the First Amendment in concluding that the production and distribution of a motion picture was

⁸⁷ See Section C.ii.

⁸⁸ See Section C.iii.

⁸⁹ *Comedy III Productions, Inc. v. Gary Saderup, Inc.*, 25 Cal.4th 387 (2001).

not a “commercial purpose” within the meaning of Florida’s right of publicity statute.⁹⁰ Similarly, in 2016, a three-judge panel of the Ninth Circuit affirmed a lower court’s dismissal of a long-pending lawsuit brought by U.S. Army Sgt. Jeffrey Sarver, who claimed that the character of Will James, portrayed by Jeremy Renner in 2008’s *The Hurt Locker*, was based on him and violated his right of publicity. The court’s opinion, which held that the First Amendment “safeguards the storytellers and artists who take the raw materials of life—including the stories of real individuals, ordinary or extraordinary—and transform them into art, be it articles, books, movies, or plays,” was perhaps the strongest ever legal endorsement of the First Amendment as a near-absolute defense to right of publicity claims arising out of the production and distribution of films, television series, and comparable creative works.⁹¹

E Practical Considerations

Given the foregoing legal context—with limited legal protection against the depiction of true facts, lack of copyright protection for mere ideas or *scènes à faire*, harm to reputation as a requirement for liability for the depiction of untrue facts, non-existent defamation/privacy rights for deceased individuals, and extensive First Amendment defenses to potential claims—one might reasonably wonder why a television studio would seek to obtain rights outside of the narrow context of adapting fictional copyrighted works (for which permission to create a television adaptation is largely essential). Nevertheless, there are numerous practical reasons for making deals with rightsholders, even in situations where it may not be strictly necessary to do so, as a matter of law.

The most obvious reason is risk mitigation. The author of a non-fiction work may feel wronged by the production of a television series that is based on his or her work, particularly if the author’s work is the only major primary source for the facts discussed therein.⁹² Similarly, an individual—whether or not that person is a public figure—may have legitimate personal objections to being depicted in a television series, explicitly or implicitly, without his or her consent. The fact that such individuals’ claims may be technically weak may do little to dissuade them from filing a lawsuit if they feel sufficiently aggrieved.

90 *Tyne v. Time Warner Entertainment Co.*, 901 So.2d 802 (2005).

91 *Sarver v. Chartier*, 813 F.3d 891 (9th Cir. 2016).

92 As an interesting aside, the author of a putatively non-fiction work could also suddenly reveal that the so-called “facts” he or she reported were actually made up, rendering the author’s work a piece of fiction that would be entitled to substantial copyright protection. However, courts may treat with skepticism the claims of authors who initially present their work as factual, only to later say “just kidding” when expedient to support a legal claim. See, e.g., *Corbello v. Valli*, 974 F.3d 965 (9th Cir. 2020), a case in which the allegedly infringed work originally emphatically represented itself as a nonfiction autobiography, based on which the Ninth Circuit concluded that the *Jersey Boys* musical did not infringe any of the protectable elements of the book.

Indeed, as the volume of original series has grown over the last several years and the true crime genre has emerged as a favorite of both platforms and audiences, there has been a corresponding increase in the volume of lawsuits arising out of such “based on a true story” productions. And as Netflix has increasingly cemented itself as a—if not *the*—dominant player in the modern industry, it has also emerged as the most popular defendant for such claims, facing high-profile lawsuits from individuals aggrieved by their fictionalized portrayals in hit series including *When They See Us* (settled on terms favorable to Netflix), *Inventing Anna* (Netflix lost a motion to dismiss and the case has proceeded to discovery), and, most recently, *Baby Reindeer* (just filed as of this writing).

The mere threat of a lawsuit may be sufficient to scare away financiers, licensees, or other business partners from a project. Once a claim is filed, the defendants have no choice but to defend those claims, usually at great expense, no matter how unmeritorious the claims may be.⁹³ And once the claim has entered the system, judges and juries (many of whom may regard large, powerful entertainment companies as unsympathetic litigants) can prove extremely unpredictable, particularly given the vague and nebulous legal standards for critical concepts like the idea/expression distinction, substantial similarity, and transformation.⁹⁴

Relatedly, studios and networks routinely insist, as a condition of proceeding with the production or distribution of a television series, on obtaining a so-called “errors and omissions” insurance policy, which provides coverage against liability for copyright and trademark infringement, defamation, violations of the rights of privacy and publicity, and comparable claims. Insurance carriers providing such policies may require that the insured exercise reasonable efforts to minimize prospective liability, including by obtaining releases from identifiable potential plaintiffs who may be likely to assert claims that would be covered by the policies. A carrier may treat such releases as a condition of offering coverage, or may insist on unfavorably high premiums or deductibles or significant coverage exclusions if such releases are not in place.

93 In the majority of cases, successful defendants in such cases also have no basis for recovering their legal fees, even if they successfully litigate the claims to a judgment in their own favor.

94 For instance, in September 2017, a California judge surprised many observers by finding that 101-year-old Olivia De Havilland had a minimal probability of prevailing on a false light claim arising out of her arguably unflattering depiction as a “vulgar gossip,” as portrayed by Catherine Zeta-Jones in FX’s *Feud: Bette and Joan*. The claim itself probably came as a surprise to FX, given that De Havilland was an extremely minor supporting character in the series, which primarily concerned the true-life story of the rivalry between Bette Davis and Joan Crawford on the set of 1962’s *Whatever Happened to Baby Jane*. The California Court of Appeal calmed the nerves of studio and network executives everywhere by reversing the lower court and dismissing De Havilland’s lawsuit in March 2018. *De Havilland v. FX Networks*, No. B285629 (Cal. Ct. App. Mar. 26, 2018). The lower court’s initial decision nevertheless serves as a valuable reminder of the inherent unpredictability of litigation.

The risks of proceeding without acquiring rights are also greater where a studio has actually received a pitch for a proposed series. California and New York, where the entertainment and media industries are largely centered, have each developed bodies of “idea theft” law, a patchwork of state law actions available to plaintiffs who believe their ideas have been unjustly stolen. These disputes typically take the form of a claim of breach of express or implied contract.⁹⁵ In essence, the claim is that the studio heard an individual’s pitch, and the individual agreed to disclose his or her idea, based on the explicit or implicit understanding that the studio would not use the individual’s idea without entering into some kind of agreement with the individual for rights and/or services. Such idea submission claims have been asserted based on well-known projects like HBO’s *The Sopranos*⁹⁶ and Fox’s *So You Think You Can Dance*.⁹⁷

The scope of potential liability for “idea theft” is potentially greater than that for copyright infringement, because idea theft claims can be based on material that does not qualify for copyright protection (e.g., because the “idea” in dispute is based on true facts that are in the public domain or is too general to qualify for copyright protection). This was the case in the classic California case on idea theft, *Desny v. Wilder*, in which the California Supreme Court allowed a plaintiff to maintain an implied contract claim based on director Billy Wilder’s use of his idea for a movie about the life of Floyd Collins, a man who was trapped in a cave for two weeks in a widely publicized incident.⁹⁸

Because idea theft claims are mostly based on breach of contract theories, the principal elements that a plaintiff must prove in an idea theft dispute are (1) mutual assent between the parties (i.e., an express or implied agreement by the studio to pay for the use of the plaintiff’s idea, if used) and (2) the defendant’s breach of the agreement (i.e., by actually using the idea).⁹⁹ In light

95 Plaintiffs in idea theft disputes also usually assert a variety of secondary state law claims, including misappropriation (a property/tort-based claim that is not recognized in the idea theft context in California, but that may be raised in New York), joint venture, unjust enrichment, false advertising, conversion, and unfair competition. These theories do not warrant detailed discussion, except to note that their legal basis is usually weak.

96 *Baer v. Chase*, 392 F.3d 609 (3d Cir. 2004).

97 *Cassese v. Fox Broadcasting Company*, No. B217655 (Cal. Ct. App. Aug. 10, 2010).

98 *Desny v. Wilder*, 299 P.2d 257 (Cal. 1956).

99 In New York (but not California), courts have also historically required some showing that the idea that the defendant allegedly stole was “novel.” On this basis, the Second Circuit once held that a plaintiff’s idea for *Father’s Day*, a television series about a middle-class black family starring Bill Cosby, was not sufficiently novel or original to sustain a claim against NBC for its alleged subsequent adaptation of the idea into *The Cosby Show*. The idea for *Father’s Day*, the court reasoned, “merely combined two ideas which had been circulating in the industry for a number of years—namely, the family situation comedy, which was a standard formula, and the casting of black actors in non-stereotypical roles.” The court rejected the plaintiff’s contention that the “unique” and “revolutionary” portrayal of a non-stereotypical black family constituted legal novelty, holding that the show merely “represented an ‘adaptation of existing knowledge’ and of ‘known ingredients’ and therefore lacked ‘genuine novelty and invention.’” Instead, to warrant protection, an idea had to

of the industry custom and practices around rights acquisition, merely hearing a pitch may open up the door to idea theft claims if the studio runs with the idea without making a deal with the person who originated it. In evaluating the legal risk of proceeding with an idea that it has been pitched without making a deal, studio lawyers will consider whether the studio ever expressly disclaimed any express or implied agreement (such as in a published “submission policy” or in an explicit “submission agreement” disclaiming any such deal). The studio may also look to establish that it was separately aware of the disputed idea (or better yet, already developing it independently) prior to the plaintiff’s submission.

Putting aside the potential liability from proceeding without rights, a studio may look to use a rights agreement as a sword as well as a shield. Making a rights deal may discourage a competing studio from pursuing a similar project at all or provide a basis for asserting a claim against a rival producer who elects to develop a competing project.

Another key benefit of making a rights deal is obtaining the cooperation of the individuals granting rights. The author of a non-fiction book or real-life subject of a series could be engaged to provide valuable consulting services, which would assist in both the development and ongoing production of a project. Journalists and researchers can lend their expertise to the television writing team. Obtaining access to a real-life subject’s personal records, letters, photos, and memorabilia can provide invaluable inspiration to the writing team and lend impressive realism and verisimilitude to their work. Rightsholders may also be asked to participate in promotional and publicity efforts for a series. And all this cooperation would be provided exclusively, meaning that the studio not only obtains the benefit of these efforts for itself; it also denies its competitors the opportunity to secure them.

This cooperation may be especially important to the studio as it attempts to navigate and mitigate less obvious liability risks. For example, the author of a non-fiction book or article may not be able to legally prevent a studio from producing a television series based on his or her work, but if that non-fiction work concerns one or more living individuals, it may be necessary to obtain the life rights of the individuals depicted in the work, whether or not a studio obtains the rights to the work itself. The author may be a valuable ally in obtaining the necessary rights and waivers from the subject(s) of his or her work. Similarly, although a studio may not fear a defamation claim from a deceased individual

be “truly innovative.” See *Murray v. National Broadcasting Company, Inc.*, 844 F.2d 988 (2d Cir. 1988). In more recent years, however, the courts in New York have substantially weakened the novelty requirement for idea theft claims on express or implied contract theories, limiting the requirement to novelty to the buyer. See *Apfel v. Prudential-Bache Securities, Inc.*, 616 N.E.2d 1095 (N.Y. 1993); *Nadel v. Play-By-Play Toys & Novelties, Inc.*, 208 F.3d 368 (2d Cir. 2000).

or an all-purpose public figure, it may be concerned about liability from depicting friends, colleagues, and family members of such individuals, who could be readily identifiable by their relationship to the primary subject (assuming that such friends, colleagues, and family members are alive and are not themselves public figures).¹⁰⁰ Making a deal with the primary subject of a series, even if legally unnecessary, may be extremely useful in obtaining the cooperation of (and releases from) such third parties. Indeed, a studio may reasonably choose to be so cautious as to obtain rights from a deceased individual's estate (even though defamation and privacy-based torts can only be pursued by living plaintiffs, and the First Amendment otherwise offers a strong defense against right of publicity claims), particularly if the studio may face problems with potential infringement of trademarks owned by the estate if it proceeds without the estate's consent.¹⁰¹

Finally, a studio's decision to obtain underlying rights may be motivated primarily by marketing-oriented concerns. A pithy and memorable title can be vital to a series' success, and securing the unquestioned right to use the specific title of a non-fiction work could easily justify the expense of a reasonably priced rights deal. A rightsholder and/or his or her work may bring with them a dedicated preexisting fan base, giving a new series a head start in finding an audience. Even absent a valuable title or substantial preexisting audience, many producers and executives believe that, in the modern, competitive television marketplace, the mere existence of underlying intellectual property makes a project more attractive to network licensees¹⁰² and provides a writer with some much-needed inspiration to help him or her overcome the daunting blank page and undertake a new project. This line of thinking, perhaps more than any other, has generated an increasingly frothy, competitive market for underlying rights over the last ten years.

In light of these factors, underlying rights deals for non-fiction works and life rights are surprisingly common, although the economics of such "legally unnecessary" deals tend to be somewhat more modest than those of deals for fictional copyrighted works.

100 This risk from seemingly tangential third parties makes open-ended series (as opposed to closed-ended television movies or mini-series) that are closely and recognizably based on true stories relatively uncommon. Such series, when they are produced, are usually subject to extensive legal vetting throughout the production process.

101 For example, Walt Disney was undoubtedly an all-purpose public figure, and both Disney and most members of his immediate circle have been deceased for decades. But the Walt Disney Co. nevertheless owns and rigorously enforces Disney's name as a trademark, rendering almost unthinkable the notion of any non-Disney-affiliated company attempting to produce a film or television series based on Disney's life. (Disney itself, on the other hand, dramatized the real-life Walt Disney's interactions with *Mary Poppins* author P.L. Travers in the 2013 film *Saving Mr. Banks*, starring Tom Hanks.)

102 And/or easier to justify or defend to their own bosses.

On the other hand, in ambiguous legal or factual circumstances, a studio may reasonably determine that *not* seeking a release is the preferable course of action, particularly where the studio believes a rightsholder is unlikely to respond favorably or cooperatively to a request for a grant of rights or a waiver of claims. For instance, seeking a release may bring a project that might otherwise go unnoticed to the attention of would-be plaintiffs, or highlight to a potential plaintiff the availability of a marginal claim that the individual or entity would not have otherwise considered. The request for a rights grant or release may also signal to a potential plaintiff, rightly or wrongly, the studio's belief that the studio *needs* that rights grant or release, and could be construed as an implicit admission of liability if the studio were to proceed without it. In some cases, the active participation of rightsholders (in particular, when it comes with a desire to limit, dictate, or otherwise control the content or development of a new series based on their rights) may be considered a detriment rather than a benefit. Deciding when and from whom to obtain rights or waivers therefore requires a careful consideration of all relevant facts and circumstances.¹⁰³

103 Actor, director, and producer Danny DeVito learned this lesson the hard way in connection with his planned feature film project *Crazy Eddie*, about Eddie Antar, the owner of the Brooklyn-based Crazy Eddie chain of consumer electronics stores (whose famous slogan was "*His prices are insane!*"). DeVito did the seemingly cautious thing and entered into a rights deal with Crazy Eddie. By 2010, however, DeVito had cut ties with Antar, after the actor-director was contacted by a lawyer representing several individuals who had been victimized by Antar's various fraud schemes (which had ultimately landed Antar \$150 million in fines and six years in prison). The lawyer threatened to put liens on the movie to pay the victims of Antar's frauds and prevent Antar from benefitting from the film. Despite DeVito's severing of ties with Antar, the film never made it out of development. Antar himself died in 2016.

5

UNDERLYING RIGHTS DEALS

Having laid out the basic legal context for underlying rights agreements, we can now turn our attention to the agreements themselves. The standard mechanism by which a studio gets the right to adapt a preexisting piece of intellectual property is an option/purchase agreement, an agreement by which a buyer (in this case, the studio) acquires the exclusive and irrevocable right, for a specified period of time, to purchase certain specified rights in a defined property, on pre-negotiated terms.¹ The decision to make that purchase is called “exercising the option” or “striking the option.”

Why an option rather than an outright purchase? The probability that any given project will make it to production is relatively low, and purchase prices can be quite expensive. Options allow studios to exclusively reserve rights at less up-front cost than it would take to buy those rights outright. And usually, the initial option fee is applicable against the purchase price, so if the studio does eventually purchase the optioned rights, its cost may not be any higher than if it had simply purchased the rights outright up-front. Options have therefore been the dominant mode of rights acquisition in film and television for decades, with up-front purchases reserved for the most singular and competitive of titles (and seldom in the television, rather than feature film, context). As “IP”² has grown into an increasingly ubiquitous (if not essential) component

1 For an option to be legally enforceable, there must be consideration for the option (which may be in the form of money or simply the option-holder’s efforts to develop the project) and separately stated consideration for the purchase of the rights. The purchase price for the rights must be specifically negotiated and reflected in the deal; it cannot simply be left to future good faith negotiation.

2 As all such forms of such underlying rights have become breathlessly known, with little concern for any technical meaning of “intellectual property.”

of the television development and production marketplace, however, the norms for both the pricing and the structure of these contracts have evolved quickly.³

Even putting aside outliers like Amazon’s blockbuster \$250 million deal for series rights to *Lord of the Rings* (in 2017) and Netflix’s outright acquisitions of the Roald Dahl Story Company for over \$500 million (in 2022), the everyday market for underlying rights has exploded since 2013, when a purchase price of \$100,000 for television adaptation rights would have been considered top-shelf, and an extremely competitive bidding process that yielded a \$250,000 purchase price would have been cause for celebration.⁴ By 2023, sought-after properties could easily obtain *option fees* of \$100,000 or more, against eye-popping seven-figure purchase prices, even for rights deals with narrow and limited scope and substance (at least in terms of protectable intellectual property)—for example, \$1.5 million (before producing fees) for the right to produce a single limited series based on just one season of an ongoing *nonfiction* podcast.⁵ With numerous beloved science fiction and fantasy series having already been adapted in film and/or television, the few (and occasional new) marquee properties that remain unadapted can command even higher purchase prices, especially over multiple seasons that draw on multiple installments in a single series.

This rapid growth has been driven, in part, by a growing field of production companies and smaller independent studios directly participating in the rights marketplace. For many years, studios strongly dominated the landscape of buyers for such rights. When producers under first-look or overall deals “discovered” a property they wanted to develop, they would bring it to their home studio, which would bid on that property “on the producer’s behalf” (i.e., with

3 When either the motion picture or television division of a legacy multimedia studio wishes to adapt a title originated by the other, the necessary intra-company arrangement runs the gamut from structured, collaborative, and virtually automatic to adversarial, defensive, and ad hoc. Such projects may also require executives to address complications in the property’s chain-of-title or ambiguities about control of important rights.

4 Prior to the “peak TV” era, television adaptation rights were widely understood to be worth a small fraction of the corresponding rights for feature films, and television production rights were customarily included within a standard rights grant for no further compensation than an extremely modest episodic royalty. Because these rights were such an afterthought, some older deals to acquire underlying rights for features excluded television production rights from the rights grants or froze such rights even after a feature was produced (and significant compensation paid). By the 2010s, when television studios were frequently mining the rights libraries of their feature affiliates for owned and unadapted properties, decades-old agreements granting feature adaptation rights—which almost uniformly seemed to never contemplate the crazy notion that an original series might be produced based on the acquired rights *before* a major motion picture—were dusted off to become the legal basis of major new development projects. Where television production rights had been frozen, and for the most successful, influential, and still active/agency-represented authors, rightsholders were frequently able to negotiate new and more favorable deals specifically in connection with new television productions.

5 The market for feature film adaptation rights has been similarly frothy, but also started in a much higher place prior to the current IP gold rush.

the producer attached to the project, if acquired). Even when independent producers without first-look or overall deals identified desirable properties, they would frequently approach a studio with which they had a preexisting relationship and propose that the producer and studio jointly pursue the available rights (with, again, the studio controlling the actual dealmaking on their collective behalf). With so much investment capital sloshing around the industry over the last ten-year period of low interest rates and robust M&A activity, however, some production companies (especially those aligned with marquee talent, such as Reese Witherspoon's Hello Sunshine and Margot Robbie's LuckyChap Entertainment) have become sufficiently capitalized to spend their own money to develop projects, rather than relying on a studio partner to front all development expenses from inception. These production companies, as well as smaller independent studios like A24 and AGBO (which frequently accept "buyouts" of their studio positions at the insistence of buyers) can afford to cash flow significant option fees, with the expectation that they will soon be reimbursed for most or all of those fees by a partner studio that they approach *after* (rather than before) securing the desired rights.⁶ Because such companies also have no expectation of ever being directly on the hook for the purchase prices for these properties, they also tend to bid more aggressively than the major studios and platforms to which they might intend to subsequently "lay off" a project. Studios are therefore put in the position of either ruffling feathers by insisting on renegotiating previously "closed" deal terms that they find unpalatable, or accepting terms that are more generous than the studios would have personally agreed to.⁷ Perhaps most gallingly, such studios sometimes end up acquiring from independent producers projects that they had unsuccessfully bid on directly (on more favorable terms to the rightsholder than the studio had been willing to agree to when negotiating for itself).

In addition to ballooning option fees and purchase prices, fierce competition for underlying rights has resulted in more deals for highly competitive properties being structured as outright purchases, with rights being legally granted upon signature of the relevant contract(s), subject to "reversion" terms providing for the rights to eventually return to the seller if no show is ever produced.

6 These production companies and smaller studios may consider it worth paying an upfront option fee (and taking the risk that they will never be able to recoup that cost by laying it off onto a buyer studio or network) because it gives them the unfettered creative freedom to choose projects and begin packaging, without having to convince or accommodate a partner studio that gets to make the ultimate decisions because it is controlling the purse strings. In addition, direct contractual control of valuable underlying rights (as opposed to a mere shopping agreement or even looser form of attachment) strengthens a company's bargaining position when negotiating its own deal as part of a set-up with a buyer studio or network.

7 As a matter of custom and practice, studios in this position will often be relatively demanding when it comes to extending option terms or cleaning up key granted/reserved rights and ownership provisions, but usually try to refrain from much more controversial renegotiation of financial terms.

These agreements are immediately lucrative to the seller/rightsholder, while usually also promising additional bonuses, royalties, and/or producing or other services fees (as well as contingent compensation) if a project is actually produced. In 2023, after a hugely competitive auction, Michael Lewis's *Going Infinite: The Rise and Fall of a New Tycoon*, about disgraced crypto billionaire Sam Bankman-Fried, sold to Apple as a reported outright purchase for \$5 million—despite the manuscript not having been made available for prospective buyers to review prior to bidding.⁸ At first, this seemed likely to represent a durable highwater mark for such deals, but within months, Britney Spears began shopping the rights to her recently published memoir, for both scripted and documentary productions. Although the auction process has been slowed at Britney's own insistence, meaning the deal is still open as of this writing, it could set new records for deals of its type.

Virtually any type of content or intellectual property can be acquired as the basis for a proposed television show—a popular Twitter⁹ feed of (almost) the same name spawned short-lived CBS sitcom *\$h*! My Dad Says* in 2010, while the defunct corporate trademark of airline *Pan Am* served as the basis of an ABC period drama in 2011.¹⁰ Nevertheless, the most common properties at the heart of option/purchase agreements for television production are still fiction and non-fiction books and articles. The standard deals for these properties are explored in detail in Section A. Podcasts (both scripted and nonfiction), comic books/graphic novels, classic films, and video games have all emerged in recent years as particularly common wellsprings for new television series. The deals for such properties are closely adapted from those that are used for literary works, with the more particular considerations laid out in Section B. The popularity of the true crime genre, and of “based on a true story” stories generally, has also made for a robust market for life rights (especially those that are acquired as part of, or alongside, the rights for a non-fiction literary work).¹¹ These option/purchase agreements for life rights are also modeled on those for literary works, with additional nuances that are discussed in Section C. Finally,

8 Apple TV+ (market value: approximately \$3 trillion) has proven to be an especially generous and prolific buyer of underlying rights.

9 This was well before the platform was renamed “X” in 2023, so the reference to “Twitter” here is correct. In general, though for ease of readability—and as a small and meaningless act of protest—this book consistently refers to “Twitter” rather than (as most American newspapers seemed to do for the second half of 2023) “X, the platform formerly known as Twitter.”

10 *Pan Am* is perhaps the only scripted television series essentially “based on” a mere trademark, without any further underlying narrative material. However, the notion of “adapting” a trademark into series form is more common in the context of unscripted television. See Chapter 12, Section D.ii (pg. 477).

11 See Chapter 4, Section C (pg. 164). “Life rights” are generally not a legally recognized property right in the same way that copyrights, trademarks, and patents are; rather, they are a bundle of waivers and releases from legal claims that immunize studios from potential liability to the people being depicted.

one of television's oldest traditions is to adapt itself, and there is a longstanding market for "format rights" in existing television series.¹² These are discussed in Section D.

A Rights Agreements for Books and Articles

i Option Fees and Terms

The "option" is the buyer's right to purchase the negotiated rights, and the "option period" is the period of time for which that right is effective. When optioning a book or article, an initial option period of twelve to eighteen months is typical, reflecting the window of time necessary to develop, write, and solicit an order of a television series based on the underlying property.¹³ The option fee for this initial period is customarily applicable against the purchase price.

Prior to the now-long-running bull market for rights deals (which began circa 2015), initial option fees typically ranged between \$2,500 and \$10,000, with higher option fees on highly desirable properties and/or in competitive dealmaking situations. Thanks to the decade-long run on trendy science fiction, fantasy, and other (high-production cost) genre properties, the "podcast boom" of the last five years, and the overall long-term strength of the rights market, most properties that attract multiple bidders can now command option fees around \$25,000.¹⁴ Older and/or non-competitive titles still price out lower, but now frequently land around the \$10,000 mark that would have been considered quite high only ten years earlier. An initial option fee in the range of 10% of the negotiated purchase price is typical, meaning that option fees in competitive situations can climb into six figures. That said, studios may offer

12 This is true both for U.S. producers looking to adapt existing international series, and for foreign producers looking to produce local versions of American series. This chapter focuses solely on the former: "inbound" underlying rights agreements entered into by U.S. studios as the basis for developing new series (e.g., Showtime's *Homeland* or NBC's *The Office*). "Outbound" format deals are one of the ways that studios monetize derivative rights in their existing series (one of many so-called "allied and ancillary rights"). See Chapter 3, Section C.i.d (pg. 135).

13 Some agreements provide for the option period to run from the "as of" date of the agreement, or from the date that the substantive deal terms were initially agreed. Other agreements set the clock as running for twelve to eighteen months from the date the option/purchase agreement is signed. This is because, under U.S. copyright law, an option must be reflected in a signed written agreement to be legally enforceable. While this practice effectively extends the duration of the studio's option, it may create problems down the line if the parties do not keep an unambiguous record of when the agreement was actually signed. In addition, the negotiation of written paperwork may take several months to complete, which could be regarded as unjustly inflating the initial option period. As a result, the parties to an option/purchase agreement may, in the course of negotiating paperwork, agree to start the option clock from a specific negotiated date, which may be sometime between when the initial deal terms were agreed and when the actual written contract was finalized.

14 This applies regardless of the "strength" of the rights these "underlying properties" represent from an intellectual property law perspective. See Chapter 4, Section E (pg. 183).

higher-percentage initial option fees to stand out in competitive bidding, while lower percentages are not uncommon when attached to ultra-high seven-figure purchase prices. In addition, as discussed at the beginning of this chapter, the hottest properties on the market may bypass the option fee/structure altogether, instead commanding “straight purchase” deals with full-freight purchase prices paid up-front (and long-term reversions if no projects are ever produced).¹⁵

Most option/purchase agreements also include one or more studio options to extend the option period by an additional nine to eighteen months, usually for the same price as the initial option fee (or proportionate to the size of the option period), but non-applicable against the purchase price.¹⁶ In some cases, option extension periods may be shorter than initial option periods, or may be conditioned on “active development” or certain development milestones, such as a writer having been engaged to write a pilot teleplay or a network agreeing to develop the project (though such conditions are more common when the optioning party is an independent producer rather than a major studio, which usually resists such conditions).

ii Purchase Price

The purchase price is the amount paid by the optioning party to acquire the rights under option, typically upon production of a pilot or first season episode.¹⁷ If the destination platform for a project is unknown at the time a deal is made, the purchase price in an underlying rights deal may be negotiated into two or three tiers (according to typical production budget ranges) for different platform types.¹⁸ A studio whose option is about to expire (and which does not hold any contractual option extensions) may elect to purchase the rights prior to the expiration of the studio’s option in order to retain the rights.¹⁹

15 See Section A.xi.

16 In addition, the legal boilerplate for these agreements will typically provide that the option period is automatically extended in certain circumstances, such as the occurrence of a force majeure event (i.e., “acts of god” such as war, earthquakes and major weather events, union strikes, and other events beyond any party’s reasonable prediction or control), or during the pendency of any adverse third-party claim that may undermine or encumber the optioned rights.

17 In rare instances, the payment of the purchase price on a project with a pilot step may be deferred, in whole or in part, until series production.

18 In such tiered deals, the richest terms apply for high-budget streaming platforms like Netflix and Amazon. Depending on whether the deal provides for two or three tiers, broadcast networks and premium pay cable networks may be included in the top tier, or either or both may be broken out into a separate “middle” tier. The lowest-tier purchase prices apply if a project is produced for basic cable, or for less “premium” SVOD and/or AVOD services. Precise categorization often varies according to the particular policies and practices of each studio. Henceforth, when this book refers to “tiering” of entitlements according to networks/platforms, it contemplates this kind of two- or three-tiered structure.

19 In general, all that is required to exercise an option is a timely written notice, accompanied or promptly followed by a check for the applicable purchase price. Where a deal provides for tiered

In the pre-boom years (around 2010–15), a typical purchase price for a book or article ranged between \$30,000 and \$100,000, with the usual competitive factors—the prominence of the property (in terms of audience, sales, or other metrics), the scope of the property (e.g., a book series vs. a short story or short-form article), and the number of bidders—potentially driving purchase prices as high as \$500,000. Today, million-dollar purchase prices are increasingly routine. Purchase prices of \$2 million or more remain rare, though in the current market, the most in-demand properties can command \$3–\$5 million without breaking into “Black Swan” territory (like the *Lord of the Rings* and *Ronald Dahl* deals). Such extra-large purchase prices are often further applicable against subsequent payments, such as royalties, bonuses, or contingent compensation; and, if a deal is intentionally structured to juice a top-line number, may be negotiated to buy out services fees as well. If a project may be developed as either an ongoing episodic series or a closed-ended television movie or mini-series, there may be different purchase prices negotiated for each form of initial production (with television movies and limited series usually commanding a higher price tag).

If theatrical feature film rights are subject to the option, they will also often be subject to a separately negotiated purchase price—usually higher than the corresponding television purchase price, and often denominated as a percentage of the film’s ingoing²⁰ production budget (2%–3%) with a floor and a ceiling (with ranges that could span from \$100,000 to as much as \$2 million or more for a bestselling blockbuster property).²¹

iii Royalties

Where the applicable production is an episodic series, in addition to the purchase price, the deal will also include a negotiated episodic royalty, which is payable to the rightsholder for the life of the series’ production. These royalties typically range from \$1,500 to \$10,000 per episode (excluding the pilot) and, like purchase prices, may be tiered depending on the platform for which the series is produced. They are “passive,” meaning that there is no requirement that ongoing services be rendered to receive these payments. In addition, rightsholders may negotiate to receive further royalties for reruns of each such episode, though this is not as commonly granted for underlying rightsholders

purchase prices and the studio exercises its option without a specific platform having been established, the studio will generally pay the lowest-tier purchase price, and make a subsequent payment to “true up” to the higher purchase price if the project is eventually sold to a higher-tier platform.

20 The significance of this percentage being calculated on the “ingoing budget” is that if the film goes overbudget, the purchase price customarily does not increase proportionately.

21 Often, a studio acquires rights for television and motion picture productions simultaneously, potentially without knowing what medium the studio will initially pursue for adaptation.

as for pilot script writers.²² In addition, this right may be granted for broadcast network television series but not for cable series (where heavy reruns are more common) or digital series (where on-demand streaming renders the concept of a “rerun” a non sequitur).

iv Backend

In addition to a purchase price and royalty, the seller of television rights will expect to receive a share of the “backend” or contingent compensation from the series. Depending on the stature and nature of the underlying property, this share tends to range between 1.5% and 5% of modified adjusted gross receipts (“MAGR”) or the corresponding principal defined form of contingent compensation used by the applicable studio.²³ The majority of properties draw 2.5% of MAGR in backend.²⁴ Because it is based on the adaptation of existing intellectual property, as opposed to the ongoing rendering of services, the share of backend accorded in respect of the underlying source material is typically considered fully vested from inception.

v Bonuses

Additional bonuses are a common, but not ubiquitous, economic element of underlying rights deals. The most common bonuses are for the ordering of a series (as opposed to merely a pilot) based on the underlying rights, and are referred to simply as “Series Sales [or Sale] Bonuses” (or “SSBs”). These typically range from \$10,000 to \$50,000, with \$25,000 being especially common. The bonus is typically subject to proration based on the number of episodes actually produced and exhibited.²⁵

When an option/purchase agreement includes the rights for multiple entries in a series of books, it will often provide for additional bonuses beyond the “purchase price” for the first season. Such bonuses may be for flat amounts (as low as \$25,000 per season), equal to the initial purchase price, or sometimes greater than the initial purchase price (potentially with further escalations for seasons after the second). They may be triggered by the production of additional seasons (regardless of the content of such subsequent seasons), or specifically by the studio’s first use of unique storylines, characters, or other distinct elements from subsequent entries in the underlying book series. Studios may also agree to additional bonuses for subsequent seasons on high-value non-series

22 See Chapter 6, Section A.viii (pg. 225).

23 For the definition and accounting for contingent compensation, see Chapter 9 (pg. 351).

24 A single percentage point of MAGR is sometimes referred to as a “point,” so this might be referred to as “2.5 points.”

25 See Chapter 6, Section A.ix (pg. 226) for a deeper discussion of such proration.

properties, to balance a rightsholder's expectation for significant compensation with the studio's desire to limit its financial exposure from (or the burden on the budget of) an unproven series' first season.

If the initial option is obtained by a small independent producer (especially if that initial option is granted for free), there may be "set-up" bonuses triggered by the development of the project with a major studio or a network. In addition, if an option/purchase agreement is negotiated for an unpublished book, the purchase price may be subject to certain "Best Seller Bonuses," meaning escalations to the purchase price (if the option is exercised) triggered by the book's appearances on *The New York Times* Best Sellers List.²⁶

vi Granted Rights

Every option/purchase agreement must specify the rights that are being optioned, and are therefore subject to purchase, by the studio. Major studios typically define their rights acquisition as encompassing all rights in the underlying property, other than those that are expressly reserved (i.e., starting from 100% of rights and working their way down). Smaller producers and studios may settle for acquiring only specified rights (e.g., "all motion picture and television rights"), with all rights not expressly enumerated being reserved by the seller (i.e., starting from 0% of rights, and working their way up).

Although television rights are the obvious rights subject to such deals, rights deals must also encompass so-called "allied and ancillary" or "subsidiary" rights, such as merchandising, music publishing, soundtrack, live stage, theme park, and subsequent/derivative productions. In addition, where the rightsholder claims trademark rights in any elements of those properties, it may be necessary to negotiate terms around the transfer, co-registration, or other coordination of such rights, particularly where the buyer wishes to integrate such trademarks into the title of the contemplated series and/or engage in merchandising and other licensing activity around the series.

vii Reserved and Frozen Rights

"Reserved rights" refers to those rights in a piece of intellectual property that are excluded from the grant of rights under an option/purchase agreement and that are therefore "reserved to" the seller/grantor of rights (e.g., the author of a book). Because most major studios' rights deals operate on the (non-negotiable) model of acquiring all rights in the underlying property other than explicitly

26 The particulars of these bonus structures vary from studio to studio, and generally incorporate some combination of flat bonus payments for top ranks achieved and/or weekly bonus payments for each week spent on the Best Sellers List (usually divided into tiers and subject to a cap).

reserved rights, much of the work of negotiation concerns reserved rights, rather than granted rights.

The author or rightsholder of a book or article is essentially always permitted to reserve the ongoing right to publish the original work, and to publish or authorize the publication of author-written prequel or sequel books.²⁷ Other rights typically reserved by the author without controversy include radio rights (i.e., dramatic radio adaptations); live recital rights (i.e., public readings); and live television rights (i.e., live telecast of a dramatic performance). Rights for comic books and graphic novel adaptations may require particular attention in negotiation—rights grantors seek to reserve these rights as a form of publishing, while grantees seek to acquire them as a form of merchandising.²⁸

Authors often seek to reserve merchandising rights in their works, and in particular, rightsholders for science fiction, fantasy, and other genre titles tend to fight hard to reserve or at least freeze potentially lucrative video game rights. Studios strongly resist any such reservations of rights. There may be a distinction drawn between “classic merchandise” (i.e., merchandise based solely on the underlying work) reserved by the author and “series merchandise” (i.e., merchandise that recognizably incorporates logos, actor likenesses, or other unique elements of the television adaptation) controlled by the studio. Typically, however, this is only entertained by the acquiring studio where there is a meaningful preexisting merchandising program in place for the property. Otherwise, most television studios have a strong expectation that they will control merchandising and, at best, may agree to a “separate pot” royalty granting the rightsholder a share of merchandising revenue that is not cross-collateralized with series production expenses and distribution revenues.

Major negotiation may take place around theatrical feature film rights and live stage rights, which may have significant value. The acquirer’s ability to obtain such rights may depend on the relative bargaining power of the parties, and on the buyer’s ability to make the case that it is positioned to effectively exploit such rights (e.g., through an affiliated motion picture production and distribution arm). Such rights, when acquired, may be subject to the payment of additional “purchase prices,” contingent compensation structures, and/or sequel compensation terms if a feature film or live stage production is actually produced.

Other than publishing rights and live recital rights (both for the initial work and for author-written sequels), reserved rights are typically subject to holdbacks that prevent the owner from exploiting them for a defined period of time. Many television studios employ a framework from feature deals known as the “5/7 holdback”—reserved rights are held back until the earlier of five years

27 There may be negotiated limitations on “enhanced books” that incorporate audiovisual elements.

28 In some cases, the authors may have already granted such comic book/graphic novel rights to the publishers of their books, in which case the rights would not be available to grant to the studio in any event.

following the initial exhibition of a production based on the property, or seven years following the execution of the rights agreement. However, because successful television series are often produced and released over multiple years, a more common holdback structure would be clocked to the initial exhibition of the last episode of a series or the expiration of a network's option to order more seasons of the series. The actual length of the holdback from that point is usually one to three years, and often expands as more seasons of the series are actually produced.²⁹ Once any applicable holdbacks expire, these reserved rights may also be subject to a right of first negotiation and/or a right of first or last refusal in favor of the purchaser of the granted rights (who would have a natural interest in acquiring such reserved rights at some future time).³⁰ As with the holdback on reserved rights, the length of the studio's subsequent FN and FR/LR rights may be tied to (and expand with) the total number of seasons produced prior to cancellation.

Where parties cannot reach agreement on the granting or reservation of rights—again, most commonly with respect to theatrical feature film rights and/or live stage rights—they may agree to freeze these rights. “Frozen rights” are unexploitable by both the buyer and the seller unless the parties can reach some future agreement on the terms for the “unfreezing” and exploitation of these rights, or the “freeze” of the rights otherwise expires according to the terms of the contract and the rights revert to the sole control of one of the parties.

Option/purchase agreements must also account clearly for the status of rights (beyond publishing) in author-written sequels. Rights that are consistent with those granted to the studio for the initial acquired property (e.g., motion picture, television, and ancillary rights) are known as “equivalent rights,” while rights that are consistent with those reserved to the rightsholder for the initial property are known as “equivalent reserved rights.” Equivalent reserved rights in author-written sequels are customarily reserved by the rightsholder to the

29 In other words, the holdback on reserved rights might be one year from the expiration of the network's option to order more seasons if only one season has been produced; two years from network option expiration if two seasons have been produced; or three years from network option expiration if three or more seasons have been produced.

30 A “right of first negotiation” (sometimes also referred to as a “first opportunity,” “first opp,” “FN,” or “ROFN”) is a requirement that the seller of rights must undergo exclusive good faith negotiations with the holder of the ROFN before the seller may negotiate with other interested parties. This “first window” gives the ROFN holder the opportunity to take the rights off the market before others have an opportunity to bid. The terms “right of first refusal” (“FR” or “ROFR”) and “right of last refusal” (“LR” or “ROLR”) are often used imprecisely. Practically, a “first refusal” is a requirement that, if the seller of rights is prepared to accept terms less favorable to the seller than those last offered by the holder of the FR right (or, alternatively, less favorable than those last demanded by the seller), then, prior to accepting the deal, the seller must give the FR holder an opportunity to purchase the rights on those same terms. A “last refusal right” differs from a “first refusal right” in that the seller must give the LR holder a final opportunity to accept the deal, even if a third party has offered the seller more favorable terms than were ever offered by the LR holder. Last refusal rights are especially burdensome and are quite rare.

same extent, and subject to the same holdbacks, as the corresponding reserved rights for the initial property. Equivalent rights, on the other hand, are commonly addressed in a variety of ways.

If the “property” in which the studio acquires rights under the option/purchase agreement is defined to include author-written sequels, then equivalent rights in such author-written sequels are automatically included in the initial rights grant.³¹ If the defined “property” is limited to the initial published work, then equivalent rights in author-written sequels may be subject to pre-negotiated options (usually on a per-book basis); frozen (provided the studio exercises its option and pays its purchase price for the first book); or reserved subject to a holdback and studio FN/FR thereafter (consistent with other reserved rights). And, as with other negotiated terms in option/purchase agreements, the applicable terms for equivalent rights may be tied to the number of seasons produced.³²

Studios and networks are wary of paying handsomely for rights, only to see rightsholders receive a second lucrative payday from “re-selling” the same (or closely related) rights to a third party. By the same token, executives are loathe to see others profit from a future production based on the same underlying literary property in which they have already invested heavily. Consequently, studios and networks both tend to require meaningful rights or restrictions with respect to equivalent rights in author-written sequels, at an absolute minimum prohibiting them from being sold to or otherwise exploited by third parties until well after the initial series based on those rights has completed its run. In addition, to the extent that a rightsholder reserves the right to sell equivalent rights in author-written sequels to third parties, such equivalent rights are typically limited to characters, storylines, and other unique elements that first appear in such author-written sequel(s); any characters, stories, or other unique elements that first appear in the original work (for which the studio has paid a purchase price) remain exclusively controlled by the initial buyer studio.³³

31 In such cases, the deal typically provides for the rightsholder to receive potentially significant bonuses tied to the production of additional seasons, and/or to the studio’s use of storylines, characters, or other unique elements from such sequels. See Section A.v.

32 For example, the deal may provide for equivalent rights to be reserved with a holdback and FN/FR if only one series season is produced, but permanently frozen if multiple seasons are produced.

33 Subject to any applicable reversion terms; see Section A.xi. In most cases, the unavailability of rights in core creative elements established in the first book in a series would substantially impair the value of reserved equivalent rights in author-written sequels, although such rights may remain quite marketable, especially when later installments in a literary series introduce important new characters around whom a new film or series could be built. In rare cases, the rightsholder for a desirable and well-established literary series (e.g., an ongoing series of detective novels with a recurring protagonist appearing in unique and largely independent stories) may negotiate for the right to include a main character or other continuing elements from the initial work in a future grant to a third party of equivalent rights in author-written sequels. Any such grant of rights to a third party would typically be on a non-exclusive basis, meaning that the original studio would retain its right to use the same character or other elements as part of its exploitation of the rights it continues to control.

viii Consulting or Producing Services

Rights agreements may include a services agreement element, by which the author of the underlying work agrees to render ongoing consulting or producing services to assist the studio with developing and producing the series based on his or her work. For the seller, this is a way to draw more financial benefit from the deal; for the buyer, the author's perspective may be useful to the writers and producers of the series, particularly where the underlying work is autobiographical or heavily research-based (although authors are infrequently treated as bona fide producers, even if they are credited and paid as such).

Consulting fees typically range between \$1,500 and \$15,000 per episode (but can be higher at high levels and on major high-budget platforms) and may be committed for a single season, two or three seasons, or for the life of the series. Unlike a royalty, these fees are not passive and require the author to be available to render a reasonable amount of services when called for, though in practice, the level of commitment is often very low, and authors often relish the opportunity to have an ongoing impact on the television series based on their work.

At higher levels, particularly where the author has some personal experience in television, such consulting deals may escalate to full-fledged non-writing producing deals. In addition to providing more favorable credit for the author, such arrangements typically involve more substantial episodic fees, and may come with higher-level locks and/or additional backend ("as a producer," to distinguish it from the separately stated, and differently vesting, backend received "as a rightsholder").³⁴

ix Credit

Source credit is typically accorded to the underlying work from which a series is adapted. A typical form would be "Based on the novel by [AUTHOR]" if the series has the same title as the underlying work, or "Based on the novel [TITLE] by [AUTHOR]" if the series has a different title. For non-fiction works, "Inspired by" credit is more common than "Based on," typically for risk management reasons—television series based in whole or in part on true-life events must often emphasize their fictionalization in order to reduce the risk of right of publicity and/or defamation claims from the individuals connected to the works.³⁵ Rightsholders typically seek to negotiate for these source credits to appear in the main or opening titles,³⁶ rather than the end credits, of a series.

34 See Chapter 6, Section D (pg. 248).

35 See Chapter 4, Section C (pg. 164).

36 Although these terms are used somewhat inconsistently and interchangeably, to be precise, "main titles" refers to an opening title sequence that precedes the actual action of the episode (and may be elaborately animated or produced, such as the well-known, Emmy-winning main title sequences for HBO's *True Detective* and *Game of Thrones*), while "opening titles" refers to credits that appear at

In addition, rightsholders may push for such credits to appear in paid advertising for the series (with placement often tied to credits accorded to writers and creators).

If the rightsholder's name is a meaningful marketing tool (e.g., Stephen King), then the agreement may include a much more detailed description of how the studio may or may not use the rightsholder's name, likeness, and biographical information to promote the series, both on screen and in advertising. If the rightsholder is a household name, the deal may go so far as to allow (or alternatively, require) the studio to title the series using a possessory credit with the rightsholder's name, such as *Stephen King's Storm of the Century* (ABC) or *Philip K. Dick's Electric Dreams* (Amazon).

In addition, if there is a consulting services component to the rights deal, there is usually a separate credit granted to the author for such services. "Executive Consultant" is a standard lower-level credit, usually granted in the end titles; "Consulting Producer" would be considered a higher-level credit and may be granted in the main or opening titles (where other major producers are credited). However, some studios have more recently disfavored the Consulting Producer credit due to pressure from the WGA, which has urged studios to limit the credit's use to writer/producers.³⁷ If more substantial credits are accorded (such as "Co-Executive Producer" or "Executive Producer"), these services agreements have typically been expanded into full-fledged producing deals.³⁸

x Subsequent Productions

Because the rights granted in these agreements typically include the right to produce future productions (whether remakes, sequels, prequels, or spinoffs of the original series), there are usually negotiated economic terms that relate

the beginning of the episode, with text superimposed over the actual filmed action of the episode. There is significant flexibility (and inconsistency) in which credits appear in the main titles vs. the opening titles, and not every series necessarily includes both main and opening titles. In general, main titles contain, at a minimum, the name of the series and often the series's "Created By" credit. See Chapter 6, Section A.x (pg. 227). Some main title sequences also incorporate the credits for series regular actors. See Chapter 6, Section E (pg. 249). Longer main title sequences may also include credits for producers, episodic directors, and episodic writers, though these are more often included in the opening titles. In general, credits for individuals of like functions (e.g., all series regulars, all producers above a given seniority level, etc.) are grouped together within one of these two title sequences. But creative variations abound; for instance, some shows include neither main titles nor opening titles, and credit even senior cast and crew at the end of the episode (a format sometimes referred to as "main-on-end").

³⁷ The WGA also discourages crediting individuals as "Creative Consultants," and requires studios to obtain a special waiver from the guild in order to accord credit to an individual in this particular form.

³⁸ See Section A.viii and Chapter 6, Section D (pg. 248).

to such subsequent productions (also sometimes referred to as “derivative productions”).

Payments for subsequent series may include additional purchase prices, royalties, bonuses, and backend; the buyer will typically seek to limit the variety of repeated payments (e.g., royalties and backend only), while the seller will seek to have all the various forms of payment obligation revived for subsequent series.

A standard rights agreement might provide for 50% of the applicable negotiated payments for the initial series to be made for any generic spinoffs (definitions vary, but typically meaning a spinoff that includes, as a principal character, one or more principal characters who appear in the original series or the underlying work) or sequels/prequels, 33% of the applicable negotiated payments to be made for any remakes, and 25% for any planted spinoffs.³⁹ At higher levels, generic spinoffs, sequels/prequels, and remakes may be subject to rights payments up to 100% of the payments owed for the original series, and planted spinoffs paid at up to 50%.

In this context, a studio’s “subsequent production” rights concern derivatives *of the initial series produced by the studio*, and are conceptually distinct from equivalent rights in author-written sequels. A studio that does not control equivalent rights in author-written sequels may still be free to develop and produce “original” derivatives of the initial series, so long as the new production does not incorporate creative elements from such reserved author-written sequels.⁴⁰ Where a studio does control equivalent rights in author-written sequels, its financial obligations with respect to a derivative production may be different depending on whether or not the new production uses creative elements from such author-written sequels (as opposed to only elements from the studio’s initial series, or from the initial book acquired by the studio, even if those elements had not been included in the initial series).

xi Reversion

Rightsholders will often negotiate for the rights granted in an option/purchase agreement to automatically return to the grantor after a specified period of time, depending on whether, or the extent to which, programming has actually

39 “Planted spinoffs” are those that follow an original character introduced anew into the initial series specifically to set such characters up for their own series, e.g., the character of Mork from Ork, played by Robin Williams, who appeared in a single episode of *Happy Days* before being spun off into the series *Mork & Mindy*.

40 Thus, the first season of a television series based on a series of books may be closely based on the first book in the series, while subsequent seasons take the series in new directions that may have little or nothing to do with the content of author-written sequels.

been produced based on the granted rights. This concept of “reversion” is a subtle but often hotly contested deal issue.⁴¹

Reversion is typically allowed without objection when rights are purchased but no pilot is ever produced, or if only a pilot, but no series episodes, is produced. A typical reversion may kick in if no pilot is produced within a year of rights purchase, or if no series is produced within a year of completion of the pilot. However, the issue is more contested where the rightsholder looks to reclaim rights even after a series is produced. Buyers will want their purchase of rights to vest permanently if any series episodes are produced; sellers will want rights to eventually return to them no matter how many series episodes are produced, once continuous production of a series has ended. Typical compromises involve rights that vest permanently with the buyer if a threshold number of episodes or seasons of the series are produced (often two to three seasons or seasons’ worth of episodes), but that are subject to reversion if those thresholds are not met. The reversion typically occurs one to three years after the last episode of a series is exhibited (or after the network’s option to order more seasons expires), and, as with holdbacks on reserved rights, this time period may increase or decrease depending on how many episodes/seasons have actually been produced before cancellation. For the most part, unless the property under option is extremely well known or valuable, the studio will insist that, at some point, its rights vest permanently.

Reversion is typically subject to a lien for the buyer’s purchase price and its unreimbursed development expenses (if no pilot or series was ever produced), or at least for its purchase price (if a pilot or series was produced). The buyer may also seek a passive participation in any new productions based on the rights it had previously acquired, the right to and size of which may also be tied to how many episodes/seasons (if any) had been produced prior to reversion. The standard range is \$2,500–\$5,000 per episode in royalties and 2.5%–5% of MAGR in backend, but episodic fees in particular can run substantially higher, especially for studios that were heavily invested in a project prior to reversion. The buyer may also seek certain additional protections in a reversion scenario,

41 Reversions are somewhat rarer in the theatrical feature film world, where studios typically exercise their options as close as possible to the commencement of principal photography, and a single produced film is usually considered good enough to permanently vest the studio with the acquired rights. In the theatrical context, reversions may come up if a very aggressive studio in a highly competitive bidding situation agrees to purchase the rights outright, rather than pay for a mere option. In addition, where a rightsholder has great leverage, the studio may agree that sequel or remake rights revert if a certain number of years (typically five to ten) pass following the release of the first produced film without a sequel, prequel, or remake being produced. Some observers have attributed Columbia Pictures’ repeated and narrowly spaced reboots of its *Spider-Man* franchise (in 2012 and again in 2017) to the studio’s need to continue producing new *Spider-Man* films, lest the rights to the character revert to Marvel (which, after selling the *Spider-Man* film and television rights to Columbia, began producing its own superhero movies before selling itself to Disney in 2009 for \$4 billion).

such as a further holdback on the exploitation of reverted rights, or first negotiation and/or first refusal rights to reacquire reverted rights.

B Other Forms of Preexisting Copyrighted Material

As studios have gone in search of inspiration for their writers (and dedicated built-in audiences for their potential series), they have experimented with an increasingly diverse universe of source material as the bases for their projects. When AMC's *The Walking Dead* premiered in 2010, it was considered unconventional for drawing on a long-running independent comic book series by Robert Kirkman. In the years since, Disney's Marvel Studios and Warner Bros.' DC Studios have together elevated comic books to the dominant form of "underlying intellectual property" for filmed entertainment⁴²—first for feature films, but more recently for streaming series as well.⁴³ "Independent comics" have similarly thrived as source material for television series, from costly one-and-done efforts like Amazon's *Paper Girls* (2022), to steady multi-season performers like AMC's *Preacher* (2016–19) and Netflix's *The Umbrella Academy* (2019–present) and *The Sandman* (2022–present), to bona fide megahits like Amazon's *The Boys* (2019–present) and its spinoffs. Podcasts have had their own renaissance as well, spawning numerous streaming series based on soapy true crime podcasts like Lifetime's *Dirty John* (2018–20) and Peacock's *Dr. Death* (2021–23), narrative nonfiction podcasts about major newsmakers like Apple TV+'s *WeCrashed* (2022) and Hulu's *The Dropout* (2022), and scripted narrative podcasts like Amazon's *Homecoming* (2018–20). Classic films have become a favorite of studios that have substantial film libraries in the corporate family.⁴⁴ And the next major frontier in IP appears to be video games, with Netflix's *Arcane* (2021) and HBO's *The Last of Us* (2023) having finally broken the industry-wide drought on high-quality

42 That said, as rightsholders, they have not directly benefitted from the hot market for such rights, because Marvel and DC are wholly owned by their respective studio parents, which (for internal purposes) can exploit the companies' intellectual property freely (with the comic brands' dedicated studio units).

43 Between 2013 and 2023, Marvel alone—directly or via partner studios—generated a whopping twenty-one original series based on its comic book properties, with forty produced seasons among them, across ABC (three series with ten seasons among them), Hulu (two series with four seasons between them), Netflix (six series with thirteen seasons among them), and Disney+ (nine series with eleven seasons among them). That figure, of course, excludes the dozens of feature films released by Marvel over the same period, as well as the several additional series that have been announced and are, as of this writing, in various stages of development, production, and post-production.

44 Including titles based on underlying literary or third-party film properties, Paramount Television Studios alone has produced (as of this writing) *American Gigolo* (Showtime, 2022), *Boomerang* (BET, 2019–20), *Catch-22* (Hulu, 2019), *Grease: Rise of the Pink Ladies* (Paramount+, 2023), *Fatal Attraction* (Paramount+, 2023), *The Offer* (Paramount+, 2022, about the making of *The Godfather*), *The Spiderwick Chronicles* (Disney+ to Roku, 2024), and *Time Bandits* (Apple TV+, expected 2024).

video game adaptations. A highly anticipated adaptation of *Fallout* was a critical and commercial success for Amazon in April 2024, and several other major titles like *God of War* and *Mass Effect* are in development as of this writing.⁴⁵

In general, these deals follow the basic template of underlying rights deals for books and articles (although underlying material with minimal narrative content, or which is subject to very thin intellectual property protection, will tend toward the less lucrative end of the pricing spectrum). To the extent the material is also autobiographical or otherwise non-fiction in nature, the deal would also need to be structured and drafted to include “life rights”-style waivers (or commitments to help secure them from critical third parties). To the extent the material’s title (which the studio may wish to use in connection with its own series) is also subject to trademark protection, the deal would need to account for these rights.⁴⁶ In general, however, this is a matter of careful thought and drafting, and these rights extensions are meant to anticipate potential legal issues without necessarily requiring any further compensation to the rightsholder.

In general, just as it is customary for the author of a book or article to retain the right to publish the original work and to write “author-written sequels” (and other subsequent literary works), these agreements typically grant rightsholders of all types significant latitude to continue to exploit their existing works and engage in their existing businesses, whatever they are. So, for example, however aggressive a studio might usually be about securing comic book or podcast rights in its option/purchase agreements for literary works, it typically will not seek such rights where the underlying property is itself a comic book or podcast. Similarly, an option/purchase agreement for a video game property would reserve to the rightsholder the right to make sequel/prequel/spinoff games (although, like author-written sequels in literary option/purchase agreements, those sequel/prequel/spinoff games might then be subject to studio FN/FR, or pre-negotiated purchase rights for equivalent rights).⁴⁷

45 Notably, *Arcane* was produced directly—at huge expense and on spec (i.e., without a license agreement with a commissioning network in place)—by *League of Legends* studio and publisher Riot Games, which licensed the complete series (but not production rights) to Netflix.

46 Titles of books and articles are not subject to trademark protection, unless they have already given rise to a merchandising and consumer products program or have already blossomed into an ongoing series.

47 The parties may negotiate around the use of series-specific elements in new productions of the same type being acquired in the deal. For example, a video game developer would not (by default) have the right to use unique creative elements from the studio’s produced series in its own games. Instead, the use of series-specific elements in video games is presumptively frozen, though the parties may negotiate terms by which the developer may work on new series-related games.

For major non-literary properties like comic books and video games—which, in addition to huge and engaged audiences, may also have significant preexisting merchandising or other ancillary businesses—particular attention should be paid to parsing out licensing and merchandising rights and the “classic” vs. “series” merchandise distinction. For instance, Robert Kirkman—the author of *The Walking Dead* comic book series on which the AMC series of the same name is based—had already sold licensed *Walking Dead* t-shirts, toys, and other merchandise directly to fans prior to making his deal for the TV rights and was able to retain those rights in his deal with AMC. *The Walking Dead* comics use a different logo than the TV series, and the characters, as drawn by Kirkman, are visually distinct from the real-life likenesses of the actors who portrayed them on TV. Kirkman has registered numerous trademarks and extensively licensed such “classic” *Walking Dead* merchandise across a variety of product categories, and Kirkman’s *Walking Dead* merchandise lives alongside similar *Walking Dead* merchandise licensed by AMC, whose “series merchandise” uses show-specific assets such as the TV series logo and actors’ likenesses. Kirkman’s revenue from those reserved merchandising rights have no doubt been competitive with (if not exceeded) his direct payments from the AMC series. Subsequent licensors of such rights have tended to be much more conservative about securing exclusive merchandising rights, or at least studio rights of consultation/coordination and/or financial participation with respect to rightsholder-reserved “classic” merchandising rights.

If the underlying material continues to exist and grow outside of the television series (e.g., an ongoing serialized comic book, podcast, web series, or social media feed), a well-structured deal will also address whether the studio also acquires rights to subsequently created material (and whether any additional compensation is due in connection with the studio’s use of such subsequently created material); whether the rightsholder has any right to use studio-owned or created intellectual property in its own series; potential limitations on the rightsholder’s right to continue its project if a television series is produced (particularly in the case of web series or other audiovisual materials); and ongoing coordination efforts between the rightsholder and studio to maximize value and avoid interference in the marketplace.

C Life Rights Agreements

A “life rights agreement” is not, strictly speaking, a “grant of rights,” but rather, a waiver of claims that may otherwise be brought by an individual who is depicted without their consent in a television series.⁴⁸ The overall structure of

48 See Chapter 4, Section C (pg. 164), which delves more deeply into the question of what “life rights” are and why a studio would need to acquire them.

such an agreement is nevertheless generally identical to that of an option/purchase agreement for rights in a book, article, or other published work, although these deals tend toward the lower end of the economic range described in Section A. When life rights are granted in connection with a concurrent deal for a non-fiction book, article, or podcast, they are typically subject to a separate agreement. When there is common ownership of the literary and life rights, however, rights deals are often negotiated in aggregate and then allocated to life and literary rights, rather than treating the two as independent negotiations.

The buyer of “life rights” generally demands that the rights and waivers it receives under the deal are granted exclusively (to prevent any competing “authorized” projects about the same individual), and that the subject cooperates (again, exclusively) with the buyer going forward (for example, by providing access to personal notes and memorabilia, or assisting in obtaining releases from friends and family members). Specific negotiation may take place concerning the scope of the rights granted (e.g., for a television series only vs. for other entertainment products such as films and stage plays, carve-outs for news or documentary programming, etc.); limitations on the portions of an individual’s life that are subject to the rights grant/claim waiver (e.g., limiting the grant to a certain time period in the individual’s life); specific objective restrictions on how the individual may be portrayed (e.g., prohibiting the individual from being portrayed as committing a crime or engaging in an extramarital affair); and rules governing whether the real names of the subject (or the subject’s family members) may be used in the actual series. As biographical documentary series and based-on-a-true-story scripted series have both exploded in popularity in streaming, studios and platforms have increasingly prioritized securing both scripted and documentary rights to stories whenever possible.⁴⁹

D Format Rights Agreements

Another rich source of television inspiration is, simply, television: formats of television series from foreign countries. The term “format” refers generally to the overall concept and branding of a copyrighted television program, independent of the specific scripts and shot episodes of the series itself.⁵⁰ Unscripted

49 The market has occasionally embraced pairs of scripted and documentary programs about the same subject matter released in rapid succession (e.g., FX’s *The People vs. OJ Simpson* and ESPN’s *OJ: Made in America*, or Paramount Network’s *Waco* and A&E’s *Waco: Madman or Messiah*).

50 The level of copyright protection for series formats (which do not include expressive elements such as specific dialogue and individual storylines) is debatable in light of legal concepts like the idea/expression distinction and scenes a faire doctrine. See Chapter 4, Section A (pg. 148). Trade-mark law would at best prohibit the recycling of the name of a television series, but not the substance of its format. See Chapter 4, Section B (pg. 161). The robust market for television formats seems to

series formats, such as singing competitions *American Idol* and *The Voice*, have long been exported across national boundaries and adapted into local versions. In more recent years, scripted series have become subject to the same process of international exportation, with general story, setting, and characterization (but not necessarily specific scripts, dialogue, and filmed production assets) being packaged and adapted across territories. Even this book's perennial example, Netflix's *House of Cards*, was based on a preexisting BBC series of the same name.

Format rights agreements also largely track the structure and economic parameters of option/purchase agreements for print publications—option fees and periods, purchase price, royalties, bonuses, backend, subsequent productions, reversion. However, such agreements often require negotiation around a few more particular aspects of the granted and reserved rights.

A format owner may wish to subdivide territorial rights, to enter into numerous deals for local productions based on the original series across a variety of countries. A U.S. buyer probably only needs to obtain English-language U.S. adaptation rights but must take care to preserve its right to distribute its U.S. version worldwide. Format licensees in the U.S. also typically seek restrictions on the distribution of the original series or other versions in the U.S., as American networks generally will want to limit the availability of other versions, particularly other English-language versions, of a format they have taken to market locally. Now that most buyers are (or are closely aligned with) streamers with global reach and theoretically unlimited inventory, they generally look to acquire adaptation rights in most or all available languages and territories, and to license exhibition rights for the original local series (to the extent desired rights are available). Format licensees also generally seek the right, to the greatest extent possible, to use other specific elements of the original series (such as music or specific episodic stories or teleplays) in their local version.

In addition, because international format rights are generally held by the individual producers of those foreign formats,⁵¹ and because these individuals are usually experienced television professionals, format rights deals are almost always accompanied by substantial non-writing executive producer deals for the individuals (or principals of the company) who control the format.

represent an unspoken détente among studios around the world. In other words, each studio subscribes to a worldwide industry custom and practice of paying for format licenses in part to ensure that other studios accord them the same courtesy.

51 This is at odds with norms in the United States, where studios (rather than individual producers) generally own and control the format rights for the series they produce.

E Quick Reference Guide

TABLE 5.1 Underlying Rights Agreements

<i>Deal Term</i>	<i>Main Issues/Ranges</i>	<i>Other Issues</i>
1. Option Fees and Terms	• Initial option periods 12–18 months • Initial option fees \$2.5K–\$25K (or 10% of purchase price) without competition, or higher in percentage or amount (well into six figures) in competitive situations • Options to extend option fee for additional fees	• Initial option fees usually applicable vs. purchase price • Option extension fees usually non-applicable • Possible extension conditions (e.g., “active development,” setup, etc.)
2. Purchase Price	• Usually \$30K–\$300K • At high levels/in competitive situations, frequently \$1–\$2M, even higher for mega-properties or in extremely competitive situations	• Usually paid on pilot production (or first episode if no pilot); may be deferred in part to series • May have separate prices for limited series vs. ongoing series • May have separately stated theatrical feature purchase price (2%–3% of budget, with floor and ceiling)
3. Royalties	• Usually \$1.5K–\$10K per episode (excluding pilot), but may be higher	• Possible rerun royalties • Possible tiering based on network/budget level
4. Backend	• 1.5%–5% of MAGR • Most commonly 2.5% of MAGR	• Miscellaneous backend definition issues (see Chapter 9)
5. Bonuses	• Usually \$10K–\$50K (one-time) for series pickup • Most commonly \$25K	• May be prorated based on the number of episodes produced • Possible set-up bonuses • Possible subsequent season pickup bonuses
6. Granted Rights	• Usually “all rights,” other than reserved rights • Must address “all television [and motion picture] rights,” including allied/ancillary or subsidiary rights • For life rights, must obtain necessary waivers of claims • For format rights, must address language and territory restrictions	• May need to address scope of waivers in “life rights” agreements • For format rights, may need to address right to use specific elements of preexisting series • For format rights, may need to address exploitation of preexisting series in the U.S.

(Continued)

TABLE 5.1 (Continued)

<i>Deal Term</i>	<i>Main Issues/Ranges</i>	<i>Other Issues</i>
7. Reserved and Frozen Rights	• Standard to reserve publication rights (including author-written sequels), or corresponding rights for equivalent existing medium or business for non-literary properties (e.g., podcasts, video games, etc.) • Also normal to reserve radio rights, live recital rights, and live TV rights • Comic books and graphic novels? • Merchandising? • Stage rights? • Theatrical feature film rights?	• May need to address grant of equivalent rights in author-written sequels (or exclusivity of elements) • Freezing rights may provide a compromise between granting and reserving • Possible to distinguish between “classic merchandise” and “series merchandise” • Separate pot royalties for merchandise? • Negotiated holdbacks on exploitation of reserved rights other than publishing (e.g., 5/7 holdback)
8. Consulting Services	• Usually \$1.5K–\$15K per episode • Locks between 1 year and life	• At higher levels, may be styled as Producer or Executive Producer deal
9. Credit	• Customary source credit (“based on”) • “Executive Consultant” or “Consulting Producer” credit for services	• May prefer “inspired by” for true-life stories • Services credit may be at higher levels (“Producer” or “Executive Producer”)
10. Subsequent Productions	• 50%–100% for generic spinoffs/sequels • 33%–100% for remakes • 25%–50% for planted spinoffs	• Typically paid based on royalties and backend only • May apply to purchase prices, bonuses, royalties, etc. as well
11. Reversion	• Rights usually revert 1–3 years after last produced pilot/episode • Reversion window may extend based on number of episodes/seasons produced • Rights may vest permanently if a specified number of episodes/seasons are produced	• Must determine whether episode counts or season counts control reversion terms • Reversion may be subject to liens, royalties (\$2.5K–\$5K), and passive backend (2.5%–5% MAGR) • Possible post-reversion holdbacks and FN/FR

6

WRITING AND NON-WRITING PRODUCING DEALS

A Creator/Writer-Producer Agreements

Because television is a writer-driven medium, the writer-producer agreement is often the most significant deal in the development process. At the development/pilot stage, there is seldom any such thing as a writing deal by itself—nearly every agreement for the writing or acquisition of a pilot script will include negotiated terms for the writer’s ongoing participation in the production of the series as a producer (usually an “Executive Producer,”¹ the highest-level credit in television).² An experienced creator³ will be expected to serve as the “showrunner” of the series, the lead creative manager of the production

1 “Executive Producer” is a potentially ambiguous term, in that it is both a specific form of screen credit and a generic term for a top-level producer (who may be rendering primarily writing, directing, or other non-writing creative services). In general, this text will try to use the capitalized “Executive Producer” when referring to the screen credit, and the uncapitalized “executive producer” when using the phrase as a noun to describe a high-level producer. Similarly, it will use the capitalized “Producer” when referring to the screen credit, and the uncapitalized “producer” as a generic noun that can describe any writing or non-writing producer on a series, up to and including the “Executive Producer” level. However, when referring to writers and writer/producers of any other rank/title, from Staff Writer to Co-Executive Producer, this text will use the title case to identify both the role and the credit.

2 In theatrical feature films, the equivalent senior-most credit is simply “Producer.”

3 This book consistently refers to a “writer,” “creator,” “producer,” or comparable individual in the singular. In reality, while many writers work as individuals, many others choose to regularly partner with a co-writer as a “bona fide writing team.” In addition, pairs of writers who do not customarily work together may still come together (either on their own accord, or at the suggestion of a producer or studio) to co-write/co-create a pilot/series, an arrangement informally known as an “arranged marriage.” Relevant issues for teams (both bona fide and arranged marriages) are discussed in Section A.i.xv.

process.⁴ This job requires a complete television production skill set consisting not only of the ability to write great scripts, but also to generate story arcs, lead large teams of writers and other production personnel, understand and manage budgets and schedules, and otherwise coordinate with studio and network executives. Less-experienced writers will still usually be engaged as senior-level producers and will enjoy a meaningful and central creative role in the series going forward, but will be paired with (and in at least some respects subordinate to)⁵ more experienced producers who are brought on to run the show, if produced.⁶

Regardless of the experience level of the writer/creator, the critical factor in these deals is creation credit. Writing credit for the pilot teleplay generally determines “creation” credit for the series, and “creation” credit, in turn, dramatically impacts nearly all of the writer/producer’s entitlements, from locks to royalties to backend to attachments to derivative productions.⁷ Ultimately, in the television world, writers are much more likely than any other creative contributors to be viewed as the creators and auteurs of their series (even if their lack of experience requires that they eventually be paired with a more experienced writer/producer who will “run” the show on a day-to-day basis). And it is that status as creator, as reflected in the formal credits for the series, that serves as the lynchpin to nearly all other components of the writer’s deal.

i Writing and Spec Acquisition

When a writer “sells” a show to a studio, they may be approaching the studio with a verbalized idea for a new series (a “pitch”), or with a previously written pilot script embodying that idea (a “spec script”). Less experienced writers must generally write out their ideas, independently and without initial compensation, into a “spec script” in order to attract attention and interest; more experienced writers seldom officially put pen to paper until they have a firm deal in place based on their pitch, but usually will have produced substantial written material

4 Not all executive producers are showrunners, but all showrunners are executive producers.

5 Often, these originating but initially subordinate writers will find their producer status elevated in later seasons, as showrunners move on to other projects and other key creative personnel for the series move up the producing ladder. See Section A.x.

6 Such experienced writer/producers often join projects at an early developmental stage and help supervise the pilot writing process. See Section C.

7 Television writers are much less likely than their counterparts in the feature film world to see their work rewritten by another writer. Compared to feature films, television series are more frequently the product of a single writer/creator. If the original writer cannot figure out how to develop the project into something that the studio and network want to produce and exhibit, the parties are more likely to scrap the project altogether and start from scratch than to bring in a new writer to rework the original writer’s efforts.

to serve as the basis for the pitch, which may be shared in whole or in part with executives depending on the circumstances and the writer's preferences.⁸

A "pitch" may be purchased on one of three basic structures—if/come, firm, or blind. An "if/come" deal relates to a specific idea that the writer has pitched to a studio. The studio negotiates writing and producing terms for the writer to develop the idea, but the entire agreement (including all financial commitments) is contingent on the studio, in turn, selling that idea to a third-party network licensee (which will contribute to the development costs of the project).⁹ A "firm" deal, which is usually reserved for higher-level writers or competitive deals, involves a commitment to pay the writer to write the project whether a network deal can be put into place or not. A "blind" deal is sometimes used synonymously with a firm deal, but more precisely refers to a firm deal that is not tied to a specific predetermined show idea; it may commit the studio to pay for a script from the writer but require the writer to pitch multiple concepts before the studio approves one of them to proceed to writing. Sometimes, these deal structures can be combined; for instance, a studio may make an "if/come" deal with a writer for a specific concept, with the understanding that if that idea does not sell to a network and the if/come deal is therefore never triggered, the deal automatically converts to a blind script deal.¹⁰

8 See Chapter 3, Section A.i (pg. 102).

9 If/come deals have remained popular in broadcast television, but otherwise have declined in prominence over the last several years, especially as studios increasingly took on the cost and risk of developing scripts independently to maintain their relevance and competitiveness in the "Peak TV" environment. In the cost-conscious post-"Peak" era, however, they seem to be coming back into style, as a way for studios to take additional "swings" at potential sales without depleting their increasingly constrained development budgets on highly speculative projects.

10 In addition, to win heavy competitions for hot pitches, studios sometimes add a blind script deal to their offer for the desired project, as a means of adding more value to the overall transaction without making an exorbitantly expensive deal for either project individually that would blow the studio's precedents.

The term "precedent" refers to the universe of financial and non-financial deal terms that a studio has ever agreed to in its deals, which is often rigorously monitored and enforced as a way of resisting constant pressure from talent representatives for ever-improving deal terms. A basic practice of talent representation is to exploit moments of leverage for powerful clients and/or in hotly competitive situations to achieve major new breakthroughs in financial and non-financial deal terms with studios. In addition, talent negotiators who favor positional bargaining tactics frequently make extreme financial and non-financial demands, seeking to improve their outcomes by anchoring negotiations to their arguably indefensible opening counters. See Chapter 13, Section B (pg. 503).

When a studio agrees to an unprecedentedly (or at least extremely unusually) high dollar amount, or an unprecedentedly/unusually favorable non-economic deal term, it will often designate such point as being agreed on a non-precedential and/or non-citable and/or confidential basis. Sometimes, such terms are excluded altogether from the long-form agreement documenting the deal and are reflected only in a separately executed "confidential side-letter." In theory, the negotiators are to tell no one of the studio's agreement to such terms and are not even to reference their existence in future negotiations for their own other clients. In practice, the knowledge that a studio has actually agreed to something it nominally claims never to agree to cannot be unlearned, and there is little a studio negotiator can say in response to a talent representative's citation as precedent of non-citable,

Where a writer walks in with a pre-written spec script, the deal is based on an option/purchase structure (but, again, with a negotiated producing deal as part of the agreement). A writer may grant a free “if/come” option to the studio to immediately shop the spec script to network buyers; a network’s commitment to develop the project could then trigger either a paid option fee (and specified option window), or the payment of the whole purchase price. Alternatively, particularly if the studio does not intend to pitch the spec script to networks in its current form, the studio may immediately pay for an option on the script (which, again, usually costs about 10% of the purchase price, and in any event must be no less than 10% of the applicable WGA scale minimum price for the pilot script). Again, the parties may negotiate as to whether payment of the purchase price is triggered merely by a network’s agreement to develop the project, or only when the studio elects to purchase the rights (or, at latest, upon commencement of production of a pilot based upon the script). Larger studios are apt to pay the purchase price based on earlier triggers, in order to attract writers with more immediate paydays and maintain tighter control of rights; smaller studios may seek to defer large payment obligations as long as possible

non-precedential deal terms than a more polished version of “nuh uh, doesn’t count, says so right there.”

At the same time, talent and their representatives frequently want to know that a studio is offering them “the best we’ve ever done for anybody,” especially when what the studio is offering is in any way less favorable than something the talent previously received in another deal or contract with another studio. This instinct simultaneously pulls deals upward, because the talent or negotiator’s satisfaction is based on relative rather than absolute performance (and therefore anchors them to high performers), and pulls them downward, because a studio can (at least in theory/in the aggregate) try to calibrate for the least favorable terms it can get everyone to agree to so long as they are satisfied that no one has gotten better. For critical-but-controversial policies, the practical reality may be that the studio has to win the point every time to win it anytime. That is why precedent is so valuable to studios.

Once a studio has agreed to a term once (even “on a confidential, non-citable, non-precedential basis”), the same representatives who extracted that concession then re-introduce it into future negotiations, looking to expand its adoption to less and less competitive dealmaking situations, and to clients of lower and lower stature. As word spreads throughout the talent representation community of the studio’s willingness to agree to that term, other representatives begin seeking it in their own negotiations, repeating the same process of regularizing its use in deals. Eventually, a concession that was once virtually unimaginable to a studio may become an ordinary component of day-to-day business that only old-timers can remember was ever controversial.

As for blind deals that are tacked onto an ongoing negotiation to preserve the studio’s precedent as it aggressively throws money at an intensely desired pitch, there may sometimes be a tacit understanding between the parties that the studio will only require the writer to render services on the blind script agreement if the pitch that is the focus of the deal does not sell to a network. If the main project sells, the guaranteed compensation under the blind script deal is paid out in whole or in part, and the agreement “settled out” with no services required. In rarer cases, the tacit understanding may be that the studio will not require services on the blind script deal at all and will simply pay out the deal’s guaranteed compensation in full, either in a lump sum or over time.

All of which illustrates that, depending on one’s perspective, precedent-based negotiation is either a marvel of pragmatic dealmaking or a horror of institutionalized insincerity.

(ideally until a major studio or network brings its checkbook to the table), which also allows writers to avoid divesting themselves of ownership of their scripts without a more certain network development opportunity in play.

A script deal typically buys out five writing steps—a story (or outline), first draft, two sets of revisions, and a polish¹¹ (although creative executives and non-writing producers will often informally manage the writing process and, in practice, obtain more interim drafts from writers than are formally reflected in this structure). Where a spec script is acquired, the purchase price typically buys out the initial story and draft reflected in the existing script, and pre-pays for the two sets of revisions and the polish by the writer.

For the 2024–25 contract year (during which this second edition is released), WGA scale minimum for a network primetime, Tier 1 HBSVOD,¹² or Tier 1 HBAVOD¹³ pilot script (story and teleplay) is \$68,096 for a one-hour pilot or \$46,301 for a half-hour pilot.¹⁴ For cable, Tier 2 HBSVOD, and Tier 2 HBAVOD, the applicable scale numbers are \$49,388 for a one-hour pilot, and \$27,171 for a half-hour pilot.¹⁵ As a matter of policy, however, larger studios tend to pay

11 A “polish” is a term of art for a less labor-intensive revision to a screenplay or teleplay, in which changes are made to dialogue, narration, or action, but without altering the basic storyline or inter-relationship of characters in the script.

12 Under the WGA Basic Agreement, high-budget SVOD (“HBSVOD”) is a defined used to determine scale compensation and other minimum terms of employment for original series in streaming with budgets (for the 2023–26 contract term) over \$1,750,000 per pilot/episode for one-hours or \$1,030,000 per pilot/episode for half-hours (let’s call those the “Minimum Budget Thresholds”). Applicable scale minimums vary depending on whether a project is produced for an SVOD platform with 20 million or more “domestic” (i.e., U.S. and Canada) subscribers (let’s call these the “Major SVODs,” a category that includes all eight major U.S. SVOD services), versus for an SVOD platform with fewer than 20 million domestic subscribers (or “Minor SVODs,” e.g., AMC+ and BET+).

For the 2023–26 contract term, “Tier 1 HBSVOD” minimums—which are equivalent to those for broadcast network series—apply for projects produced for Major SVODs with budgets over \$3,800,000 per episode (let’s call these “High-Budget”) for one-hours or \$2,100,000 per episode for half-hours. “Tier 2 HBSVOD” minimums—which are equivalent to those for cable series—apply for programs produced for Major SVODs with budgets between \$1,750,000 and \$3,800,000 per episode for one-hours or between \$1,030,000 and \$2,100,000 per episode for half-hours (let’s call these “Mid-Budget”), and for all original programs produced for Minor SVODs (so long as their budgets exceed the Minimum Budget Thresholds). No minimums apply, and rates are freely negotiable for scripted streaming series under the Minimum Budget Thresholds (which are rarely seen on Major SVODs).

13 “HBAVOD” means “High-Budget AVOD,” a category created in the 2023 WGA Basic Agreement to newly extend MBA minimums to high-budget original series for FAST channels/services like Roku and Freevee. HBAVOD minimums apply as they do for HBSVOD programs for Major SVODs—equivalent to broadcast network minimums for High-Budget programs (“Tier 1 HBAVOD”), equivalent to cable minimums for all Mid-Budget programs (“Tier 2 HBAVOD”), and no minimums/freely negotiated if under the Minimum Budget Thresholds.

14 See Section E for a streamlined table of WGA minimums, including projected minimums for the 2025–26 contract year (with certain stated caveats and disclaimers).

15 These pilot minimums are each 150% of the corresponding scale minimum payments for non-pilot scripts. These minimums, as well as all other WGA scale minimum amounts, have historically increased 3% annually (often with 0.5% of either or both annual increases for each contract term

at least the “upset price” for a pilot script. The “upset price” is a WGA-determined minimum—currently \$85,213 for one-hour pilot scripts and \$57,948 for half-hours—which allows the studio to buy out certain “separated rights” (including stage, theatrical, publication, and merchandising rights), which are otherwise automatically reserved to the writer/creator of an original television series under the WGA Basic Agreement.¹⁶

The actual writing fee/purchase price negotiated may vary wildly depending on the “quotes”¹⁷ (i.e., past deals) of the writer; the contemplated budget of the project; the nature of the contemplated distribution platform; the policies of the studios and networks involved; and applicable WGA scale. For major broadcast,¹⁸ cable, HBSVOD, and HBAVOD productions, pilot writing fees/script purchase prices tend to range between approximately \$75,000 and \$300,000, although prolific creators and feature writers accustomed to drawing

diverted to enhance the funding of the union’s pension or health funds. Due to high rates of inflation following the Covid-19 pandemic, the 2023 Basic Agreement provided for annual increases of 5% (effective immediately), 4%, and 3.5% (still subject to such optional 0.5% diversions for the second and third contract years).

16 Although the WGA Basic Agreement technically requires a “separate negotiation” in a “separate document” and for a “separate consideration” for the studio to acquire such separated rights, studios generally manage this via a small separate form included with the writer agreement and a nominal separate fee (e.g., \$100), both of which are effectively non-negotiable.

17 This text will refer frequently to such quotes as impacting the negotiations for various individuals’ services, and for many years, the industry near universally operated under the “quote system,” in which studios requested an individual’s established terms/rate, or “quote,” as the first step in commencing a deal negotiation, then largely sought to anchor the new deal’s terms as closely to the quote as possible. Talent usually had to point to some major recent achievement or success to win more than incremental improvements on their quotes. In late 2017 and early 2018, however, new ordinances/laws went into effect in New York City and the state of California, respectively, prohibiting employers from inquiring about a candidate’s salary history while negotiating terms of employment. These laws (which applied across all sectors, without specifically targeting the entertainment industry) were intended to close the gender pay gap, as the systematically lower wages earned by female workers across all sectors were frequently justified by the fact that employers typically anchored salary negotiations to candidates’ actual salary histories, thereby making it difficult or impossible for female workers to ever catch up and “close the gap” between them and their male counterparts. Under these laws, all employers (including studios negotiating deals with writers, producers, actors, and other service providers) cannot ask about an individual’s past fees and cannot justify wage disparity between the sexes solely based on earning history, although individuals remain free to volunteer information about their salary histories in the course of negotiations. By essentially illegalizing a request for an individual’s “quote,” these laws dramatically reshaped negotiation dynamics in the television industry (and indeed, throughout the entertainment industry). For the most part, however, studios continue to price out offers on new deals based on comparative estimates against their own existing deals, and talent representatives routinely hint at or outright volunteer information about their clients’ past deals to expedite and simplify negotiations (especially when an initial studio offers fall short of the talent’s own past deals). This book will continue to refer to “quotes” (whether actual/known or hinted/estimated) as relevant factors in deal term negotiations.

18 This chapter will frequently use the word “broadcast” as shorthand to refer to a series is that produced for primetime exhibition on one of the four major broadcast networks (ABC, CBS, Fox, or NBC).

larger writing fees for theatrical projects may command \$300,000–\$750,000 (or even higher in the rarest cases). Independent studios may negotiate separate writing fees or purchase prices to apply depending on whether the project sells to a broadcast network (or other high-budget platform) or a cable network. Where a deal is based on WGA scale minimum fees, the parties may sometimes negotiate to add a 10% premium on applicable WGA scale amounts to cover the agency commissions payable by the writer on their fees.

ii Optional Additional Development Steps

Historically, initial agreements for creators tended to cover only the standard five steps of writing for a pilot script. If a studio subsequently decided to commission additional rewrites or polishes, a series format or bible, or one or more backup scripts to support the pitching and sale of the project to networks,¹⁹ or if a network wanted to commission such additional material to review before deciding whether to order a series to production, these would be negotiated on an ad hoc basis when requested. Usually, the negotiated rate was applicable WGA scale (or perhaps scale + 10%), though higher-level creators could sometimes negotiate for overscale compensation for such additional writing steps.

As streaming networks have increasingly relied on such additional materials (beyond the pilot script alone) to make their ordering decisions, however, many studios and platforms have begun proactively negotiating options for such additional steps or materials as part of the creator's initial deal. Writers and their representatives would prefer to avoid such pre-negotiated steps, in hopes that they could command better compensation or otherwise exert more influence over the development process if the studio/network is forced to negotiate with them later. In practice, however, those platforms that consistently rely on such additional materials as part of their development process typically treat them as a non-negotiable component of their agreements with all but the highest-level writers/creators (who may be better able to negotiate for overscale compensation for these steps).

Similarly, when mini-rooms were first introduced (and for the first few years thereafter), creator agreements were not initially negotiated to account for them.²⁰ When a network commissioned a mini-room, the studio would need to engage in a separate negotiation with the creator for the financial and other terms of their work in the mini-room. In theory, then, a creator could refuse to negotiate, or make such large demands that a deal could not be made; in practice, however, this was rare, given the networks' substantial leverage and

19 These additional WGA-covered development materials are discussed in greater detail in Chapter 3, Section A.ii (pg. 103). Of particular note, the WGA scale minimum compensation for backup scripts—i.e., episodic scripts commissioned by a studio or network prior to series greenlight—is 115% of the corresponding scale minimums for episodes assigned after series greenlight.

20 See Chapter 3, Section A.iii (pg. 109).

control over the development/ordering process, and the natural motivation of creators to play ball as needed to keep their development projects alive and moving toward an order. As mini-rooms have grown more ubiquitous, some studios and platforms have begun specifically negotiating for them as part the original writing/producing deals for their creators.

iii Producing Fees

Producing fees for writer/producers who create a series are a function of several factors, including the quotes of the writer; the contemplated budget of the project; the nature of the contemplated distribution platform; the policies of the studios and networks involved; and whether the writer/producer is expected to serve as the showrunner. It is generally understood that broadcast networks, premium cable networks, and HBSVOD platforms support higher overall budgets—and therefore higher fees to executive producers. When the eventual platform is unknown at the time a project is initially put into development, the deal may provide for tiered executive producer fees depending on the identity of the network buyers. In addition, many studios require that total ingoing executive producer fees on any given project be capped; consequently, a writer/producer who is working as part of a large team of collaborating producers may be expected to work for lower fees than if that same writer/producer was involved in a package with fewer high-level collaborators.

Executive producer fees for writer/creators generally range from \$25,000 to \$75,000 per episode, depending on the various factors set forth earlier—though again, there are outliers on either end. The applicable fees for smaller digital studios and lower budget and/or short-form digital productions are usually significantly lower. On the other hand, experienced creator-showrunners on high-budget projects can see fees north of \$100,000 per episode. Pilot fees may be identical to the negotiated episodic fee for the first season, or slightly elevated. Cumulative annual bumps of 5% in episodic fees are typical, but variations abound; some studios insist on lower (e.g., 4% bumps), while others may be willing to offer larger, round increases between the first and second season's episodic rates (e.g., an increase of \$2,500 or \$5,000 per episode), particularly where the executive producer is perceived to have allowed some form of “discount” on the initial fee.

Driven by the years-long trend toward longer and longer writing and production periods, some studios now favor paying creators and showrunners for their series producing services on a weekly basis, rather than with episodic fees.²¹

21 In addition, many writers' representatives seek to negotiate for a “best-of-both-worlds” structure, with high episodic fees *and* a “floor” weekly compensation rate to limit the dilution of those episodic fees over long services periods. When negotiated as a protective floor for episodically structured compensation, this is often referred to as “artificial span protection.” See Section A.v.

As of this writing, most studios try to keep such weekly fees at around \$15,000 per week, with \$17,500 per week acting as a typical ceiling for these deals. First-time showrunners who are being entrusted with an opportunity to prove themselves may be held to a lower fee, such as \$12,500 per week. In rare cases, these weekly producing fees can reach up to \$25,000 per week, a level usually reserved for the highest-level showrunners taking over expensive, established, and successful series (especially if those series are somehow in creative or production distress and need a “rescuer” writer/producer to swoop in quickly to get them back on track).

iv Years/Locks

Most deals for producing services by a writer/creator cover a pilot and two seasons of production (although inexperienced, lower-level writers have sometimes been forced to accept three-year deals). Because of the central role that writers (as creators, showrunners, or both) play in the creative process, writers generally prefer such short-term deals for at least two reasons: first, because of the expectation that, in success, they will be able to negotiate a more favorable deal to return to a show in its third season (or thereafter); and second, to allow themselves greater freedom/opportunity to move on to their next creative endeavor at that time.

While a two-year deal may often be presumed for a writer/producer creator, the “lock” under the deal may be more heavily negotiated. In television, the presumption in every deal is that a studio never actually has to *use* the services of an individual it has engaged, but it may have to pay for those services even if they are unused. This is the concept of “pay-or-play”—a guarantee that an artist will be paid some specified amount, whether the artist’s services are actually required by the hiring party or not. “Pay-or-play” protects artists by providing for some amount of their fees to be guaranteed, but it also protects studios by preserving the studio’s unfettered right to terminate anyone, at any time, with or without cause, as long as it is willing to deal with the financial consequences (if any) of that decision.

The “lock” under a writer/producer deal refers to the period of time for which the writer/producer’s fees are guaranteed, if the series is actually produced for that long, whether or not the writer’s services are actually used. A “one-year lock” would guarantee the payment of episodic fees for the pilot and all episodes produced for the first season of the series. A “two-year lock” would guarantee the payment of episodic fees for the pilot and all episodes produced for the first two seasons of the series. A “modified two-year lock,” also known as a “two-year Warner lock,” is effectively an initial one-year lock, which automatically expands to cover the second season of the series if the studio fails to exercise its “pay-or-play” right (i.e., termination without cause) prior to the

completion of the individual's services on the first season.²² In any event, the guarantee provided by the "lock" only applies to the extent that series episodes are actually produced; a "two-year lock" would not entitle a writer to two years' worth of episodic fees if only one season of the series is ever actually produced.

Most deals for writer/producers who function as series creators provide for two-year Warner locks. Higher-level deals for more experienced writers may provide for a firm two-year lock. At the very highest levels, a creator with major bargaining power may negotiate for a "life lock"—i.e., to be guaranteed the payment of the artist's episodic fees for all episodes produced for the entire run of the series—with an option (held by the creator) to "drop down" to a lower level of services at some point during the term of the deal.²³ This provides the writer/producer with a maximum amount of protection and flexibility—they cannot be divested of their fees for the life of the series without cause, but they can still force a subsequent renegotiation (in their own favor) by threatening to exercise the "drop down" right and walk away from any obligation to continue to work on the show in a full-time showrunning capacity.

Locks for writer/producers are generally credit-contingent. A writer/producer's lock for pilot and/or series services is usually contingent on the individual receiving sole "created by" credit on the series according to the WGA's credit determination process (although, if pilot/first episode decisions are being made prior to WGA credit determination, as is typical for pilots and for many first episodes without pilot steps, the applicable condition may be stated as the writer having been the sole writer of the pilot script, as produced, perhaps excluding production polishes).²⁴ If the individual does not receive sole "created by" credit (or, pre-WGA credit determination, was not the sole pilot writer), their services are usually at the studio's option.²⁵ However, if writers are assigned to work together, or for writers who are brought in to rewrite a preexisting script, it is typically agreed that shared "created by" with concurrent or preexisting writer(s) will suffice to satisfy such a condition.

22 To put it another way, if a studio fires a writer under a "two-year Warner lock" any time prior to the completion of the first season, it must only pay the writer their full applicable first season fees, but not any fees for the next season. However, if a studio fires a writer under a "two-year Warner lock" any time after the completion of the first season, the studio will still have to pay the writer their full applicable second season fees as well.

23 See Section A.vi.

24 See Section A.vi.

25 If a studio tentatively determines that a writer will not be entitled to sole "created by" credit and does not exercise its option to engage the writer for pilot/series services, but the writer does end up with sole "created by" credit following final WGA credit determination, the creator's lock is restored, and the studio must pay the writer the applicable compensation for the pilot or any other production steps for which the writer had previously not been engaged or paid.

v *Services and Exclusivity*

When rendering services as executive producers, writer/producers generally work on a full-time basis on a single series and provide services to their studio on an exclusive basis during production periods of that series. In addition, studios often require writer/producers to agree to render services exclusively in the medium of television for the life of the agreement, even outside of active series writing and production periods. However, there are several nuances and exceptions to these general presumptions.

Writers at all levels often want the right to continue to develop projects for third parties and/or to write for feature films, even while one of their series is ongoing. This is generally agreed as a matter of course for hiatus periods (i.e., when the individual's ongoing series is not in active production), and the right to develop (but not produce) for third parties is often permitted (on a part-time, "second position," non-interfering basis) even during production periods (though sometimes such third-party development is not allowed during production of the critical first season of a series).

Extremely experienced and prolific writer/producers may insist on the right to render even production services on more than one series at the same time (often with the benefit of a strong "number two" writer/producer working beneath them).²⁶ Typically, if this is agreed, it is in a context where all of those series are being produced by a single studio, which can coordinate closely with the writer/producer to manage their schedule across various commitments. For instance, during 2013, showrunner Chuck Lorre worked on four different broadcast network comedies—*Two and a Half Men*, *Mike & Molly*, *The Big Bang Theory* (all of which Lorre created), and *Mom* (which was created by another writer)—for studio Warner Bros. Television and network CBS at the same time. Similarly, during 2016, showrunner Shonda Rhimes worked on four broadcast network dramas—*Grey's Anatomy* and *Scandal* (both of which she created), as well as *How to Get Away with Murder* and *The Catch* (both of which were created by other writers)—for ABC Signature and the ABC network at the same time.

All showrunners, and virtually all creators, earn high enough episodic fees to not qualify for span protection under the WGA Basic Agreement.²⁷ In the absence of span protection, the only theoretical limit on the number of weeks that a writer/producer can be required to work for a single season is that the writer's total fees, amortized over their total span of services, may not drop below applicable WGA minimum weekly scale. Representatives for such writer/producers nevertheless regularly seek limitations on the number

²⁶ See Section B.

²⁷ For a writer earning episodic fees who is subject to span protection, each episodic fee buys out no more than 2.4 weeks of services. See Section B.i and Chapter 3, Section A.vi (pg. 116).

of weeks of services that can be required from the writer (after which the studio may continue to engage the writer but owes overage compensation).²⁸ Such “artificial span protection” is not an unusual give at some especially aggressive and “entrepreneurial” studios,²⁹ but is much rarer (or altogether prohibited as a matter of policy) at most larger studios, especially those affiliated with the major legacy companies.

vi Position/Priority and Preexisting Commitments

Because of the large and steep funnel of television development (many development projects, which yield few pilots, which yield even fewer series), successful writers often have multiple projects in development at any given time. These concurrent deals, which may be made with separate studios for projects that are developed at separate networks, require managing the “position” (or “priority”) of the writer’s various commitments.

In general, the television industry subscribes to a presumption of “first in time, first in line”—services on any project are usually subject to any preexisting contractual commitments, and individuals and their representatives have a generally understood obligation to disclose extant preexisting obligations prior to finalizing any new deals (so that their new employer can make an informed decision to proceed with the deal despite such preexisting obligation(s)). If a writer’s higher-position project goes into production, they are usually rendered unavailable to render ongoing services on a lower-position project. If a lower-position project goes into production while a higher-position project is still in development, the studio behind the lower-position project faces a risk that the writer may be forced to walk away in order to work on the higher-position project if it is subsequently ordered to production as well. For this reason, studios will often consider a writer who is subject to a higher-position preexisting commitment to a third party to be effectively unavailable for production services unless that writer obtains a waiver from any higher-position employer(s) of their right to pull that writer away.

If a writer/producer is subject to higher-position preexisting commitments at the time a script deal is entered into, the negotiated script price is usually discounted somewhat (e.g., by around 15%–25% compared to what the writer would command for a first-position deal) to account for the risk of the writer’s

28 For a highly paid showrunner whose services will be required from commencement of writing to completion of principal photography and beyond, the requested limits are generally more generous to the studio than 2.4 weeks per episodic fee (e.g., one consecutive [or partially non-consecutive] year of services based on a minimum number of episodes produced, extended pro rata for additional episodes ordered beyond the minimum).

29 Especially those that will probably eventually take a buy-out of their studio position, assign these deals to the buyer (which will have to honor or renegotiate their terms), and give up any ultimate responsibility for the financing or physical production of the series.

unavailability at the time a pilot or series may be ordered to production. If the writing services themselves are interfered with by a preexisting commitment, the studio usually has the right to “roll” the deal (i.e., to postpone writing by up to twelve months, into the next development season), or to terminate the agreement. If the writer/producer cannot render executive producer services on the pilot due to a prior commitment, series services are usually then at the studio’s option.

Usually, if a preexisting commitment goes away (because the project dies in development without ever being produced), subsequent existing commitments automatically move up in “position” or “priority.” In some instances, however, aggressive representatives with prolific, in-demand clients (or whose clients are accepting substantially lower-than-market script fees) may seek to make “no position” deals (i.e., deals that do not enjoy priority over subsequent development projects until a production is actually ordered), or to otherwise reserve the right to book additional projects in higher priority than the current deal.³⁰ A “second (or lower) position” deal would have superior call on a writer’s services over a “no position” deal, even if entered into after the “no position” deal. A single prolific writer may simultaneously be in an active first-position, an active second-position, and one or more no-position deals.

Finally, higher-level writers who are stacking multiple concurrent development projects may make two-tier deals such that, if the writer/producer is unavailable to render services at a full, “Tier 1” exclusive executive producer level (as described in Section A.iv), they may still be locked to render services (and collect fees) at a less-demanding (and lower-paid) non-exclusive “Tier 2” level of services (though often still with an executive producer credit). In some cases, especially high-level writers may negotiate for the right to “drop down” to Tier 2 services at their own discretion³¹ (and not necessarily due to professional unavailability), a right that the studio may allow to be exercised before either or both series years (if it agrees at all).³²

30 This can result in what is sometimes called a “horse race,” a situation in which multiple projects/studios have equivalent “no position” deals with a single writer, and therefore, the first of the writer’s projects to be ordered to production is the one that secures the exclusive (or at least first-priority) right to the writer’s services for the two-year term of the writer’s deal.

31 Many studios caveat such discretionary drop-downs, opt-outs, and comparable rights with a requirement that they be exercised reasonably and in good faith, and not for the purpose of renegotiating financial or other terms of the agreement.

32 The standard rule is that, once a writer/producer “drops down,” they cannot then “drop back up” to a higher tier of services for the next season (although, if the studio is interested in the writer/producer returning to a higher tier of services, they could always make a new deal to that effect).

vii Consulting

Most writer/producer agreements provide that, at the end of the individual's initial two-year term as an executive producer,³³ the individual is locked for an additional two years to render services as a consultant. This is referred to as a "consulting one-for-one," as in one year of consulting services for each year of executive producer services rendered. This may be abbreviated as "consulting 1:1." Consultant-level services are non-exclusive, only occasionally (if ever) in-person, and typically non-writing. Although the studio may require active services to be rendered in exchange for the consulting fees ascribed to such services, as a matter of practice, a former executive producer's stint as a consultant is often nearly or entirely passive, allowing the original creator/executive producer some form of ongoing fee and credit while leaving room for that individual's successor as showrunner to establish and preserve their own creative stewardship of the series going forward.³⁴

A consulting lock is typically conditioned on the writer/producer having received sole "created by" credit on the series, having rendered two years of executive producer services without being "pay-or-played" (i.e., terminated without cause), and otherwise not being in breach of their agreement.³⁵ The applicable fee is usually between \$7,500 and \$15,000 per episode produced during the two years of the consulting lock (non-escalating), though consulting fees may instead be stated as a fraction (e.g., one-third or, rarely, one-half) of the individual's last-earned executive producer fee. At very high levels, the consulting lock that follows the period of executive producer services may be for the life of the series, rather than on a "one-for-one" basis, though this is uncommon.

viii Royalties

In addition to any applicable executive producing and/or consulting fees, the creator of a television series is almost always entitled to a passive episodic

33 Or once the executive producer completes their run, if extended beyond those initial two years.

34 For example, *Community* creator Dan Harmon was fired from the series after its third season and received executive consultant credit (and presumably fees) for all episodes of the show's fourth season. After Harmon was rehired to return to the show as showrunning executive producer for its fifth season, however, he revealed (via his own podcast) that he had not even watched the fourth season until his rehiring, and publicly criticized the quality of the show as it had been produced without his participation.

35 Usually, to satisfy the conditions for a consulting lock, the writer/producer must have rendered two seasons of full-time/"Tier 1" services; thus, a writer who drops down to "Tier 2" services before the end of that two-season period may not qualify for a consulting one-for-one. At higher levels, talent representatives may negotiate for the consulting lock to apply even if services for either or both of the preceding seasons were rendered on a non-exclusive/"Tier 2" basis (potentially with a lower episodic consulting fee).

royalty for the life of the series, excluding only the pilot. These royalties typically range from \$2,500 to \$7,500 per episode for a writer who receives sole “created by” credit (as always, with outliers on either side) and are reducible if the writer receives shared “created by” credit to an amount between 50% and 75% of the applicable royalty for sole “created by” credit. The reduction for shared “created by” credit may be automatic to the reduced level indicated here, or on a dollar-for-dollar basis (to the negotiated floor) based on royalties payable to other credited writer(s). And, as with other economic terms, the applicable royalty may be tiered, depending on the platform for which the series is produced. Finally, on broadcast network shows, it is typical for the writer to receive an additional “100/5” royalty—that is, a further royalty payment equal to 20% of the initial royalty amount, payable for each of the first five reruns of the applicable episode.³⁶

ix Bonuses

Virtually every writer/producer deal for a series creator also provides for a series sales bonus, payable to the writer if the project makes it past the pilot stage and a series is actually produced. The vast majority of such bonuses are for \$25,000 for a writer who receives sole “created by” credit, reducible to \$12,500 (either automatically or on a dollar-for-dollar basis by bonuses paid to other writers) if the writer receives shared “created by” credit. However, the applicable “sole credit” bonus may, in some instances, be as low as \$20,000 (e.g., if the series is produced for lower-budget cable, or for very low-stature writers) or as high as \$50,000 (or rarely, more) for very prominent creators. On rare occasions, series sales bonuses may also be payable for one or more subsequent seasons of a series, but such an agreement is unusual and is typically a negotiated response to unique circumstances.

Usually, series sales bonuses are subject to proration based on the number of series episodes actually produced. For broadcast network series, the standard is for the full bonus to be payable based on the production of twelve series episodes (excluding the pilot), with proration downward for smaller production runs, and no bonus payable for fewer than six episodes produced. In cable and streaming, the negotiated proration may be more favorable (e.g., 100% payable based on ten [or even eight] episodes produced, inclusive of pilot), less favorable (e.g., 100% payable based on twenty episodes produced, inclusive of pilot), or identical to the standard “12/6 proration” for broadcast network deals, depending on the identities, policies, and order patterns of the studios and networks

36 For cable programming, some (but not all) studios agree to a “100/12” royalty—that is, a further royalty payment equal to 8.33% of the initial royalty amount, payable for each of the first twelve reruns of the applicable episode by the program’s cable licensee. In always-available streaming, the concept of a “rerun” is a non sequitur, and no such rerun royalties are due.

involved. As short-order/script-to-series models have dominated over the last several years, however, many studios have begun eliminating proration terms from such bonuses altogether, sometimes re-styling them as “series production bonuses” to signify that they are flat and non-prorated.

In rarer cases, particularly where a writer has agreed to a lower-than-market pilot script writing fee, the deal may also provide for a set-up bonus (if the project is initially developed independently by a producer and later “set up” with a studio or network) or pilot production. Such bonuses are generally intended to get the writer to where they expected to be economically for the script alone, in the successful scenario of a project being sold or pilot being produced.

x Backend³⁷

As with other entitlements under writer/producer deals, the amount of backend accorded to a writer under their deal is typically tied to the share of “creation by” credit received by the writer, with a base entitlement that is laid out if the writer receives sole “created by” credit, and various applicable reductions from that base entitlement. Backend entitlements are, like other deal terms, heavily driven by the stature and quotes of the writer and, in particular, whether it is contemplated that the writer will render showrunning services in series (if ordered), or whether a third-party showrunner will have to be engaged to help produce the series. However, because most studios have rigid policies capping the total contingent compensation granted in connection with any given series—for most studios, 35% of the modified adjusted gross receipts (“MAGR”),³⁸ although smaller and mid-size independent studios may recognize pots of 40%, 45%, or in rare cases, even 50%—backend reductions are commonly negotiated for heavily packaged projects that involve many prominent elements who are entitled to contingent compensation.

It is common for a writer/producer’s backend entitlement to be stated as involving an artificially high ceiling (again, conditioned on the writer receiving sole “created by” credit on the series). This ceiling is usually reducible, to some extent, by participations granted by the studio to third parties (i.e., other producers, writers, actors, and other participants) in connection with the same series,³⁹ and may be further reducible if total backend entitlements on the

37 To fully understand these terms, readers may consult the more detailed discussion of contingent compensation contained in Chapter 9 (pg. 351).

38 Or the corresponding form of contingent compensation used by the applicable studio (e.g., “Defined Proceeds”). Again, see Chapter 9 (pg. 351).

39 It is essentially inevitable that some third-party participations will be granted in connection with the series, and therefore, that this initial reduction will be triggered. Consequently, the initial “ceiling” figure in a backend deal term is often essentially cosmetic and virtually impossible for the participant to achieve, and the floors more relevant in determining the writer’s practical, real-life entitlement.

series, for all participants, exceed a maximum threshold (usually 35% in the aggregate, without regard for differences in definition). The writer's backend will be further reducible (if not automatically reduced) if the writer receives shared "created by" credit on the series, in most cases with no backend due for a writer who does not receive even a share of "created by" credit (though such a circumstance is rare, and usually specifically negotiated around when it arises). In some cases, where a writer's status as a potential showrunner is uncertain at the time the deal is made, the backend terms may reflect tiering or further reducibility if the studio is forced to engage and provide backend to a third-party showrunner.

To illustrate, a substantial writer/producer deal for a writer who is expected to showrun their series may provide that the writer receives 17.5% of MAGR if they receive sole "created by" credit, reducible on a dollar-for-dollar basis⁴⁰ by all participations granted to third parties to 15% of MAGR, further reducible on a dollar-for-dollar basis to the extent that aggregate participations granted on the series exceed 35% of MAGR to a floor for the writer of 12.5% of MAGR, further reducible if the writer receives shared "created by" credit to a floor of 7.5% of MAGR. (This may be stated, in shorthand, as "17.5% → 15% → >35% to 12.5% → for shared to 7.5%.")

At the lowest entry level, floors of 5%–7.5% for sole "created by" credit, and 2.5%–5% for shared "created by" credit, are common. At middle levels, floors of 10%–12.5% for sole credit, and 7.5% for shared credit, are typical. At high levels, one might expect floors of 15%–17.5% for sole credit, and up to 12.5% for shared credit. The applicable ceilings under such deals may range from 10% at low levels, to 20% at high levels, to the full studio-permitted "pot" at the highest levels (typically 35%); again, however, the structure of reducibility built into these terms, and the practical necessity of granting participations to parties other than the writer/producer, render such ceilings largely symbolic and cosmetic.

For writer/creators, contingent compensation virtually always vests in quarters—one-quarter upon completion of the writer's pilot writing services, one-quarter upon completion of pilot producing services, one-quarter upon completion of series producing services for the first season, and one-quarter upon completion of series producing services for the second season. When there is no pilot step, the 25% vest allocable to pilot production may be applied instead to the first series episode, added to the vest for the first season (bringing it to 50%), or distributed evenly across the first two seasons' vests

40 Some studios seek to apply such reductions on a point-for-point, rather than dollar-for-dollar basis. If the various participants have substantively different backend definitions that make one party's points more or less valuable than another's, this point-for-point reduction may allow the studio to bank additional savings by essentially pocketing the difference in value between the parties' differently defined points.

(so, 37.5% per season). Some studios may allow for pro rata vesting of the final two quarters (particularly for higher level writers)—in other words, if a writer is terminated after half of the episodes of the second season have been produced, they will vest for one-half of the final one-quarter of the writer's backend, i.e., for a total of 87.5% of the writer's total backend entitlement. Sometimes, such pro rata vesting may require that the writer complete services on at least half the episodes of the season to receive any share of vesting for that season. When a writer/producer exercises their right to “drop down” to “Tier 2” services, for each production step worked at that lower tier of services, they typically vest for one-eighth of their backend (i.e., half of the quarter they would have vested for had they worked at the higher tier of services). A writer who exercises a drop-down right will therefore never vest for 100% of their contractually defined backend (and the unvested portion will likely be redistributed to other participants in some fashion).

xi Episodic Scriptwriting

As seasons of television have grown progressively shorter and the medium has taken on more of the auteur-oriented sensibility of feature films, many creators now prefer to personally write most or all of the episodes in a season, especially on closed-ended limited series.⁴¹ Creators who are particularly firm about this expectation may seek to negotiate for it up-front in their deals, seeking guaranteed episodic script assignments (of which some or all may be contingent on the series actually being produced).

Like most episodic scripts, guaranteed episodic scriptwriting assignments are normally paid at applicable WGA scale (including the 15% premium applicable for any scripts that are commissioned prior to series greenlight and therefore are considered “backup scripts”). If the studio intends to commission one or more of those additional episodes prior to pitching the project to networks, it may negotiate to initially pay for those scripts at the lower rate applicable to cable, Tier 2 HBSVOD, and Tier 2 HBAVOD shows, with the fee(s) later “trued up” for the writer if the project ultimately qualifies for higher broadcast/Tier 1 HBSVOD/Tier 1 HBAVOD minimums. On the other hand, higher-level writers may be able to negotiate for overscale compensation for these episodic scripts—something that is virtually never agreed for scripts that are assigned, whether assigned to the creator/showrunner or to another writer, in the ordinary course of series writing. This is most likely to happen for feature writers and for high-end creators whose representatives are explicitly negotiating for some specific minimum aggregate compensation for the full season, and the studio is

41 Specific examples of such single-writer series, along with an exploration of the impact of such examples on the negotiation of new “minimum staffing” rules as part of the 2023 WGA Basic Agreement, can be found in Chapter 3, Section A.vi (pg. 116).

essentially trying to structure the deal to “back into” that total amount. In any event, however, such additional episodes will be priced much closer to WGA scale than to the writer’s full-freight pilot script fee.

Such guarantees are rare for run-of-the mill creation agreements, especially given how much control a showrunner customarily exercises over the composition of the writers’ room and the eventual assignment of episodic scripts. But when the studio and creator are aligned on the creative plan—and/or if the studio needs to provide more guaranteed compensation to close a deal but does not want to further enhance the pilot script fee for precedential reasons—creator deals may provide for guaranteed episodic scripts.

Such guarantees are made on a pay-or-play basis, meaning that—like almost any other commitment a studio makes—the studio is obligated only to pay for such guaranteed episodic scripts, and not necessarily to actually commission or use them. Such decisions are usually made in partnership with the writer, however, rather than unilaterally imposed by the studio (given the conflict that would naturally generate). And such changes in plans are fairly common, given the huge workload of personally writing six to ten episodes from scratch, the tendency of writers to fall behind on producing duties if buried too deeply in their writing caves, and the significant time pressures that at some point impact virtually every production. The cautious studio practice when agreeing to guaranteed episodic scripts is to negotiate for the creator’s guarantee to be automatically reduced for any episodic script(s) subsequently assigned to a third-party writer with the creator’s approval, and/or for the creator to agree to split a single episodic writing fee with their partner for any co-written scripts.

xii Credit

There are three main credit issues in play in writer/producer deals for show creators: producing credit, logo or company credit, and creation credit.⁴² In many respects, credits are so fleeting and non-obvious to viewers as to be largely meaningless. Nevertheless, such credits can be extremely significant for the professional resumes of the parties and provide valuable precedents that substantially influence the parties’ entitlements in subsequently negotiated deals.

Pilot writers are virtually always accorded “Co-Executive Producer” or “Executive Producer” credit.⁴³ Some studios offer Executive Producer credit to all creators, regardless of stature; others restrict lower-level creators to Co-Executive Producer credit, or, at worst, Supervising Producer credit, though this is rare. If a junior writer starts with Co-Executive Producer credit for the

42 In television, all credits for all roles are customarily made subject to the approval of the applicable network, including the negotiated credits for writer/producers, other than guild-determined and mandated credits.

43 The hierarchy of television producing credits is discussed in further detail in Section B.ii.

pilot and first season of the series, it is common for the writer to automatically graduate to Executive Producer credit in the second season of the series. Such credits are virtually always granted on separate cards (or, for bona fide writing teams, on cards shared only between the members of the team), in the main or opening titles of the series.

Higher-level writers, particularly those with showrunning experience, may also be accorded a “logo credit” or “company credit,” in the form of a logo that appears after the end credits at the end of each episode. This logo card typically bears the name of the writer’s “production company,” though for the vast majority of writers, this is essentially a vanity company name that serves as a calling card for the writer themselves and does not signify a meaningful full-fledged production company operation.⁴⁴ Negotiated issues around such logo credits include conditions (e.g., requiring that the writer receive sole “created by” credit and/or that they be rendering sole or co-showrunning services); whether such logo must be static or may be animated; and whether such logo must appear on a separate card or may be on a shared card with another logo.⁴⁵

Finally, deals must address “created by” credit (which, as discussed throughout this section, is a condition for most of the entitlements under a writer/producer deal). This usually actually requires little negotiation because most major scripted television production is subject to the jurisdiction of the WGA, which has exclusive control over the determination of writing and series creation credits for WGA-covered series. As a general rule, whatever writer(s) receive(s) “written by” credit on the pilot episode of the series also receive(s) “created by” credit on the resulting series.⁴⁶ This credit determination (which is made

44 Some of these logo cards can prove iconic with time. Ubu Productions, the independent production company of non-writing producer Gary David Goldberg, gained recognition in the 1980s and ‘90s for its logo card, which featured an audio cue of Goldberg’s voice saying “*Sit Ubu Sit!* [Dog barks.] *Good Dog.*” Fans of *The Simpsons* can recite the brief musical jingle over the Gracie Films logo card. Writer/producer Chuck Lorre openly refers to his production company logo as a “vanity card,” and customizes that card, on an episode-by-episode basis, with lengthy comedic texts, directed specifically at the audience, discussing (in text far too long for two seconds of screen time) topics as varied as Lorre’s show’s stars, network executives, atomic bomb drills, and veganism.

45 This is a function of both the writer’s stature and the availability of such logo cards, which networks have historically limited in number (to no more than three or four cards per episode) in part to precisely manage episodic runtimes. Streamers—who are under no pressure to stay within any particular runtimes, and whose end credits are seldom seen due to the standard “autoplaying” of next episodes—tend to be more liberal about logo card inventory.

46 In the WGA’s system, “story by” credit is accorded to the writer(s) who establish the essential plot and characterization for a script, while “teleplay by” credit is accorded to the writer(s) executing that basic narrative and characterization with specific scenes and dialogue. The “story by” and “teleplay by” credits may each be accorded to a single individual or writing team, or to up to two individuals or writing teams. When the “story by” and “teleplay by” credits are accorded to the same individual(s), they are unified into a single “written by” credit. For all purposes, the WGA considers a bona fide writing team to be a team functioning as an “individual” in all respects. See Section A.i.xv.

by the WGA) then becomes the basis of satisfying various conditions on the writer's benefits under their deal. However, where the pilot script is based on underlying material (such as a book, article, movie, video game, or preexisting television format), "written by" and "created by" credits are generally unavailable under the WGA's credit determination standards. In such circumstances, studios usually agree to submit any writer who solely wrote a pilot script based on underlying literary material for "developed by" credit from the WGA (if the WGA determines that "created by" credit is unavailable), and it is common to negotiate for "created by" and "written by"-based credit conditions to be deemed satisfied if the writer receives "developed by" and "teleplay by" credit, respectively. The WGA also allows for studios to contractually accord "created by" credit, outside of the WGA credit determination process, where a pilot/series is based on underlying material. Some studios prefer to avoid granting such credit contractually but may be open to creative alternatives such as "created for television by."

Other aspects of writing credit (including the determination of episodic writing credits in series and the placement of such credits) are also generally determined and governed by the WGA, and therefore not expressly negotiated.

xiii Perks

There are a small number of "perks" that may be negotiated as part of a writer/producer deal. Most writer/producers are provided with an office, assistant, and parking during production periods of a series; for showrunners, the office and assistant must usually be exclusive (rather than shared with other series staffers). Showrunners are typically entitled to meaningful consultation with respect to key creative issues on the show, befitting their role as the primary creative stewards of the series, but full-blown contractual approval rights over any creative or business elements are extremely rare to the point of being virtually nonexistent. If a writer is required to travel to render services (e.g., to a distant location to supervise physical production of an episode the writer has written), the writer is typically provided with business-class travel, first-class hotel accommodations, ground transportation, and a per diem (minimum terms for which are prescribed by the WGA Basic Agreement, where applicable).⁴⁷ Writers who are expected to remain on location for weeks or months at a time may instead receive flat monthly living allowances, usually in the range of

47 In some cases (particularly when a series films in Los Angeles, though sometimes for New York, as well), the writing team (led by the showrunner) lives and works in the same city where production takes place. However, for series that shoot outside of Los Angeles and New York, it is common for the writers (including the showrunner) to be based in Los Angeles, while other producers and series staffers manage day-to-day affairs at the production location, subject to periodic set visits by the showrunner and/or by the writer(s) of the specific episode being produced.

\$4,000–\$10,000 per month (depending on the stature of the writer and the cost of living at the production location), as well as additional plane tickets (to allow them to visit home during scheduled breaks or fly friends or family in to visit them on location).

xiv Subsequent Productions

Finally, a writer/producer deal will typically provide the writer with the first opportunity to negotiate to render pilot writing and pilot/series executive producing services on certain subsequent productions based on the original television series. This right is often limited to television spinoffs, although for higher-level writers (especially those with bona fide theatrical writing experience), it may extend to cover theatrical derivatives as well.

This first opportunity is subject to various customary conditions, including some or all of the following: (1) the writer receiving sole “created by” credit on the original series; (2) the writer rendering at least two years of executive producing services on the original series without being “pay-or-played”; (3) the writer not being in breach of their original deal; (4) the writer being professionally available when required by the studio; (5) approval of any applicable network (which the studio must generally use good faith efforts to obtain); (6) the writer then being active in the industry; and (7) time limits (e.g., the derivative being produced within five or seven years, measured from the production of the pilot, the production or exhibition of the last episode of the series on which the individual actually rendered executive producer services, or the production or exhibition of the last episode of the original series). The first opportunity right may initially be limited to the first spinoff of the original series, but “roll” for (i.e., automatically apply to) subsequent spinoffs, if the same conditions continue to be satisfied for each successive spinoff. For series that are part of interconnected “shared universes” with other film and/or television projects, studios may refuse to grant such first opportunity rights altogether, or negotiate more specific limitations to avoid multiple writers having simultaneous conflicting first opportunity rights and otherwise protect the studio’s broader franchise management efforts.

Often, the first opportunity clause will provide that, for comparable productions (e.g., television spinoffs to a television series), the writer’s deal for the original series serves as a floor for the negotiation of a new deal for the spinoff. Commonly, such clauses will further provide that, if no deal is reached or if certain conditions of the first opportunity right are not satisfied (such as availability or network approval), the creator of the original series is entitled to a passive participation on the spinoff. This usually amounts to 50% of the royalty and backend of the original series for any generic spinoffs or sequels/prequels/remakes, or 25%–33% of the royalty and backend of the original series for any planted spinoffs (but, in either case, usually not the executive producer fees).

Such passives are uncommon on franchise/shared universe projects, even when the writer is accorded some form of first opportunity right.

xv *Bona Fide Teams vs. Arranged Marriages*

Bona fide writing teams—i.e., those who regularly collaborate and work as a single unit as writers and producers—enter into agreements as a pair and divide all compensation between them (usually on a 50/50 basis). The scale minimum payments applicable to writing teams are the same as those applicable to individual writers, and usually, compensation and other deal terms are comparable to whatever would be granted to an individual writer of similar stature. In other words, writing teams don’t get paid more than individual writers just because they have two mouths to feed instead of one.⁴⁸

For arranged marriages—i.e., one-off co-writing/co-creation arrangements between two writers⁴⁹ who do not customarily work together as a “bona fide writing team”—the negotiations are typically bifurcated between shared entitlements and individual entitlements. The “shared entitlements” are those that compensate writers, whether up-front or in the future, principally for their actual writing or their successful creation of a series—i.e., writing fees, royalties, bonuses, and backend. The “individual entitlements,” on the other hand, are those that reflect each person’s circumstances and/or their individual stature and experience as a producer—i.e., producing fees, locks (including drop-downs), exclusivity, matters of position/priority/preexisting commitments, and credit.⁵⁰ For both types of co-writing arrangement, “credit-based entitlements”—those that are contingent on receiving sole or shared “created by” credit⁵¹—are usually acknowledged to be earned for “sole” credit based on credit shared only between the partners, and to be reduced for “shared” credit

48 Three-person teams are rare, and largely frowned upon by the WGA. (Four-person teams require a specific WGA waiver, which is very rarely requested or approved.) Where three individuals render services as a bona fide team, each applicable WGA minimum is doubled (unless all three members of the team are above the Staff Writer level, in which case each minimum is increased by 50%), and each member of the team must individually receive at least one-third of that elevated scale amount.

49 Technically, an “arranged marriage” could exist between one individual writer and one bona fide writing team, or even between two bona fide writing teams, but such arrangements are rare (for obvious reasons).

50 Bona fide writing teams (whether preexisting or “arranged”) are readily identifiable in credits because their names are separated by an ampersand. When the written-out word “and” separates two writers or writing teams, it signifies that the writers on either side of the word “and” worked independently of one another, and not as a bona fide team.) When a pilot script results in story and teleplay credits for separate writers or writing teams, all of those writers or writing teams share “created by” credit for the series. Pilot writing credit also generally determines the awarding of “separated rights” in a series, if applicable and if not already bought out by the studio.

51 I.e., locks, royalties, bonuses, backend, and subsequent production rights.

only if credit is shared with a (theoretical) separate third-party writer in the future.

Shared entitlements are customarily negotiated collectively for the new team, with the financial terms generally based on the leverage and quotes of the senior member of the arranged marriage. Studios usually make a point of staying out of any discussions between the paired writers about how such compensation is to be split between them, instead looking to the writers (usually through their representatives) to work it out amongst themselves and jointly instruct the studio on how to divide payments. 50/50 splits are also common in arranged marriages, but alternative splits may be negotiated when one member of the arranged marriage is of significantly higher stature than the other. In addition, splits need not necessarily be uniform among all financial terms—for example, because writers’ backend entitlements reflect their experience and expected contributions not only as writers/creators, but also *as producers*, the partners in an arranged marriage sometimes agree to split writing fees, royalties, and bonuses on a 50/50 basis, but to allocate a larger share of backend to the senior partner.⁵²

Individual entitlements are negotiated separately with each writing partner, with terms that generally reflect what each writer could command in their own separate deal. That said, both partners may be forced to accept somewhat lower producing fees because of the studio’s need to manage its aggregate costs of creation and total producing budget.⁵³ Partners in an arranged marriage frequently have different sets of preexisting obligations to negotiate around, so they may be subject to different terms on priority, position, and dropdowns. Senior partners in such arrangements may be more demanding about negotiating for “no position” deals, especially if they are making significantly less money than if they wrote alone, or if they intend to concurrently develop (and want to prioritize) projects for which they are the sole creator. The junior partner in an arranged marriage sometimes seeks “favored nations” status with their senior partner on fees, locks, and other terms—both as a matter of “equity” and, more practically, to draft on the senior partner’s superior quotes and leverage—but such efforts are usually rejected (especially for financial terms).

52 Backend negotiations can be especially complex and tricky in these situations, with the most sophisticated representatives often negotiating for one individual in the arranged marriage (particularly the seniormost one) to automatically succeed to any unvested backend from their partner (e.g., if the other partner departs for an outside opportunity or is pay-or-played off the show prior to the end of the second production season), in lieu of that unvested backend going back “into the pot” (or into the studio’s pocket).

53 The same would be true with a crowded field of non-writing producers, although there is more pressure on writer/producers in arranged marriages to shoulder larger reductions than might be the case for a single writer/producer working with several non-writing producers. See Section A.xv.

*xvi Quick Reference Guide***TABLE 6.1** Creator/Writer-Producer Agreements

<i>Deal Term</i>	<i>Main Issues/Ranges</i>	<i>Other Issues</i>
1. Writing/Spec Acquisition	• If/come (contingent on network sale) vs. firm (guaranteed on specific concept) vs. blind (guaranteed on TBD concept) • May be based on pitch (unwritten concept) or option/purchase of “spec” (pre-written) script • Generally \$75K–\$300K for a 5-step deal (story, first draft, first rewrite, second rewrite, polish), but for very high-level deals, may be in the \$300K–\$750K range	• Usually 5 writing steps bought out; may have to address additional steps • For spec scripts, must negotiate option and purchase terms, plus additional writing steps for further revisions • Possible tiering based on network/budget level • See “Streamlined Schedule of WGA Minimums” (Section E) for applicable scale minimums
2. Optional Additional Development Steps	• May negotiate for built-in options for additional rewrites/polishes beyond standard 5-step deal, series format or bible, or one or more backup scripts • Typically paid at scale (or scale +10%), but high-level creators may negotiate for higher amounts	• May pre-negotiate studio/network options and terms to commission a mini-room as part of the development process • See “Streamlined Schedule of WGA Minimums” (Section E) for applicable scale minimums
3. Producing Fees	• Usually \$25K–\$75K per episode (but may be more at the highest levels) • May be structured as weekly fees of \$12.5K–\$17.5K per week (often \$15K), but may be higher (e.g., up to \$25K per week) in special cases	• 5% annual bumps are typical, but may be lower (e.g., 4%) or higher (e.g., flat \$2.5K or \$5K) • Possible tiering for multiple classes of services (especially if preexisting commitments) • Possible tiering based on network/budget level
4. Locks	• Usually a “modified 2-year lock” or “2-year Warner lock” • At higher levels, may have firm 2-year lock	• At highest levels, may agree to “life lock” with drop-down rights • Usually subject to sole “created by” credit, with studio options if writer receives shared “created by” credit

(Continued)

TABLE 6.1 (Continued)

<i>Deal Term</i>	<i>Main Issues/Ranges</i>	<i>Other Issues</i>
5. Services and Exclusivity	• By default, fully exclusive during writing and production, and exclusive in television at all times • Usually may develop for third parties and render limited other services during hiatuses in “second position”	• May have right to develop in “second position” during production periods • At very high levels, may allow for juggling of multiple concurrent projects
6. Position/ Priority and Preexisting Commitments	• Must address “position” if writer is under active preexisting deals • 15%–25% discount on script fee, compared to first position • May make “no position” deal (i.e., “position” does not lock until production is ordered)	• May provide for drop-down to non-exclusive services, if unavailable for exclusive services due to preexisting commitment (or, at very high levels, at the writer’s discretion)
7. Consulting	• Usually consulting 1-for-1, but may be for life • Usually \$7.5K–\$15K per episode	• Usually requires 2 years of services • Possible tiering based on network/budget level
8. Royalties	• Usually \$2.5K–\$7.5K per episode for sole “created by” credit • Usually reduced by 25%–50% for shared “created by” credit	• Possible rerun royalties • Possible tiering based on network/budget level
9. Bonuses	• Usually \$25K for series pickup if writer receives sole “created by” credit • Usually \$12.5K for series pickup, if writer receives shared “created by” credit	• May be prorated based on the number of episodes produced • Possible set-up or pilot production bonuses • Possible subsequent season pickup bonuses
10. Backend	• Often negotiate ceilings and floors, with participations reducible by third parties (perhaps over a 35% aggregate participation threshold) • Ceilings usually between 10% and 20% of MAGR for sole credit	• Vests $\frac{1}{4}$ for pilot writing, $\frac{1}{4}$ for pilot producing, $\frac{1}{4}$ for season 1 producing, and $\frac{1}{4}$ for season 2 producing (various adjustments possible if no pilot step) • Possible pro rata vesting

(Continued)

TABLE 6.1 (Continued)

<i>Deal Term</i>	<i>Main Issues/Ranges</i>	<i>Other Issues</i>
	- Floors usually between 5% and 17.5% of MAGR for sole credit - Usually between 2.5% and 12.5% of MAGR for shared credit	- Backend vests 1/8 (rather than 1/4) for steps worked at “Tier 2” services - Miscellaneous backend definition issues (see Chapter 9)
11. Credit	- Usually Executive Producer credit, except for extremely junior creators, who may start at Co-Executive Producer - Logo credit at higher levels (e.g., showrunners) “Created by” credit per WGA - Executive consultant credit for consulting 1:1, as applicable	- Generally main or opening title credit, separate card, with ties to other credited Executive Producers - May provide for “developed by” credit where source material makes “created by” unavailable, and/or contractual “created by” or “created for television by” credit
12. Episodic Scriptwriting	- May guarantee episodic script assignments for creators who intend to write most or all series episodes - Additional episodes typically paid at scale (with 15% premium for backup scripts) - Even when paid overscale, priced much closer to episodic scale than to pilot script fee	- Episodes written before network sale may be paid at lower scale amounts and later “trued up” to applicable higher scale - Guarantees typically reduce, and script fees split, if episodes are subsequently assigned to or designated for co-writing with a third-party writer
13. Perks	- Meaningful consultation rights for key creative matters - Business-class travel, first-class accommodations, and per diem - Ground transportation or rental car - Parking, office, and assistant	- Negotiate exclusivity of office and assistant - Engagement of personal assistants - May use flat weekly or monthly living allowance and/or provide additional travel tickets for extended stays on location

(Continued)

TABLE 6.1 (Continued)

<i>Deal Term</i>	<i>Main Issues/Ranges</i>	<i>Other Issues</i>
14. Subsequent Productions	• First opportunity to write and executive produce spinoffs, if writer receives sole “created by” credit • Passives on subsequent productions (still subject to writer receiving sole “created by” credit) if no new deal is made (e.g., 50% of royalty and backend for generic spinoffs; 25%–33% of royalty and backend for planted spinoffs)	• Subject to other customary conditions (e.g., time limits, network approval, etc.) • May “roll” for further subsequent productions • May be further limited or altogether eliminated on franchise projects • Current deal may be floor for future negotiation
15. Bona Fide Teams vs. Arranged Marriages	• Deals for bona fide writing teams negotiated as if for an individual writer • Deals for arranged marriages bifurcated into jointly negotiated “shared entitlements” (writing fees, royalties, bonuses, and backend) and separately negotiated “individual entitlements” (producing fees, locks, exclusivity, position/priority, and credit)	• Bona fide teammates presumptively share all compensation 50/50; partners in an arranged marriage must specifically decide on splits for shared compensation and jointly advise studio on how to divide • “Sole” credit conditions on deal terms deemed satisfied by credit shared only between the collaborating partners

B Staffing Writer Agreements

“Staffing writer” agreements (also called “staffed writer” or simply “staffing” agreements) are for the writers and writer/producers (other than the creator) who will populate the “writers’ room” for the series. The specific number of writers employed on a series depends on its particular creative needs, the nature of the distribution platform, the preferences of the showrunner, and the number of episodes being produced. The 2023 WGA Basic Agreement introduced new “minimum staffing” rules, requiring that (1) shows in their first seasons employ at least three writer/producers (including the showrunner); and (2) shows in their second or subsequent seasons employ staffs of at least three writer/producers for series orders up to six episodes, at least five writers for orders of seven to twelve episodes, and at least six writers for orders of thirteen or more episodes (with no fewer than three writer/producers in each case, including the showrunner).

Writers are generally selected by consensus among the showrunning executive producer, studio executives, and network executives. These individuals may contribute generally to episodic ideas (e.g., dialogue, scenes, or entire storylines), write full original teleplays for the series, or punch up or rewrite episodic teleplays prepared initially or primarily by other writers. Often, the senior writers and executives identify writers to hire based on their preexisting relationships and preferences. On an ongoing existing series, a new or junior writer may earn a spot on the writing staff by submitting a “spec script” that demonstrates the individual’s creative command of the series’ characters and tone, a “sample” of a comparable original work, or by being promoted from within the room’s support staff (typically after at least one season working in the showrunner’s assistant, writers’ assistant, or script coordinator positions).

i Fees

Staff Writers are almost always paid the scale minimum compensation for term writers under Article 13 of the WGA Basic Agreement, which varies depending on the number of weeks guaranteed to the writer under their deal. For the 2024–25 contract year (during which this second edition is released), the rates are \$4,515 per week with a forty-week guarantee, \$4,940 per week with a twenty-week guarantee, \$5,353 per week with a fourteen-week guarantee, or \$5,762 per week with a guarantee under six weeks (e.g., for week-to-week services). Writers who are working for a second season as Staff Writers may expect to make 110% of WGA scale.

Writers who are engaged as Story Editors are almost always paid the scale minimum compensation under Article 14 of the WGA Basic Agreement (which

governs “Writers Employed in Additional Capacities”), the specific value of which again depends on the number of weeks guaranteed to the writer. For the 2024–25 contract year, this amount is \$8,055 per week with a guarantee of twenty or more weeks, \$8,955 per week with a guarantee of ten to nineteen weeks, or \$10,745 per week with a guarantee under ten weeks. Executive Story Editors may receive up to 110% of Article 14 scale, especially if working a second year at the title. The practical responsibilities of such Story Editors and Executive Story Editors are often very similar to those of Staff Writers, and such positions are still considered quite junior within the ladder of the writing ranks; however, the titles offer a symbolic reflection of greater stature, experience, and prestige for those who have already “put in their time” at the Staff Writer level.

Writers at the Co-Producer level or higher are categorized as “writer/producers,” and are subject to a new (as of 2023) third tier of scale minimums, 9.5% higher than the corresponding minimums for Story Editors and Executive Story Editors—for the 2024–25 contract year, \$8,822 per week with a guarantee of twenty or more weeks, \$9,808 per week for a ten- to nineteen-week guarantee, or \$11,769 per week for guarantees under ten weeks.

Traditionally, writer/producers have been engaged based on episodic rather than weekly fees. Since 2018, writers earning episodic fees with guaranteed annual compensation under an MBA-defined threshold minimum⁵⁴ have been subject to “span protection,” meaning that each episodic fee can buy out no more than 2.4 weeks of services (with additional weeks compensated at the rate of one additional episodic fee for every additional 2.4 weeks of work, pro-rated for lesser periods).⁵⁵ Based on 2024–25 scale minimums, the minimum episodic fee that can be paid to a writer/producer subject to span protection

54 Such MBA-defined threshold minimum amounts or rates of compensation, above which one or more specific collectively bargained protections applicable to lower-paid union-covered employees no longer apply (or the applicable terms become “freely negotiable”), are known as “money breaks.” For the 2023–26 contract term, the money break for span protection is \$450,000 for broadcast/HBSVOD or \$375,000 for cable/HBAVOD, based only on the writer’s episodic fees. Writers whose total annual compensation takes them out of span protection frequently attempt to negotiate for it to nevertheless apply (or to impose other restrictions, besides only weekly scale minimums, on the maximum number of weeks a writer can be employed before receiving additional compensation). In general, however, studios strongly resist extending span protection beyond its WGA Basic Agreement-mandated scope.

55 This does not include weeks of post-production services, which are generally deemed to be “non-writing” and therefore not subject to WGA-mandated scale minimums or span protection (although some studios agree to pay weekly fees for post-production services at a reduced rate). During bargaining for the 2023 MBA, the WGA initially sought to modify the rules to move post-production weeks to within WGA jurisdiction/minimums but dropped these demands over the course of negotiations. It seems likely that the issue will arise again during the next round of collective bargaining in 2026.

(to cover applicable scale weekly minimums) is about \$20,500 per episode for a ten-episode series, or \$23,000 per episode for a six- to eight-episode order. These numbers are significantly higher than the traditional episodic fee ranges for writers on full-order broadcast series that are not subject to span protection, which tend to run in the neighborhood of \$15,000 per episode for Co-Producers to around \$18,000–\$20,000 per episode for Supervising Producers. In each subsequent year of a multi-year deal, the writer may expect to see a fee bump between \$500 and \$2,500 per episode, even if they are not being promoted in title (though title escalations often involve more substantial fee bumps). Consequently, many studios and platforms now favor paying mid-level writer/producers on a weekly, rather than episodic, basis (a trend that is likely to be encouraged by the more substantial changes in the 2023 WGA Basic Agreement). At the Co-Executive Producer and Executive Producer levels, episodic fees remain more common (although weekly fees are also used) and can climb substantially higher (according to experience and quotes), though the showrunner almost always remains the highest-paid writer/producer on a series.⁵⁶

ii Credit

The majority of producer-type credits on any given television series belong to writer/producers (whose primary responsibility is in the writer's room), and there is a well-established hierarchy of credits for writers (which, like other credits, are subject to network approval).⁵⁷ The most junior and inexperienced writers begin as Staff Writers (who may or may not be accorded on-screen credit for their series), with a promotion track that goes to Story Editor (the first position that consistently receives on-screen credit), then Executive Story Editor, then Co-Producer (the first position that tends to receive credits in the main or opening titles of a series), then Producer, then Supervising Producer, then

56 Prior to 2018, the episodic fees for staffing writers simply remained subject to the applicable WGA Article 14 weekly scale minimum rate, creating a crisis of “pay dilution” for which span protection was the intended solve, though not without consequences of its own. See Chapter 3, Section A.vi (pg. 116).

57 See Section C. Most shows also employ one or more non-writing Executive Producers, who often played a key role in the packaging and development of a project, and may employ a producer/director who is also credited as an Executive Producer (or, if less experienced, perhaps Co-Executive Producer). “Produced by” (as opposed to “Producer”) credit is generally accorded to line producers, although higher-level line producers may instead receive credit as Co-Executive Producer or even Executive Producer as well. See Section D. “Co-Producer,” “Associate Producer,” or “Producer” credit may also be accorded to lower-level non-writing producers (such as the development executives who serve credited Executive Producers).

Co-Executive Producer, and finally Executive Producer.⁵⁸ In addition, writers who are working part-time or otherwise below their usual rank or pay may be accorded Consulting Producer credit, which occupies a less obvious position within the aforementioned hierarchy.⁵⁹ As writers grow to increasingly higher ranks, they are generally expected to assume more duties in connection with the production, as well as writing, of series episodes. Lower-ranked writers may be released from their services once writing of a season has been completed (or earlier), while higher-ranked writers may be expected to work until the completion of photography for the season (which may be several weeks after writing is completed).⁶⁰

Writers must generally work for one to two complete seasons (of eight to twenty-two episodes each) at any given title level before being promoted to the next title, with the promotion track moving more slowly between more senior ranks.⁶¹ In early seasons, a writer's room will typically feature writers of widely varied titles and experience levels. In later seasons, staff titles tend to be more top-heavy, as staffers who have remained with a show for many seasons have crawled up the ranks and escalating production budgets on a successful series can support more expensive staff.

iii Guarantees

Weekly engagements usually guarantee a minimum number of weeks, depending on the needs of the production schedule and the studio's desire to qualify for more favorable scale minimum weekly rates. Twenty-week guarantees are common, with the studios retaining options to extend the writer's services for as many additional weeks as are necessary for the writer to complete their duties for the season. Following the introduction of span protection in 2018, studios trying to manage tight writing budgets tended to employ writer/producers who were subject to span protection for only as many weeks as could be covered by their episodic fees without any overage payments—so, twenty-four weeks on a

58 Executive Producer credit for writers who are neither creators nor showrunners is relatively rare and usually accorded only for strong “second-in-command” types with close personal relationships with the showrunner, or to long-tenured writers on a series who have risen through the ranks from season to season.

59 Writers choose to work as Consulting Producers for any number of reasons, including to help out friends and collaborators from prior projects, as a (usually mutually approved) part of their services under an exclusive overall deal, and/or to earn quick and low-commitment cash between more valued (or valuable) jobs.

60 As of the 2023 WGA Basic Agreement, such decisions are now subject to minimum employment periods. See Section B.iv.

61 Some writers report apparent “bottlenecks” in promotion between the Staff Writer and Story Editor levels, and again between the Co-Executive Producer and Executive Producer levels.

ten-episode order, just over nineteen weeks on an eight-episode order, etc. New “minimum staffing” rules introduced into the 2023 WGA Basic Agreement, however, require that the minimum staff (another new-in-2023 concept, discussed at the beginning of this section) of a post-greenlight writers’ room must be guaranteed at least twenty weeks of employment or the full duration of the post-greenlight room (whichever is shorter), and that, for single-camera series made for streaming or pay (non-basic) cable that are exclusively filmed in the United States and Canada, two writer/producers *in addition to the showrunner* must be employed for the lesser of twenty weeks of production or the duration of production.⁶²

Episodic engagements for the first season of a series typically cover the initial network order. In broadcast, where “backorders” by the network of additional episodes beyond the initial order for the season remain relevant, the guarantee for the first season will cover only the initially ordered episodes, with the studio retaining a further option to extend the writer’s engagement for any backorder.⁶³ Unlike in series regular actor deals, there is typically no episodic minimum attached to the “all episodes produced” guarantee,⁶⁴ although compensation and minimums are generally determined based on the ingoing number of episodes ordered for the season. In addition, writers always enjoy the backstop of the applicable WGA scale minimum for the weeks actually worked by the writer, as well as span protection (to the extent applicable).

iv Options and Exclusivity

Traditionally, most staffing agreements have been three-year deals, covering the upcoming production season of a series, with studio options to engage the writer, season-by-season, for up to two additional seasons thereafter. This default may be discarded in favor of a one- or two-year deal for Co-Executive Producers or Executive Producers, or for writers who are engaged to work on a part-time or consulting basis. In broadcast television, where the network’s renewal options for a series are highly regularized, these options are usually exercisable (like the options in most services deals) by June 30 of each year. Outside of broadcast, option periods for staffing writers more often must be

62 The context of these new rules is discussed in greater detail in Chapter 3, Section A.vi (pg. 116).

63 Even in later seasons of such broadcast series, the applicable guarantee will usually cover only an initial chunk of episodes for a writer’s first year on staff (e.g., thirteen out of twenty-two), as a hedge for the studio in its new relationship with the writer, with the studio holding an option to extend the writer’s guarantee and services for the balance of episodes produced. In subsequent years of the deal, the guarantee will cover all episodes produced for the applicable season.

64 This is largely because the WGA Basic Agreement, unlike the SAG Basic Agreement, does not require any such minimum guarantee in order for a studio to retain its exclusive options on a writer’s services.

exercised promptly (e.g., within ten business days) following the studio's receipt of the network's order of a new season, effectively tying the staffing writer's deal to the timing requirements of the studio's license agreement with the network.

As episodic counts and employment periods have shortened across the industry, however, studios and networks have been increasingly willing to make shorter-term deals with at least some of the writers staffed on any given series. In addition, since 2021, the WGA Basic Agreement has included a compensation "money break," under which a studio's first-position option to engage a writer for an additional seasons of services is limited to sixty days after the writer completes paid work for the prior contract year.⁶⁵ Studios may nominally negotiate for longer option periods, but for writers under the applicable money break, such options become subject to the writer's professional availability after that sixty-day mark.⁶⁶ Thereafter, the writer can seek and accept other jobs, but (so long as the studio's contractually defined option is in effect) must first notify their existing studio employer and give the studio an opportunity to preempt the outside offer (by exercising its option and guaranteeing the writer's minimum compensation for the following contract year). Alternatively, the studio may extend its first-position option beyond sixty days, on a week-to-week basis, by paying the writer at least one-third of the applicable WGA scale minimum weekly compensation (although this right is rarely used).

Most staffing writers render services on a fully exclusive basis during production periods (or, at a minimum, on an exclusive basis with respect to television services, with no other services to materially interfere). Writers will seek the right to develop (i.e., write and develop pilot or theatrical feature scripts) for third parties during the term of this engagement. Studios typically allow this during hiatus periods of a writer's primary series and on a second-priority/non-interfering basis during production periods of the second and third seasons, but some studios prohibit staffed writers from developing, especially in television, during their first production season on a show (particularly if that is also the show's first season). Some studios prefer to limit the right to develop in second position only to more senior, experienced writers, although studios have largely grown more flexible about second-position development as episodic counts and employment periods have shrunk. Nevertheless, showrunning executive producers may have strong opinions about whether the writers on their teams should be permitted to engage in development on the side.

65 For the 2023–26 contract term, the money break for writer options and exclusivity is \$350,000 per year.

66 Above that minimum compensation threshold, such options are freely negotiable.

Studios have traditionally required that such exclusivity apply even outside of active services periods, so long as the writer remains under option for one more additional season (and most studio forms for staffing deals are still drafted accordingly). Since 2021, however, the WGA Basic Agreement has also prohibited companies from requiring such “off-season” exclusivity from writers whose annual compensation is less than the aforementioned money break. At the same time, studios have grown increasingly permissive about allowing even writers earning above the WGA’s money break for freely negotiable options and exclusivity to accept outside work between seasons, but usually retain the requirement that such third-party services be in second position to the studio’s option for the next contract year.⁶⁷

Writers will also often negotiate for the right to opt out of their staffing deals in the event that a project they have created and developed is ordered to production of a pilot or series. Usually, this request is accommodated with respect to development projects that predate the staffing deal itself, although typically, the studio only permits the writer to opt out between seasons (or to decline an engagement for an upcoming season) and not to leave a production season mid-stream. However, even though studios seldom grant a contractual right to opt out mid-season (and, when they do, usually require significant notice and coordination to avoid disruption to the series), when a writer’s development project is ordered to production, many studios will, as a courtesy, agree to release the writer from their obligations, so as not to deprive the writer the opportunity to work on their own series.

Finally, particularly at junior and mid-range levels, many studios will require writers who have staffed onto one of their shows to accord the studio a “first look” at any proposed development projects during the term of the writer’s staffing deal, giving the studio the opportunity to negotiate with the writer to develop any such project before the writer is permitted to present it to third-party studios.⁶⁸

v *Episodic Scripts*

The showrunner generally assigns each episode of a series to a specific writer, subject to studio and network approval. Such episodic scripts are always paid at the applicable WGA scale minimum rate—for the 2024–25 contract year,

67 Because studios are usually loathe to employ anybody who could be recalled to another production with little or no notice, as a practical matter, a writer who wants to take on new work while subject to a firm first-position option usually asks their existing studio employer to be released from future options under their existing deal, or for the studio to agree to relegate such options to second position (behind the writer’s new job) for a specified window of time (after which, absent any further agreement, the studio’s option automatically jumps back into “first position”).

68 First look agreements outside of the context of staffing deals are discussed in greater detail in Chapter 10, Section B (pg. 402).

\$45,397 for a one-hour broadcast/Tier 1 HBSVOD/Tier 1 HBAVOD episode; \$30,867 for a half-hour broadcast/Tier 1 HBSVOD/Tier 1 HBAVOD episode; \$32,925 for a one-hour cable/Tier 2 HBSVOD/Tier 2 HBAVOD episode; and \$18,114 for a half-hours cable/Tier 2 HBSVOD/Tier 2 HBAVOD episode. As of the 2023 WGA Basic Agreement, episodic scripts for writers at all levels may not be recouped against (i.e., paid on top of) a writer's negotiated weekly or episodic fees. Staffing writers may also attempt to negotiate for a minimum guaranteed number of assigned episodic scripts (on a pay-or-play basis); such guarantees are rare, granted only at higher levels, subject (formally or informally) to approvals from the showrunner and network, and may be limited only to the first year of a multi-year deal.

vi Mini-Rooms

The 2023 WGA Basic Agreement introduced first-of-their-kind rules for pre-greenlight mini-rooms—shorter-term, smaller-staffed writers' rooms convened to generate additional development materials and provide the network with further information on which to base a series order or renewal decision.⁶⁹ Specifically: (1) weekly scale minimums that are 25% higher than the corresponding minimums for post-greenlight rooms;⁷⁰ (2) a minimum guarantee of ten consecutive weeks of employment; (3) a requirement that at least two writer/producers be engaged alongside the creator/showrunner;⁷¹ and (4) writer/producers engaged for a mini-room also must be engaged for any post-greenlight writers' room once the season is ordered to production.⁷² Weeks worked in a pre-greenlight mini-room may be credited against the writer's guaranteed weeks in the writers' room, but compensation cannot be credited.

69 See Chapter 3, Section A.iii (pg. 109).

70 These rates can also be found in the "Streamlined Schedule of WGA Minimums" in Section E. Writers are always free to attempt to negotiate for overscale weekly compensation in such mini-rooms (and otherwise), and this book is being published before the market has had an opportunity to truly digest and adapt prevailing practices to the new rules for mini-rooms. However, it seems likely that studios and platforms will seek to strictly limit writers in mini-rooms to applicable scale compensation whenever possible, and that only the highest-end creators and showrunners will be able to successfully negotiate overscale rates.

71 If the creator and the showrunner are two separate people, then that leaves only one additional writer/producer who must be engaged to satisfy the minimum for a pre-greenlight mini-room. See Section A.iii on agreements for supervising/showrunning executive producers.

72 This requirement is binding on the studio, but not necessarily on writers—those who are joining a mini-room and wish to avoid making a long-term commitment, especially at high levels, may choose to negotiate to make their engagement for a post-greenlight room subject to their own preexisting professional obligations, or even for the right to decline a pick-up to the post-greenlight room altogether based on their own personal preferences.

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TABLE 6.2 Staffing Writer Agreements

<i>Deal Term</i>	<i>Main Issues/Ranges</i>	<i>Other Issues</i>
1. Fees	• Weekly scale minimums based on number of guaranteed weeks • Staff Writers, Story Editors, and Executive Story Editors usually engaged for scale compensation (but, in a second year with the same title, or for ESEs, may be up to scale +10%) • Mid-level writer/producers in broadcast paid \$15K–\$20K per episode • Mid-level writer/producers in cable/streaming must be paid at least \$20.5K–\$23K per episode (depending on total episode count) to cover scale minimums; now frequently instead paid on a weekly basis • Senior writer/producers paid \$25K–\$50K per episode (or more)	• Raises between season, often \$500–\$2.5K per episode • Larger raises may accompany credit bumps • Span protection (i.e., 2.4 weeks of services per episodic fee, with overages at one episodic fee per 2.4 additional weeks) for writers on episodic fees guaranteed less than applicable WGA money break (currently \$450K per year in broadcast/HBSVOD or \$375K per year in cable/HBAVOD) • Post-production weeks generally deemed non-writing and excluded from scale minimums and span protection (but some studios agree to pay weekly fees for post-production services at a reduced rate) • See “Streamlined Schedule of WGA Minimums” (Section E) for applicable scale minimums
2. Credit	• Credit hierarchy: ◦ Staff Writer ◦ Story Editor ◦ Executive Story Editor ◦ Co-Producer ◦ Producer ◦ Supervising Producer ◦ Co-Executive Producer ◦ Executive Producer	• Main or opening title credit at producer levels (possible ties) • Consulting Producer credit for part-time or below-usual-level work • May escalate between years of a deal
3. Guarantees	• May guarantee minimum week counts on weekly engagements (most commonly 20 weeks) • Episodic deals usually guarantee “all episodes produced”	• In any event subject to scale weekly minimums and span requirements

(Continued)

TABLE 6.2 (Continued)

<i>Deal Term</i>	<i>Main Issues/Ranges</i>	<i>Other Issues</i>
4. Options and Exclusivity	• By default, usually 3-year terms; may negotiate for 2-year or 1-year deals • Fully exclusive during services periods; off-season exclusivity permitted only if writer is over WGA money break (currently \$350K per year) • First-position options limited to 60 days if writer is under WGA money break • Studio may require first look on new development	• May negotiate to develop in second position during hiatus and/or production periods (potentially after Y1) • First-position option period can be extended weekly for 1/3 weekly scale • Studio preemption right on outside offers after first position expires • May negotiate for opt-out if writer's own development project is produced
5. Episodic Scripts	• Usually paid at applicable scale (based on platform and budget) • Writers may seek to negotiate minimum guaranteed script assignments (on a pay-or-play basis)	• Script fees not applicable against weekly or episodic fees at any level • Guaranteed episodic scripts subject to approval of showrunner and network, and may be limited to the first year of the deal • See “Streamlined Schedule of WGA Minimums” (Section E) for applicable scale minimums
6. Mini-Rooms	• Weekly scale minimums are equal to 125% of corresponding minimums for post-greenlight rooms • Writers in mini-rooms must be guaranteed at least ten consecutive weeks of employment	• At least two writer/producers must be engaged alongside the creator/showrunner • Writer/producers must be engaged for any post-greenlight writers' room (subject to their own opt-out rights, if/as negotiated)

C Supervising/Showrunning EP Agreements

Studios may find themselves interested in developing an idea from a young and/or inexperienced writer/creator, who may be unfamiliar with the development process and/or lack the necessary knowledge and skills to showrun their own series. In such circumstances, studios will often attach a “supervising writer,” an experienced creator/showrunner who is brought on to “supervise” and guide the work of the junior creator, typically with the expectation that the supervising writer will also be the showrunner (or senior partner/“co-showrunner”

alongside the creator) of the eventual series, if ordered.⁷³ Because these supervising writers do not actually “write” (or co-write) the pilot script themselves, they are not eligible for WGA-determined creation credit (which is based on the authorship of the final pilot/first episode script). However, supervising writers attached early in the development process often still have a strong sense of personal ownership or investment in the project and are expected to play very central roles in the development and production of the series to which they are attached. The deals for supervising/showrunning EPs largely resemble those for series creators (including comparable episodic or weekly compensation),⁷⁴ with a few key distinctions and adaptations.

i Supervision (and Writing/Co-Writing) Fees

The typical fee for supervising a pilot being prepared by another writer is \$25,000–\$50,000 (as usual, with outliers). Because pilot supervision is not technically “writing,” there are no applicable WGA scale minimums.

Occasionally, based on the progress of development (or lack thereof), a studio may choose to have a supervising writer “put pen to paper” after all. This can take the form of the senior supervising writer individually rewriting an existing draft prepared by the initial junior writer, working as a team with the original writer to jointly revise an existing draft, or effectively rebooting development by commissioning a “page one rewrite”—a rewrite of an existing script that is so extensive that it functionally amounts to throwing out the existing script and starting from scratch on a new first draft.⁷⁵ Such page one rewrites may be assigned to the supervising writer individually, or, more commonly, to the supervising writing and the original writer jointly as an “arranged marriage.”

In any event, the conversion of the writer/producer’s services from “non-writing” supervision to WGA-covered writing (or co-writing) requires a renegotiation of (or amendment to) the supervisor’s existing agreement to address the new writing services and otherwise bring it more into conformity with a standard deal for a creator (essentially reversing the customary modifications to such deals that are typically negotiated for supervisors). A studio may try to insist that the newly commissioned rewrites be paid at applicable scale to mitigate the cost of the changed development strategy for an already struggling project. More commonly, however, writers and their representatives insist that

73 Supervising writers also sometimes partner with a junior creator—whether via existing personal relationships or introductions by representatives or non-writing producers—prior to initially taking a pitch out into the marketplace, in which case the supervising writer is part of the initial package of elements with which the studio must make deals in order to “buy” and begin developing the project.

74 See Section A.iii.

75 Although such “page one rewrites” may be treated as a “rewrite” for purposes of applicable WGA scale minimum compensation, in practice, they are usually paid similarly or equivalently to new pilot scripts.

such new writing services be negotiated and paid at fair market rates, as though the deal had been structured for writing/creation from inception. Especially if the studio is paying “full freight” (or nearly so) fees for the new writing work, it may seek to negotiate for any previously paid supervision fees to be applicable/credited against new writing fees (subject to applicable WGA minimums). Outstanding unpaid supervision fees are generally struck from the deal.

ii Position/Priority

Supervising writers often negotiate more aggressively for “no position” deals, drop down rights, reduced exclusivity, and comparable terms that give them increased control over whether and how long they stay with a project (and, in particular, increased freedom to depart or reduce their commitment to a supervised/co-created project in favor of an individually written/created one).⁷⁶ This creates some risk for the studio, which is explicitly relying on the supervising/showrunning executive producer to provide critical knowledge and experience that the pilot writer/creator lacks, and whose sales pitch to networks (and such networks’ comfort level about ordering the series to production) may rely significantly on the participation of that senior writer/producer. That said, because supervision fees are usually substantially lower than writing fees (and shared writing fees for co-written projects are typically not enhanced to compensate for the fact that such fees are being split), as well as a general industry-wide norm respecting the primacy of projects that a writer personally creates,⁷⁷ studios tend to be at least somewhat accommodating of such requests. Often, this requires a very frank and pragmatic discussion between negotiators about need, risk, and opportunity, and a willingness to compromise to address both sides’ legitimate concerns—for example, by requiring a supervising writer to make a stronger commitment to stick with a project at least through its first full production season, while giving the writer more flexibility to depart or reduce their commitment in subsequent seasons (as opposed to the firmer two-year commitment embodied in most creator deals).

iii Credit-Based Entitlements

Because they do not technically participate in the formal *writing* of a pilot script, supervising writers generally do not have any expectation of receiving any form of “created by” credit for the series. In such deals, credit-based entitlements are instead tied to the creation credit received *by the writer(s) being supervised*. So,

⁷⁶ Supervising writers are almost by definition of higher stature and therefore possess some bargaining power in negotiations, and naturally tend to favor and prioritize projects that they individually write/create over those that they supervise or co-create.

⁷⁷ See Section B.iv.

for example, a series lock that is normally contingent on a writer receiving sole “created by” credit is instead contingent on the supervised writer receiving sole “created by” credit. If a third writer is ultimately brought in to jointly develop (or redevelop) the project, then a supervisor’s sole credit-based terms are normally satisfied by credit being shared *only amongst writers they have actually supervised*.⁷⁸ In other words, if the supervisor is retained to supervise the work of the new writer, then credit shared between both supervised writers satisfies “sole credit” conditions for the supervisor; but if the supervisor’s work is limited to supporting only the original writer, then credit shared between the two writers would constitute “shared credit” for purposes of the supervisor’s deal. If the supervisor themselves serves as the new writer (whether working individually or jointly with the supervised writer), then “sole” credit-based conditions are usually deemed satisfied by credit shared only between the supervisor and the original writer (as is the case for projects that are co-written from inception). “Shared” credit is then redefined to mean credit shared with a future third party, although, if a development project seems to demand the work of a third writer, it is more likely to simply be killed, or—if based on preexisting material rather than the first pilot writer’s original idea, especially intellectual property that is wholly owned by the studio—perhaps fully rebooted with the original writers removed from the process altogether.⁷⁹

iv Royalties

Deals for supervising writers do not provide for episodic royalties, which remain reserved only for writers who receive sole or shared “created by” credit.

78 In addition, supervisors may sometimes seek to negotiate additional or enhanced supervision fees for their work in supervising a second writer, especially if the new writer is dramatically reworking the existing script. Studios generally resist such requests, though they may be more accommodating if the new writer is truly engaging in a “page one rewrite” that effectively starts the development process over from scratch.

79 In such circumstances, it is unlikely (and certainly not intended) that the exiting writers will end up with any share of creation credit. That said, although a “page one rewrite” is usually treated more or less like a new script for purposes of negotiating writing fees (as discussed in Section C.i), as a technical matter, the discarded script is still considered to be the “first draft,” and the original writer is still treated as a “participating writer” for purposes of the WGA credit determination process (which, in general, strongly favors according *some* credit to a script’s first writer, even if the script is dramatically reworked and transformed by later writers). In some cases, a studio and a later-added writer may specifically agree that the writer will never be given access to the original script, so that the studio can take the position that the writer is working on an entirely “new” project, and the original writer/script are excluded from WGA credit determination process. Of course, that is not an option when the later-added writer had been supervising the original writer’s work. And in any event, writers generally expect not to bear the risk of surprising outcomes in the WGA credit determination process. Therefore, writers’ representatives typically insist that all “sole credit” conditions be deemed satisfied if the new writer shares credit with the original writer (even if the new writer has never seen the original writer’s work).

If a supervisor is subsequently engaged to write or co-write the pilot script, then the modifications to their deal will usually include the addition of royalties. As in other contexts, creation credit shared with the prior writer may be deemed to satisfy the usual sole “created by” credit condition for full royalties, although these royalties would still be subject to sharing with the co-creating writer (as though the parties had worked as a writing team from inception).

v Bonuses

Deals for supervising writers typically do not provide for bonuses, which are still primarily reserved for writers who receive sole or shared “created by” credit. If a supervisor is subsequently engaged to write or co-write the pilot script, then the modifications to their deal will include the addition of bonuses (which would usually still be shared with the original writer). As in other contexts, creation credit shared with the prior writer may be deemed to satisfy the usual sole “created by” credit condition for full bonuses, although these bonuses would still be subject to sharing with the co-creating writer (as though the parties had worked as a writing team from inception).

While it can be fairly said that deals for supervisors *never* provide for royalties (unless later modified for actual writing), bonuses do occasionally appear in supervision deals, especially if the supervision fees fall well short of the supervisor’s expectations. Such bonuses may operate like those for creators, i.e., triggered by the series being ordered to production. However, in this context, they might be tied to earlier and more easily-achieved milestones, such as the project being set up with a network or a pilot being ordered—especially if the studio’s willingness to provide such bonuses helps it achieve desired outcomes on disputed terms around position and priority.

vi Backend

Backend is a standard component of supervisor deals (with credit conditions satisfied, as they are for other deal terms, by the credit received by supervised writer(s)). However, because backend will also be granted to the actual writer/creator, and because backend is understood to compensate both for the act of creation and the ongoing rendering of writing/producing services, a supervisor can expect to receive fewer “points” than they would for creating and running their own show.

If a supervisor is subsequently engaged to write, however, then the same logic dictates that they receive additional backend if they personally share in creation credit. The applicable credit conditions usually operate the same way they do in other parts of these deals, with “sole credit” conditions being satisfied by credit shared only with prior/supervised writers. However, such enhanced backend is still carefully negotiated by the studio to stay within its customary

caps and other policies for aggregate contingent compensation grants for the series. If the total negotiated backend for the project is already at the studio's cap prior to the supervisor taking on new writing duties, the studio will look to other participants to reduce their shares to "make room" for the additional backend granted to the converted supervisor. And usually, the studio will look primarily (or entirely) to the original writer to bear such reductions, in essence because the additional points are being granted to the supervisor because the original writer had "failed to get the job done" on their own, even with the supervisor's support.

vii Credit

The issues around the negotiation of credit in supervisor/showrunner deals are equivalent to those for creator/showrunner deals.⁸⁰

viii Later-Attached Showrunners

The current prevailing practice in television development is to attach a supervisor/showrunner to a project that needs one due to the creator's inexperience early in development. This allows the supervisor to have greater impact in crafting the project they are expected to eventually write and showrun, for the parties to be able to evaluate the compatibility of the creator and supervisor/showrunner in relatively low stakes/low-pressure circumstances, and for the creator and supervisor/showrunner to build a personal relationship and a more robust foundation for their future creative partnership.⁸¹

In the past, however—when there was less pre-packaging, greater use of pilots, and more ordering decisions made solely based on a pilot script—showrunners would usually be attached after a pilot was ordered (to assist with its production), or even after a pilot was completed and the parties were preparing to move to full series production. Such late attachments persist in broadcast television, where the development and ordering process remains much more "traditional," and where desirable writers/showrunners may suddenly become available when their own script is "passed on" either before or after the pilot stage. Such later-attached showrunners may not technically qualify as "supervisors" (or receive supervision fees) if the pilot script is fully developed prior to their arrival. In addition, long-running series frequently need to replace their

80 See Section A.xii.

81 Because the collaboration during development is lower-stakes/lower-pressure, it may not necessarily smoke out potential conflict or incompatibility between the creator and supervisor/showrunner, which can still emerge later during the high-stakes/high-pressure environment of series production. But it's still better than throwing the parties into the crucible of production with no prior opportunity to develop or evaluate their working relationship.

original showrunners, who usually retain some ongoing role and relationship with their series, but after a few years may prefer to move on to something new.

For such later-stage attachments of showrunners, the deals tend to resemble staffing agreements more than creator agreements (which, as discussed in this section, are the foundation for supervisor deals). Compared to typical staffing agreements for non-showrunners, these deals usually have two-year (rather than three-year) terms, and the applicable credit is always “Executive Producer.” Like other staffing agreements, they do not provide for first opportunity rights for subsequent productions.

If a showrunner joins a series prior to its third season, they will typically demand a share of backend from the series. Typical backend allotments for such showrunners range from 1% to 5% of MAGR (in rare cases, up to 7.5% or even 10% of MAGR), depending on the stature of the showrunner, the timing of their attachment, and the extent of their contributions (if any) to the underlying development of the series. As with supervisor deals generally, the showrunner’s backend allocation is expected to “fit” within the studio’s maximum permitted aggregate pot (again, usually 35% of MAGR). Where a studio expects to engage an experienced showrunner to support a junior creator (but does not do so at the inception of the development process), it will often specifically negotiate reducibility in the creator’s backend to account for the points it expects to allocate to the eventual showrunner.

Showrunners who join an established series after its second season (at which point all backend grants to the original participants are fully vested) may not receive any backend at all, especially if the project is particularly successful or long-running by the time the new showrunner takes over. Such jobs offer the opportunity to work on an “important” and widely watched project, but the lack of a personal economic stake in the show’s success can make these jobs less financially appealing than focusing on creation, while the expectation that the new showrunner sticks to an established creative template may make these jobs less creatively fulfilling than personally building something new. For these reasons, writer/producers who take on showrunning duties on well-established series are usually promoted from within the existing writers’ room, rather than recruited from outside. In addition, to reduce a showrunner’s financial incentive to leave for other opportunities, studios will frequently “wrap a showverall” around the showrunner’s deal to provide some premium beyond the showrunner’s producing fees. Studios also often commit to second-position/off-season development of one or more new projects (potentially as a blind deal)⁸² with a newly hired or promoted showrunner.

82 See Section A.i.

ix Quick Reference Guide**TABLE 6.3** Supervising/Showrunning EP Agreements

<i>Deal Term</i>	<i>Main Issues/Ranges</i>	<i>Other Issues</i>
1. Supervision (and Writing/ Co-Writing) Fees	• Supervision fees typically \$25K–\$50K (with outliers) • No applicable scale minimums for supervision fees • May later be converted to a writing or co-writing deal, with additional writing fees (usually at or near fair market value for the writer) and other adjustments to bring the deal closer to typical creator deals.	• Conversion to writing/ co-writing may contemplate supervising writing or rewriting alone or jointly with the original writer (e.g., “arranged marriage”) • If converted to writing or co-writing, previously paid supervision fees may be applicable against new writing fees, and unpaid supervision fees are generally struck.
2. Position/Priority	• Usually more flexibility than in creator deals about priority/position, locks, and drop downs, especially to protect the writers’ ability to develop and produce their own individually created projects	• Studio may require a robust commitment for pilot/first season, but be more flexible about subsequent seasons • Consulting Producer credit for part-time or below-usual-level work • May escalate between years of a deal
3. Credit-Based Entitlements	• Credit-based entitlements are based on creation credit accorded to the writer(s) being supervised (rather than to the supervisor) • “Sole credit”-based entitlements usually deemed satisfied if credit is shared by multiple writers with whom the supervisor directly worked	• If supervisor is later engaged to write or co-write, then “sole credit”-based entitlements usually deemed satisfied by credit shared with prior writer(s)
4. Royalties	• Not provided for supervising writers (unless they subsequently write or co-write)	• If the supervisor writes, “sole credit” condition for royalties typically satisfied by credit shared only with prior writers, but royalties must still be shared by the co-creators

(Continued)

TABLE 6.3 (Continued)

<i>Deal Term</i>	<i>Main Issues/Ranges</i>	<i>Other Issues</i>
5. Bonuses	• Generally not provided for supervising writers (unless they subsequently write or co-write) • May occasionally be agreed even without writing, especially if supervisor accepts lower-than-expected supervision fees and/or such bonuses are tied to agreed position/priority terms	• If the supervisor writes, “sole credit” condition for bonuses typically satisfied by credit shared only with prior writers, but usually must still be shared by the co-creators
6. Backend	• Typically fewer points than the same individual would get for creating their own series • Supervisor may negotiate for additional points if subsequently engaged to write or co-write, within studio policies/aggregate caps	• If supervisor is later engaged to write or co-write, necessary reductions from other participants are usually borne primarily by the original writer
7. Credit	• Same as for creator/EP agreements (Section A)	• Same as for creator/EP agreements (Section A)
8. Later-Attached Showrunners	• Deals modeled principally on staffing rather than creation agreements (with EP credit standard) • May provide for backend (usually 1%–5% of MAGR, or more at higher levels), especially if engaged before pilot or first season	• Backend expected to “fit” within standard pot caps • Usually 2-year terms (rather than 3) • May “wrap a showverall” around the deal and/or develop on the side • No first opportunity for subsequent productions if showrunner did not supervise pilot writing

D Non-Writing Executive Producer Agreements

Non-writing executive producers, often referred to as “NWEPs,” serve a variety of roles on television series. Many effectively serve as an outsourced labor force for a studio’s development activities, scouting the marketplace for interesting pitches from writers and underlying properties to adapt and bringing them to the attention of studios. Many non-writing producers enjoy close relationships with writers, actors, or other key talent, and can play a vital role in the

packaging of a product; others focus on close relationships with studio and network executives and decision-makers, which can be vital to getting traction for a project. Some play an active role in casting, crafting the visual look and feel of a series, or other key creative tasks that are not directly related to writing, while others actively engage directly with writers (albeit without ever putting pen to paper themselves). Many series have an executive producer who serves as producing director, personally directing multiple episodes of the series while working closely with the line producer and other episodic directors to manage physical production and maintain a consistent look and feel to the series.⁸³ And some non-writing producers are the managers and/or close confidantes of writers, rightsholders, star actors, or other elements of the creative process, who insinuate themselves as producers of their friends' or clients' projects. Big-name non-writing producers active in television include well-known theatrical producers like Imagine Entertainment's Brian Grazer (Fox's *Empire* and Hulu's *Under the Banner of Heaven*), Amblin Entertainment's Steven Spielberg (*Bull*, *Extant*, and *Under the Dome*, all on CBS), and Jerry Bruckheimer (CBS's *CSI* franchise and Fox's *Lucifer*), as well as successful manager-producers like Peter Principato (ABC's *Black-ish* and Peacock's *Twisted Metal*) and the late Steve Golin (Netflix's *13 Reasons Why* and USA's *Mr. Robot*).

In general, non-writing producer deals are subject to the same basic structure as writer/producer deals (with the obvious exception of pilot-writing services, which are non-applicable to such deals). Consequently, the summary set forth in Section A can generally be understood to apply to non-writing producers as well, with the following caveats and modifications.

i Development Fees

Although non-writing producers do not personally write the pilot teleplay, they are often actively engaged in that process, working closely with the writer to craft the initial story, and providing notes on the writer's drafts. For the most part, such services are rendered by the non-executive producer for no initial charge in exchange for the promise of episodic fees and backend if a pilot or series is ever actually produced. At some studios, this is a matter of hard policy. But in some rare instances, a non-writing producer may be able to extract from the studio a development fee (which may be treated as an advance against future fees owed to that producer for services on the pilot/series). Where applicable, such fees typically range between \$10,000 and \$50,000, with \$25,000 being most common (but again, all such development fees are relatively uncommon and usually reserved for high-level producers in unique circumstances). Producers who independently spent money on the development of a project prior

83 See Chapter 7, Section B (pg. 279).

to setting it up with a studio (e.g., by commissioning a script or paying option fees to lock up an underlying property) may also seek reimbursement for their historical development expenses, which could come immediately, be deferred until the production of a pilot and/or series, or be divided between the two.

ii Producing Fees

The range of producing fees for non-writing producers, and the structure of fee bumps in subsequent seasons, are comparable to those applicable to writing producers (but typically lower than those for established creators and show-runners). Non-writing producing fees generally range between \$15,000 and \$60,000, although non-writing producers who definitively control desirable underlying rights, or who engage in significant packaging activity prior to stepping up a project with a third-party studio or network, may be able to command more substantial fees, up to \$100,000 per episode or even higher in streaming. These higher fees are more common where the “non-writing producer” is a bona fide company operation (such as Amblin Entertainment, Plan B Entertainment, or Anonymous Content), rather than an individual or pair of individual independent producers.

Where a studio employs hard caps on aggregate executive producer fees on any given series, non-writing producers are more likely than writer/producers to reduce their fees to accommodate a package of many high-level collaborators. In addition, unlike writer/producers, non-writing producers are typically not in a position to substantially renegotiate their fees upward in future seasons, even on a successful series.

iii Locks

Although the variety of locks applicable to non-writing producers is identical to those applicable to writer/producers, the norms for such locks are different. Non-writing producer deals may be based on two-year Warner locks at lower levels or life locks at higher levels; however, most non-writing producer deals feature firm two-year locks. In addition, because non-writing producers do not receive story, teleplay, writing, or series creation credit, the credit-based conditions for locks under writer/producer deals are not applicable to writer-producer deals. Instead, series locks are typically conditioned only on the individual not being in breach and completing pilot producer services without being “pay-or-played.” Finally, because non-writing producers typically play a more vital role in the development and pilot stages of a television series and a less vital role in its ongoing production, they have less leverage than writer/producers to negotiate more favorable terms to stay with a successful series in later seasons. Consequently, unlike writer/producers (who generally favor two-year deals), non-writing producers virtually always seek to be locked for the life of a series.

iv Services and Exclusivity

Unlike writer/producers, whose services for a series are usually substantially exclusive and full-time, the services obligation of non-writing producers is usually non-exclusive, with services for third parties not to materially interfere. Some studios may insist that particularly key non-writing producers render services on a non-exclusive, first-priority basis⁸⁴ (or require that at least one of the members of a producing team, or a mutually approved designee executive, be designated to do so), but this is relatively rare. With the exception of producer/directors, it is virtually unheard of to require full-time exclusive services from non-writing producers. This comparatively low standard of services allows non-writing producers to concurrently work on multiple projects at any given time, and the most successful and prolific producers routinely render services on multiple series simultaneously.

v Royalties

Non-writing producing deals generally do not provide for the producer to receive any form of passive episodic royalty under any circumstances. Fees for non-writing producers essentially always require some level of services to be rendered (though the actual level of services required by the studio or provided by the producer may vary widely from person to person and from project to project).

vi Bonuses

Series sales bonuses for non-writing producers may be given from time to time (and are certainly more common than royalties), but are substantially rarer than for writer/producers (for whom they are essentially ubiquitous). When provided for a non-writing producer, the parameters are generally the same as for writer/producers, although again, credit conditions are not applicable.

vii Consulting

Non-writing producers who are not locked for the life of a series may also be entitled to a “consulting one-for-one.” As with some of the other terms for non-writing producers, this entitlement is not necessarily as automatic and ubiquitous as it is for writer/producers, but it is relatively common. In addition, a life lock as a consultant (which commences after the initial lock as an executive

84 If the studio has “first priority,” it has the general right to require the individual to render services when and where required by the studio, and the individual’s services for third parties would need to be subject to the individual’s commitment to satisfy their obligations to the first-priority employer.

producer has expired) is a more common accommodation to non-writing producers, as a step short of the desired life lock as executive producer.⁸⁵

viii Backend

In general, the backend entitlements for non-writing producers are comparable to those applicable to writer/producers, with a few key distinctions. First, again, credit contingencies do not apply, so the backend entitlement simply vests over the period of the producer's services without regard for credit. Second, rather than vesting in quarters, the backend for a non-writing producer typically vests in thirds—one-third upon completion of pilot producing services, one-third upon completion of series producing services for the first season, and one-third upon completion of series producing services for the second season (with similar variations around pro rata vesting and the treatment of straight-to-series orders).⁸⁶ Third, the range of backend granted to non-writing producers varies more depending on stature than for writer/producers, with backend floors that may range from 2.5% to 17.5% of MAGR. At the highest end, non-writing producers may negotiate for "the pot, reducible"—that is, the full studio's full allocated participation pool (usually 35% of MAGR), reducible by all participations granted to all other third parties on the series (including the writer/creator).

ix Credit

The vast majority of negotiated credits for non-writing producers are as Executive Producer, though high-level non-writing producers may also negotiate for lesser credits (such as Co-Executive Producer or Producer) for their own executives. High-level non-writing producers also seek and receive logo/company credits, subject to the same variations and parameters described for writer/producers (but again, absent any credit or showrunning-based conditions). And again, issues related to pilot teleplay and series creation credit do not apply to non-writing producers.

85 Significantly, a studio may elect to continue to engage a non-writing producer as an executive producer (rather than as a consultant), even after the individual's "lock" as executive producer has expired. In fact, this is fairly common where the relationship between the non-writing producer and the studio and other members of the creative team is positive. However, studios naturally prefer preserving their flexibility to make this decision over contractually committing themselves from inception to paying executive producer fees for the life of a series.

86 Again, this is because the first quarter vest for writer/producers, based on the completion of pilot script writing services, is not applicable to the non-writing producer context.

x Perks

The perks accorded to non-writing producers are comparable to those provided for writer/producers, although exclusive offices and assistants are rarer, given the comparatively part-time, non-exclusive nature of the role. Some non-writing producers may also negotiate for a guarantee that the studio will pay for their travel to the production location of the pilot and/or series at least once (or once per season), in order to assure their ongoing creative involvement with the production. However, studios generally reserve such decisions about the necessity and propriety of in-person, on-set services to their own judgment and further discussion with the non-writing producer, rather than making contractual commitments.

xi Subsequent Productions

Like writer/producers, non-writing producers typically seek to be attached to subsequent productions based on the original television series they have developed. First opportunities for subsequent productions, comparable to those accorded to writer/producers (but again, excluding credit conditions that are not applicable to non-writing producers), are sometimes accorded to non-writing producers as well. Some studios grant such entitlements freely, while others tend to reserve them only for higher-level producers or those who have some special articulable history with a property or project. This contrasts with writer/producers, for whom first opportunity rights, at least for subsequent television series, are generally granted freely (albeit subject to the sole “created by” credit condition). In addition, while writer/producers may expect to receive some form of passive participation if no deal is reached on the subsequent production, passives for non-writing producers are relatively rare (and, where granted, typically limited to a share of backend; again, 50% of the share from the original series for generic spinoffs, sequels, prequels, and remakes, and 25%–33% for planted spinoffs).

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TABLE 6.4 Non-Writing Executive Producer Agreements

<i>Deal Term</i>	<i>Main Issues/Ranges</i>	<i>Other Issues</i>
1. Development Fees	• Usually no development fees • If development fee is paid, usually \$10K–\$50K, most often \$25K • Independent producer’s historical out-of-pocket costs may be reimbursed	• Development fees may be applicable against subsequent fees • Cost reimbursements may be deferred, in whole or in part, to pilot and/or series production steps

(Continued)

TABLE 6.4 (Continued)

<i>Deal Term</i>	<i>Main Issues/Ranges</i>	<i>Other Issues</i>
2. Producing Fees	• Usually \$15K–\$60K per episode, but can exceed \$100K per episode for the highest-level producers in streaming • Highest-level fees are generally somewhat lower than highest-level fees for writer/EPs	• 5% annual bumps are typical, but may be higher (e.g., \$2.5K or \$5K) • Possible tiering based on network/budget level • May be higher where producer controls important rights or has done significant packaging
3. Locks	• Usually a firm 2-year lock • At higher levels, may have a “life lock”	• No applicable credit contingencies (unlike writer/EP deals)
4. Services and Exclusivity	• Usually non-exclusive, no-material-interference services (producer is expected to concurrently work on multiple projects)	• May request first priority for key individuals
5. Royalties	• Generally not applicable (unlike writer/EP deals)	• N/A
6. Bonuses	• May agree to series pickup bonus, but less common/automatic than for writer/EPs • Usually \$25K, if granted	• May be prorated based on the number of episodes produced • Possible set-up or pilot production bonuses • Possible subsequent season pickup bonuses • No applicable credit contingencies (unlike writer/EP deals)
7. Consulting	• May agree to consulting 1-for-1, but less automatic than for writer/EPs • Usually \$7.5K–\$15K per episode	• Usually requires 2 years of services • May lock for life as consultant after 2 years of EP services • Possible tiering based on network/budget level
8. Backend	• Often negotiate ceilings and floors, with participations reducible by third parties (perhaps over a 35% aggregate participation threshold)	• Vests 1/3 for pilot producing, 1/3 for season 1 producing, and 1/3 for season 2 producing (adjusted for straight-to-series orders)

(Continued)

TABLE 6.4 (Continued)

<i>Deal Term</i>	<i>Main Issues/Ranges</i>	<i>Other Issues</i>
	• Floors usually between 2.5% and 17.5% of MAGR, dependent on stature • At highest levels, 35% of MAGR, reducible by all third parties to a negotiated floor	• Possible pro rata vesting • No applicable credit contingencies (unlike writer/EP deals) • Miscellaneous backend definition issues (see Chapter 9)
9. Credit	• Usually Executive Producer credit • May provide additional lower-level credit for key executives or employees (e.g., Producer or Co-Executive Producer) • Logo credit at higher levels • Executive Consultant credit for consulting 1:1, as applicable	• Generally main or opening title credit, separate card, with ties to other credited Executive Producers
10. Perks	• Business-class travel, first-class accommodations, and per diem • Ground transportation or rental car • Parking, office, and assistant	• Exclusivity of office, assistant, etc. less common where services are non-exclusive/part-time • May use flat weekly or monthly living allowance for extended stays on location • May negotiate guaranteed travel to production
11. Subsequent Productions	• May receive first opportunity to produce spinoffs, but less common than for writer/Eps	• Applicable conditions similar to writer/EPs, excluding credit contingencies

E Streamlined Schedule of WGA Minimums

The following is a heavily edited and streamlined schedule of WGA minimums for the period from May 2, 2024 to May 1, 2026. It represents only a subset of the minimums that business affairs, production, and production finance executives work with, but is offered as a practical, conveniently structured quick reference tool for the scale figures that these executives most frequently consult in their day-to-day work. That said, any reader who is relying on these numbers in a real-world context that demands precision is urged to consult and cross-reference the most recently published official WGA Schedule of Minimums.⁸⁷

87 Historically available online at <https://www.wga.org/uploadedFiles/contracts/minXX.pdf> (where “XX” is the last two digits of the initial contract year). As of this writing, the WGA has published its initial official Schedule of Minimums for the 2023–26 contract term. In general, the 2023 WGA Basic Agreement provides for 5% increases to minimums for scripts, formats, and bibles for the

TABLE 6.5 Minimum Weekly Scale Compensation (5/2/24–5/1/26)

<i>Position</i>	<i>Guaranteed Weeks</i>	<i>5/2/24–5/1/25</i>		<i>5/2/25–5/1/26</i>	
		<i>Post-GL⁸⁸</i>	<i>Pre-GL⁸⁹</i>	<i>Post-GL</i>	<i>Pre-GL</i>
Staff Writers (Article 13)	6 of 6 ⁹⁰	\$5,762	\$7,203	\$5,964	\$7,455
	14 of 14	\$5,353		\$5,540	
	20 ⁹¹	\$4,940	\$4,940	\$5,113	\$45,113
	40 ⁹²	\$4,515	\$4,515	\$4,673	\$4,673
SE/ESE (Article 14 Tier 1)	Up to 9 ⁹³	\$10,745	\$13,432	\$11,121	\$13,902
	10–19	\$8,955		\$9,268	
	20+	\$8,055	\$8,055	\$8,337	\$8,337
Writer/Producers (Article 14 Tier 2)	Up to 9 ⁹⁴	\$11,769	\$14,711	\$12,181	\$15,226
	10–19	\$9,808		\$10,151	
	20+	\$8,822	\$8,822	\$9,131	\$9,131

2023–24 contract year, 4% increases for the 2024–25 contract year, and 3.5% increases for the 2025–26 contract year, and the union has already announced its election to divert 0.5% from its annual increases for the second contract year to instead be applied against studio contributions to the WGA’s Health Fund. The WGA has the right to make the same 0.5% diversion to its Pension or Health Fund from the scale minimum increase for 2025–26, but has not done so as of this writing. (For this reason, readers who download the WGA Schedule of Minimums to their computers are advised to check the WGA website at least once per contract year to see if the schedule has been republished to account for a new 0.5% diversion.) If the WGA so elects, the actual scale numbers for the 2025–26 contract year will be slightly lower than those reflected in these tables. It is also possible that the schedule published here gets the last digit of a number wrong due to the WGA and AMPTP using a different methodology for fractional dollar amounts when calculations compound in future years. To save ink and paper, this text will not provide the minimums for the 2023–24 contract year (which will have passed by the time it is published), nor speculate about the increases for the 2026–27 contract year or beyond (as this year’s 5%/4%/3.5% increases reflect recent inflationary pressures and broke from a longstanding precedent of 3%/3%/3% increases, and the increases for the 2026–29 deal will likely also reflect the inflationary context when they are actually negotiated). In a more liberal use of ink and paper, it publishes the script minimums in two configurations, to allow the reader to choose which system of organization best suits their needs in that moment.

88 Standard post-greenlight writers’ rooms.

89 Pre-greenlight rooms, a/k/a development rooms, a/k/a mini-rooms. Must guarantee at least ten consecutive weeks of services, after which weeks may be non-consecutive (though this would need to be negotiated as part of the deal, including potential “subject to professional availability” allowances in case of unpaid hiatuses that continue for more than a few weeks).

90 In this scenario, usually week-to-week services (but may still provide for some guarantee).

91 Technically “20 out of 26 weeks,” allowing for some non-consecutive scheduling with unpaid hiatuses.

92 Technically “40 out of 52 weeks,” allowing greater flexibility on consecutive services/unpaid hiatuses.

93 In this scenario, usually week-to-week services (but may still provide for some shorter guarantee, except for pre-greenlight mini-rooms, which require at least ten consecutive weeks of employment).

94 Again, usually week-to-week services (but may still provide for some shorter guarantee, subject to minimum of ten consecutive weeks for pre-greenlight mini-rooms).

TABLE 6.6 Major WGA Money Breaks (5/2/24–5/1/26)

<i>Money Break</i>	<i>Minimum Guaranteed Compensation per Year</i>
Span Protection (Broadcast/HBSVOD)	\$450,000
Span Protection (Cable/HBAVOD)	\$375,000
Options/Exclusivity	\$350,000

TABLE 6.7 Pilot and Episodic Script Minimums by Platform (5/2/24–5/1/25)

<i>5/2/24–5/1/25</i>		<i>Pilot</i>		<i>Episodic</i>		<i>Backup</i>	
<i>Platform</i>	<i>Budget</i>	<i>1-Hour⁹⁵</i>	<i>½-Hour⁹⁶</i>	<i>1-Hour</i>	<i>½-Hour</i>	<i>1-Hour</i>	<i>½-Hour</i>
Broadcast ⁹⁷		\$68,096	\$46,301	\$45,397	\$30,867	\$52,207	\$35,497
Pay TV ⁹⁸		\$68,096	\$46,301	\$45,397	\$30,867	\$52,207	\$35,497
Cable (Season 1)		\$49,388	\$27,171	\$32,925	\$18,114	\$37,864	\$20,831
Cable (Season 2+) ^{99 100}				\$35,059	\$18,114	\$40,318	\$20,831
Major SVOD ¹⁰¹	High-Budget ¹⁰²	\$68,096	\$46,301	\$45,397	\$30,867	\$52,207	\$35,497
	Mid-Budget ¹⁰³	\$49,388	\$27,171	\$32,925	\$18,114	\$37,867	\$20,831
Minor SVOD ¹⁰⁴	High-Budget	\$49,388	\$27,171	\$32,925	\$18,114	\$37,867	\$20,831
	Mid-Budget	\$49,388	\$27,171	\$32,925	\$18,114	\$37,867	\$20,831
AVOD	High-Budget	\$68,096	\$46,301	\$45,397	\$30,867	\$52,207	\$35,497
	Mid-Budget	\$49,388	\$27,171	\$32,925	\$18,114	\$37,867	\$20,831

95 Outside of broadcast and basic cable, covers programs between 36 and 65 minutes in length.

96 Outside of broadcast and basic cable, covers programs between 20 and 35 minutes in length.

97 Network primetime programs (on ABC, CBS, Fox, and NBC).

98 Premium pay networks (e.g., HBO, Starz, etc.). Due to the substantial integration, on both business and creative levels, of such premium pay networks with their corporate parents' flagship streaming services (e.g., HBO into HBO Max, eventually rebranded as Max; Showtime into Paramount+ with Showtime, etc.), in practice, most series that would have been governed as "pay TV" shows ten years ago are now usually governed as HBSVOD productions (although, given prevailing budget levels for these shows, this distinction generally has no impact on applicable scale minimums).

99 In most contexts throughout the WGA Basic Agreement and the officially published Schedule of Minimums, basic cable is referred to as "Other than Network Prime Time."

100 Specifically, basic cable series in subsequent seasons with budgets above \$1,200,000 per episode.

101 SVOD platforms with 20 million or more subscribers in the United States and Canada (including Netflix, Amazon, Apple TV+, Hulu, Disney+, Max, Paramount+, and Peacock).

102 For the 2023–26 contract term, over \$3,800,000 per episode for one-hours, or over \$2,100,000 per episode for half-hours.

103 For the 2023–26 contract term, between \$1,750,000 and \$3,800,000 per episode for one-hours, or between \$1,030,000 and \$2,100,000 per episode for half-hours.

104 SVOD platforms with fewer than 20 million subscribers in the United States and Canada (as of this writing, including AMC+ and BET+).

TABLE 6.8 Pilot and Episodic Script Minimums by Platform (5/2/25–5/1/26)

5/2/25—5/1/26		Pilot		Episodic		Backup	
Platform	Budget	1-Hour	½-Hour	1-Hour	½-Hour	1-Hour	½-Hour
Broadcast		\$70,479	\$47,921	\$46,986	\$31,947	\$54,034	\$36,739
Pay TV		\$70,479	\$47,921	\$46,986	\$31,947	\$54,034	\$36,739
Cable (Season 1)		\$51,116	\$28,122	\$34,077	\$18,748	\$39,189	\$21,560
Cable (Season 2+)				\$36,286	\$18,748	\$41,729	\$21,560
Major SVOD	High-Budget	\$70,479	\$47,921	\$46,986	\$31,947	\$54,034	\$36,739
	Mid-Budget	\$51,116	\$28,122	\$34,077	\$18,748	\$39,189	\$21,560
Minor SVOD	High-Budget	\$51,116	\$28,122	\$34,077	\$18,748	\$39,189	\$21,560
	Mid-Budget	\$51,116	\$28,122	\$34,077	\$18,748	\$39,189	\$21,560
AVOD	High-Budget	\$70,479	\$47,921	\$46,986	\$31,947	\$54,034	\$36,739
	Mid-Budget	\$51,116	\$28,122	\$34,077	\$18,748	\$39,189	\$21,560

TABLE 6.9 Pilot and Episodic Script Minimums by Fee Grouping (5/2/24–5/1/25)

5/2/24—5/1/25		Pilot		Episodic		Backup	
Platform	Budget	1-Hour	½-Hour	1-Hour	½-Hour	1-Hour	½-Hour
Broadcast		\$68,096	\$46,301	\$45,397	\$30,867	\$52,207	\$35,497
Pay TV							
Major SVOD	High-Budget						
AVOD							
Cable (Season 1)		\$49,388	\$27,171	\$32,925	\$18,114	\$37,864	\$20,831
Cable (Season 2+)				\$35,059		\$40,318	
Minor SVOD	High-Budget	\$49,388	\$27,171	\$32,925		\$37,864	
Major SVOD	Mid-Budget						
Minor SVOD							
AVOD							

TABLE 6.10 Pilot and Episodic Script Minimums by Fee Grouping (5/2/25–5/1/26)

5/2/25—5/1/26		Pilot		Episodic		Backup	
Platform	Budget	1-Hour	½-Hour	1-Hour	½-Hour	1-Hour	½-Hour
Broadcast		\$70,479	\$47,921	\$46,986	\$31,947	\$54,034	\$36,739
Pay TV							
Major SVOD	High-Budget						
AVOD							
Cable (Season 1)		\$51,116	\$28,122	\$34,077	\$18,748	\$39,189	\$21,560
Cable (Season 2+)				\$36,286		\$41,729	
Minor SVOD	High-Budget	\$51,116	\$28,122	\$34,077			
Major SVOD	Mid-Budget						
Minor SVOD							
AVOD							

TABLE 6.11 Upset Prices and Minimums for Rewrites, Polishes, Stories Only, Teleplays Only, and Formats, and Bibles (5/2/24–5/1/26)

5/2/24—5/1/25		Pilot		Episodic ¹⁰⁵		Format	Bible
		1-Hour	½-Hour	1-Hour	½-Hour		
Upset Price ¹⁰⁶		\$85,213	\$57,948			\$31,197	\$78,857
First Draft ¹⁰⁷	Bcast ¹⁰⁸	\$68,096	\$46,301	\$45,397	\$30,867	\$13,707	\$69,283
	Cable ¹⁰⁹	\$49,388	\$27,171	\$32,925	\$18,114		\$55,426
Story Only	Bcast	\$27,173	\$15,438	\$18,115	\$10,292		
	Cable	\$19,755	\$10,871	\$13,170	\$7,247		
Teleplay Only	Bcast	\$44,802	\$33,207	\$29,868	\$22,138		
	Cable	\$34,211	\$17,652	\$22,807	\$11,768		
Rewrite ¹¹⁰	Bcast	\$20,234	\$10,695	\$13,489	\$7,130	\$6,854	\$34,640
	Cable						\$27,712
Polish ¹¹¹	Bcast	\$10,134	\$5,337	\$6,756	\$3,558	\$3,427	\$17,321
	Cable						\$13,857
5/2/24—5/1/25		Pilot		Episodic		Format	Bible
		1-Hour	½-Hour	1-Hour	½-Hour		
Upset Price		\$85,213	\$57,948			\$31,197	\$78,857
First Draft	Bcast	\$70,479	\$47,921	\$46,986	\$31,947	\$14,187	\$71,708
	Cable	\$51,116	\$28,122	\$34,077	\$18,748		\$57,366
Story Only	Bcast	\$28,124	\$15,978	\$18,749	\$10,652		
	Cable	\$20,447	\$11,252	\$13,631	\$7,501		
Teleplay Only	Bcast	\$46,370	\$34,370	\$30,913	\$22,913		
	Cable	\$35,408	\$18,270	\$23,605	\$12,180		
Rewrite	Bcast	\$20,942	\$11,070	\$13,961	\$7,380	\$7,094	\$35,852
	Cable						\$28,682
Polish	Bcast	\$11,988	\$5,525	\$6,992	\$3,683	\$3,547	\$17,927
	Cable						\$14,342

105 Backup scripts paid at 115% of otherwise applicable scale minimums.

106 Upset prices for pilot scripts are inclusive of formats, if prepared by the same writer.

107 For pilot and episodic scripts, covers story and teleplay. See also Tables 6.6–6.9.

108 Including Pay TV, High-Budget Major SVOD, and High-Budget AVOD.

109 Including Mid-Budget Major SVOD, Mid-Budget AVOD, and all Minor SVOD.

110 Lower rewrite fees apply for non-broadcast projects with budgets under \$300,000 per episode for one-hours or \$215,000 for half-hours.

111 Lower polish fees apply for non-broadcast projects with budgets under \$300,000 per episode for one-hours or \$215,000 for half-hours.

7

DIRECTING AND PRODUCTION MANAGEMENT DEALS

A Pilot Director Agreements¹

Although compared to feature films, television remains a principally writer (rather than director)-driven medium, the migration of prominent feature film directors to (or back to)² television and streaming during the “peak TV” era has elevated the relative prominence and influence of directors in television development and production—especially for pilot directors.

Pilot directors have very important roles to play in setting the stylistic, tonal, and visual template of new series. They are also usually intimately involved with casting for each series, in close coordination with executive producers and creative executives. Even where a series is ordered directly to production without a pilot, the director of the first episode is chosen with particular care, paid equivalently to how they would be compensated for a standalone pilot, and makes a comparable creative impact on the series.³ Traditionally, pilot directors

1 This section focuses specifically on pilot directing engagements (and consistently uses the traditional term “pilot directors,” which is still widely used throughout the industry, even though prevailing trends in favor of straight-to-series ordering mean that, in practice, it might be more precise to refer to them as “first episode directors”). Episodic directing engagements, which are far simpler in nature, are discussed in Section C.

2 As it has for actors, television has historically served as a training and discovery vehicle for great feature film directors, such as Michael Mann and James L. Brooks. Others, like David Fincher and Spike Jonze, first emerged as directors of music videos and/or commercial advertising, and many high-level directors continue to quietly make significant livings directing commercials in between feature projects. Several successful feature directors, such as Justin Lin, McG, and M. Night Shyamalan, now spend much or even most of their professional time in television.

3 In addition, the first episode in a straight-to-series order is usually produced over more days and with a longer pre-production period than subsequent episodes, and on especially challenging or

have been engaged only after a pilot (or, if there is no pilot step, series) is ordered to production, in close coordination with the network. Because contemporary television development tends to favor packaging of multiple elements earlier in the process, pilot directors are now commonly attached to a project during the development phase, sometimes before the project is initially pitched to studios or networks (with some major directors proactively working to develop new projects for themselves to direct).

Pilot directors enjoy an unusual place in the entertainment industry. While some successful theatrical directors also direct television pilots, for the most part, even the most successful full-time pilot directors do not enjoy the fame of their theatrical counterparts, and many successful directors spend their entire careers in television without breaking into (or even necessarily trying to break into) feature film directing. Yet despite their relatively low profiles, the most prolific and successful pilot directors are also among the best-compensated and most sought-after professionals in Hollywood. Hardworking, in-demand pilot directors like James Burrows (*Friends*) and Pamela Fryman (*How I Met Your Mother*) may direct anywhere from two to five pilots per year. For each such pilot, the director will receive not only six-figure fees for a few weeks of work but also, more critically, a stake of potentially lucrative contingent compensation in the series they help launch. Pilot directors can enjoy these benefits without rendering any ongoing services for the series after the pilot; but if they do agree to render further services (or, as is now more common, successfully insist on an ongoing producing role as a condition of directing the pilot), they may receive even greater long-term benefits. Burrows alone directed the pilots for, and therefore has lucrative backend positions in, *Taxi*, *Cheers*, *Night Court*, *Frasier*, *Friends*, *3rd Rock from the Sun*, *Will & Grace*, *Two and a Half Men*, *2 Broke Girls*, and *The Big Bang Theory*, among other shows. Not bad for someone whose name is barely known outside of Hollywood.

i Services

Pilot directors typically render services on an exclusive basis during formal pre-production (a period of about six to eight weeks, though potentially much longer in streaming) and production of the pilot (about two to four weeks), and then on a non-exclusive but first-priority basis during post-production of the pilot until delivery of the director's cut. Between the delivery of the director's cut and final delivery, the director's services may be fully non-exclusive and subject to the individual's professional availability. The actual level of activity by the director during this late post-production stage varies widely in actual

ambitious productions, there may be a brief planned hiatus after the first episode (or initial block of two or three episodes) to allow for evaluation and potential adjustments in creative or production.

practice, with directors who are also engaged and credited as executive producers tending to play a more active role during these late stages.

If the pilot director is attached at the development stage, when the actual production period for the pilot is totally unknown (and totally speculative), the director's obligations are usually subject to their professional availability at the time the pilot is ordered. If the director is unavailable at that time, they may be divested from the project entirely, or, more commonly, entitled to some more limited (and less lucrative) ongoing attachment as a non-exclusive, non-writing executive producer. In addition, because networks retain approval rights over pilot directing engagements, the director's engagement may be made expressly subject to network approval (which the studio would typically agree to use good faith efforts to obtain).

ii Directing Fees

The fees paid to pilot directors vary widely depending on the length of the pilot (i.e., thirty-minute vs. sixty-minute) and the identities and policies of the applicable studios and networks. The smallest cable networks and their affiliated studios seldom pay much more than applicable DGA scale minimums⁴ for pilot directors.⁵ For the 2024–25 contract year, the minimums for standalone pilots for broadcast, pay TV,⁶ and High-Budget for Major SVODs are \$123,185 for one-hours and \$92,393 for half-hours; the minimums for basic cable,⁷ Mid-Budget for Major SVODs, and all pilots over the Minimum Budget Thresholds for Minor SVODs or AVOD are \$73,911 for one-hours and \$55,436 for half-hours.⁸ One-hour scale compensation covers twenty-four work days, while

4 Virtually all director engagements for scripted television in the United States are subject to DGA jurisdiction, irrespective of network/platform and budget.

5 That said, these smallest networks have been largely driven out of original scripted series production altogether by the costly competitiveness of the last decade and the redirection of most resources and projects away from cable and toward streaming.

6 A reminder that, while the term “Pay TV” most commonly refers generally to cable, satellite, and other traditional MVPD subscriptions, it is used in the WGA and DGA Basic Agreements to refer more narrowly to premium pay networks (as distinct from “cable” or “basic cable”).

7 Technically, these basic cable minimums are also subject to minimum budget thresholds, which are different than those that govern for HBSVOD—for the 2023–26 contract term, at least \$1,200,000 per episode for one-hours or \$550,000 per episode for half-hours.

8 As of 2024, under the DGA Basic Agreement, scale minimums for streaming projects are based on the same thresholds for platform subscribers (over/under 20 million domestic subscribers for “Major SVODs” vs. “Minor SVODs”) and budget (“High-Budget” if over \$3,800,000 for one-hours or \$2,100,000 per episode half-hours; or “Mid-Budget” if between \$1,750,000 and \$3,800,000 for one-hours or between \$1,030,000 and \$2,100,000 for half-hours; and no minimums/freely negotiable if below the “Minimum Budget Thresholds” of \$1,750,000 for one-hours or \$1,030,000 for half-hours) as under the WGA Basic Agreement.

As under the WGA Basic Agreement, scale minimums (for all platforms) rise year-over-year—traditionally by 3% annually, but because of high inflation, by 5%/4%/3.5% over the three-year

half-hour scale compensation covers fourteen work days. For first episodes on straight-to-streaming orders, the DGA-mandated minimums are 150% of those applicable to subsequent episodes, which works out to much less than the corresponding minimums for standalone pilots (without correcting for production period).⁹ In any event, however, studios generally do not meaningfully distinguish between standalone pilots and first episodes of pilotless series when negotiating pilot directing compensation.

At most studios, pilot directing fees range from approximately \$100,000 to \$300,000, depending on the nature of the production, the platform, and the director's quotes and stature, although highly sought-after feature directors and a handful of A+++ pilot directing specialists may command higher fees. The DGA Basic Agreement also permits any portions of the pilot directing fee in excess of 200% of applicable scale for the days worked to be credited against residuals, if explicitly agreed by the studio and director; consequently, deals featuring high directing fees often include a residual crediting component, especially in linear television. In the tightly scheduled broadcast world, in which directors might hope to tackle multiple pilots in a single season, pilot directing fees typically buy out a specifically stated number of pre-production and shooting days with a few extra days built in for potential overages, but additional pro rata daily compensation for every overschedule day beyond that. Although this practice was initially carried over to these deals in other media, pilot directing deals in pay TV and streaming now usually do not provide for a limit on working days (beyond applicable DGA minimums for the days worked).

iii Executive Producing

Pilot directors are often attached as executive producers for the resulting series. Traditionally, studios usually agreed to such an attachment only if the director had participated in the development of the project. In recent years, however, such "EP attachments" have become more common for later-attached pilot directors, as well. In most cases, the director's EP attachment is contingent

term of the 2023 MBA—and all applicable budget thresholds will continue to rise incrementally in future updates to the DGA Basic Agreement, starting in 2026. A more detailed (but still streamlined) table of DGA minimums is provided in Section E, but again, for these and all other scale minimums, readers are strongly encouraged to consult the latest DGA-published Schedule of Minimums (which may be updated during the three-year term of an agreement if the union elects—as it typically does at least once per contract term—to divert 0.5% of the negotiated year-over-year increase for any given contract year to enhanced studio funding of the union's pension or health funds).

9 That said, those "first episode" minimums also cover only the standard minimum work periods for regular episodes, not pilots. If those "first episode" rates are expanded pro rata to cover the same number of work days as are guaranteed for standalone pilots, they actually work out to slightly more money for the same duration of services (with more flexibility to engage the director for fewer days if desired).

on actually directing the pilot (an especially relevant condition when an early-attached pilot director's services are subject to their professional availability).

In general, the terms of this attachment follow the structure for non-exclusive non-writing producers, though it is more common with directors' EP attachments than with typical "NWE" deals to limit the lock to a single season. From there, the full range of locks and consulting one-for-ones are used when crafting these deals, up to a life lock in special cases.¹⁰

Occasionally, the pilot director may consider staying with the series as an exclusive, full-time producing director.¹¹ In those circumstances, the deal can be structured to cover two tiers of services—one for full-time producing directing (with a higher episodic fee and all the standard bells and whistles of such deals), and the other for non-exclusive executive producing (with a lower episodic fee and much more limited¹² scope of duties). Typically, the parties make their elections before each season separately; they must mutually agree to proceed with the higher tier, or else the deal defaults to the lower tier;¹³ and, as with other drop-down rights, if the parties elect the lower tier of services in the first season, they cannot "drop back up" to the higher tier the following season (without making a new deal to that effect).

Where a director has not participated in the development of the project and was only engaged after the pilot was ordered to production, they may be still credited as an Executive Producer—although in such circumstances, often only for the pilot, without being attached to the series on an ongoing basis. The function of a pilot-only executive producer role may vary. The credit may signify a heightened level of creative leadership and responsibility, particularly if other executive producers on the pilot are relatively inexperienced. It may be a mere vanity gift to satisfy the director's desire to be credited more prominently. It may serve as precedential cover for the financials of the deal, allowing the studio to pay the director a relatively lower pilot directing fee, but supplement it with a separately stated executive producer fee (which may range from \$10,000 to \$50,000, and which the studio may or may not elect to treat as part of the budgeted fee pool for all executive producers). It can also be very useful where there is a particularly slow-building or otherwise protracted prep period, so that the pilot director can be paid for early preparatory work in their capacity as a producer without formally commencing the director's DGA-covered directing services (which generally must run consecutively).

10 See Chapter 6, Section D.iii (pg. 259).

11 See Section B.

12 If not non-existent.

13 That said, studios/networks whose interest in a project is largely contingent on the director specifically may seek a firm option for the first season, or some other formal or informal assurances about the director's commitment to stay closely involved with series production.

iv Episodic Directing

Just as pilot writers/creators sometimes want or expect to write most or all episodes of a limited or first-season series, pilot directors (especially auteur-type feature directors) may negotiate for guaranteed episodic directing engagements in their initial deal (subject to the series actually being produced).

When the new streaming platforms were first making significant efforts to lure feature directors into the medium, they began to offer some directors the opportunity to direct every episode of full seasons of new shows, especially limited series—the so-called “ten-hour movie.” The trend was accelerated by the success of *True Detective*’s acclaimed first season with Cary Joji Fukunaga directing every episode, and Fukunaga went on to do it again on Netflix’s *Maniac*. Other prominent and creatively successful examples include Jean-Marc Vallée on the first season of *Big Little Lies*, Mike White on *The White Lotus* (which he also writes in full), and Barry Jenkins on Amazon’s *The Underground Railroad*.¹⁴ Eventually, however, platforms pulled away from the “single director” model because of its costs (financial and otherwise), and instead began encouraging even auteur directors to direct only the pilot and the season finale (or, if the series is shot in two- or three-episode cross-boarded blocks for production efficiencies, only the first and the last block). Directors and studios can and do agree on all kinds of plans for the pilot director to take on additional episodes, but it has grown increasingly uncommon for one director to handle every single episode (and in those rare cases, the production schedule and methodology are usually largely adapted into a feature production-like model, rather than a traditional television production template).

As with series creators who are guaranteed episodic scripts in their initial deals,¹⁵ a pilot director’s additional guaranteed episodes are typically compensated at scale¹⁶—for the 2024–25 contract year, ranging from roughly \$15,000 for the cheapest basic cable half-hours (with three prep days, three shoot days,

14 In addition to these creative successes, however, single-director series generated numerous production headaches, as feature directors struggled to acclimate to the different timing and rhythm of television production. Moreover, because these single directors were on set from the first day of production to the last, they had no opportunity to work on post-production for early episodes as later episodes were shooting. This significantly delayed completion and delivery of these series (at great expense, which frequently was not anticipated and properly budgeted for in many of the early cases). In some cases, a show that was initially set up to be handled by a single director has brought on one or more additional episodic directors late in the process, often under some duress.

15 An additional similarity with the parallel writing example: when assigned in the ordinary course of production (rather than in a writer/creator or pilot director deal), both episodic scriptwriting and episodic directing are almost universally compensated at scale.

16 See the “Streamlined Schedule of DGA Minimums” in Section E.

and zero post days guaranteed) to \$64,000 for High-Budget streaming shows (for seven prep days, nine shoot days, and two post days).¹⁷

In general, DGA minimums rely on the same overall set of definitions and thresholds as WGA minimums.¹⁸ Unlike the WGA minimums, DGA scale for streaming is often similar, rather than identical, to scale for the corresponding lengths and budget levels in broadcast or cable. It also has more variation in applicable minimums for cable series (based on budgets and first vs. subsequent seasons), and in certain aspects of streaming (e.g., higher, rather than identical, minimums for High-Budget vs. Mid-Budget projects for Minor SVODs).

Like their writer/creator counterparts, the highest-end pilot directors may be able to negotiate for overscale compensation on their series episodes, especially where the parties are specifically negotiating around and trying to “back into” a total guaranteed compensation number for the full season.¹⁹ In addition, their “guarantees” are pay-or-play deals, so the studio’s obligation is only to pay the director, not to actually use them—but again, such decisions are generally made in partnership with the director rather than unilaterally imposed, and the deal may provide for automatic reductions to the guarantee for any episode(s) that the director mutually approves for reassignment or if production is badly behind schedule.

Unlike writer/creators, however, pilot directors are usually engaged for series producing on a part-time, non-exclusive basis, and they are therefore not guaranteed to be professionally available to direct their additional episodes if they choose to take a more inspiring (or lucrative) new job that renders them unavailable. Negotiations around these episodes being subject to professional availability require straightforward, practical conversations about the extent of the director’s commitment to the production and the extent of the studio’s reliance on the director. In some cases, however, the parties agree for a pilot director to stay with the series as a full-time producer/director for the entire first season, mooted any availability concerns.²⁰

17 Depending on the production schedule, the actual amount budgeted and/or paid might be more than the DGA minimum, due to the director working more than the finite number of days that are covered by the applicable scale minimums for preparation and shooting, respectively. Typically, even when the ingoing schedule contemplates a director’s actual work period exceeding that covered by DGA scale, the engagement is only “guaranteed” for that minimum DGA-covered period.

18 These defined terms (as used in this text) include Broadcast, Pay TV, Basic Cable, Major SVOD, Minor SVOD, High-Budget, Mid-Budget, HBSVOD, HBAVOD, and Minimum Budget Thresholds. See Chapter 6, Section A.i (pg. 213).

19 And, again as in the analogous situation for writer/creators, these negotiated fees remain consistently closer to the applicable episodic scale amounts than to the same director’s pilot fee.

20 See Section B.ii.

v Royalties

The director of a pilot is usually entitled to a passive royalty for the life of the resulting series, if it is ordered, without any obligation to direct future episodes or otherwise render active services on the series in any way. This royalty generally ranges from approximately \$3,000 to \$7,500 per episode (with, as always, outliers on either side). Tiering, rerun royalties, and other structural elements of this entitlement are generally akin to those applicable under writer/producer deals (with the condition of being the sole pilot director replacing any applicable writing-credit based conditions).

vi Bonuses

Independent of the ongoing episodic royalty, the director of a pilot that is ordered to series is also typically entitled to a series sales bonus. In every respect, these bonuses are generally identical to the corresponding entitlement for writer/producers—\$25,000 being considered standard (with lower or higher amounts possible according to stature), proration according to the number of episodes actually produced, potential tiering or other differentiation depending on the network for which the series is ultimately produced, and potential adjustment to unprorated “series production bonuses” for straight-to-series productions.

vii Backend

Most pilot directors receive 2.5% of MAGR in backend from series that are produced based on their pilots, vesting 100% based on the director’s pilot services. Inexperienced pilot directors may receive somewhat less backend (e.g., 2% of MAGR, or, in very rare cases, as low as 1.5%), while highly successful and experienced pilot directors may command 3%–4%, and A-list theatrical directors and the most prolific pilot directors may receive up to 5% for pilot directing services alone (subject to the availability of points in the pot).

In addition, if the director is engaged for the series as a non-writing executive producer, there may be additional points allocated to those services, which would vest consistently with how points vest for any non-writing executive producer (e.g., either in thirds, across the pilot and first two seasons of series services; or in halves, across the first two seasons of services).

viii Credit

Credit for pilot directors is generally governed by the DGA Agreement (including matters of determination, form, and placement) and therefore not expressly

negotiated.²¹ However, Executive Producer credit, where applicable, must be negotiated and is subject to the usual details around main title credit, credit ties, separate cards, and other standard finer points for such credits. Logo credit may be negotiated at higher levels (subject, again, to the usual). Both individual and logo credit may be limited to the pilot only if the director's deal does not provide for any series producing services.²²

ix Perks

The “perks” accorded to a pilot director are generally comparable to those accorded to a showrunning executive producer—travel expenses (including business class transportation, first-class hotel accommodations, ground transportation or rental car, and per diem, all subject to minimum requirements in the DGA Basic Agreement), parking, office, and assistant (usually exclusive to the director). For longer trips, the parties may agree on some kind of flat weekly or monthly living expense allowance, in lieu of the default hotel/per diem entitlement, and/or additional tickets for travel to/from set.

Many directors want their own personal assistants put on the payroll of the production for the duration of their services, a request that is usually accommodated, though this may become more expensive (and therefore more problematic) if the director (and therefore the assistant) needs to travel for the pilot production.

x Subsequent Productions

Many pilot directors seek a first opportunity to be engaged to direct the pilot of any spinoffs of the series for which they are currently engaged. Where granted, the conditions applicable to such a first opportunity are generally equivalent to those applicable to a writer/producer's first opportunity to write and executive produce the spinoff. However, first opportunities for pilot directors are rarer and generally reserved for high-level directors (unlike first opportunities for writer/producers, which are usually given as a matter of course).

21 Even when an episode is extensively reshot by a second director, the DGA has an extremely strong presumption in favor of crediting only one person as the director of any production. This sometimes requires a frame-by-frame comparison of each director's contribution to the final edited product to determine credit.

22 See Section A.iii.

xi Quick Reference Guide**TABLE 7.1** Pilot Director Agreements

<i>Deal Term</i>	<i>Main Issues/Ranges</i>	<i>Other Issues</i>
1. Services	• Exclusive during formal pre-production and production; non-exclusive, first-priority until delivery of director's cut • If attached at development stage, may be subject to director's professional availability and/or to network approval	• May be non-exclusive during post-production
2. Directing Fees	• Usually \$100K–\$300K, but high-stature feature directors and A+++ pilot directing specialists may command more	• DGA permits amounts in excess of 200% of scale to be applied against residuals • See “Streamlined Schedule of DGA Minimums” (Section E) for applicable scale minimums
3. Executive Producing	• May negotiate for additional EP fee (up to \$50K) and credit	• May include non-exclusive NWEF services, with typical NWEF deal structure (especially with participation in project development) • May include series writer/producer or producing director services, on typical structures for such deals
4. Episodic Directing	• May guarantee engagement for episodes beyond pilot/first episode (subject to series being produced) on a pay-or-play basis • Address professional availability requirements and opt-out rights • Series episodes typically paid at scale and guaranteed for DGA minimum periods (even if ingoing schedule exceeds such minimums)	• “Single director” seasons increasingly rare; now more common to have first/last episodic/block structures • Even when paid overscale, priced much closer to scale for episodic directing scale than to pilot directing fee • See “Streamlined Schedule of DGA Minimums” (Section E) for applicable scale minimums
5. Royalties	• Usually \$3K–\$7.5K per episode (with outliers)	• Possible rerun royalties • Possible tiering based on network/budget level

(Continued)

TABLE 7.1 (Continued)

<i>Deal Term</i>	<i>Main Issues/Ranges</i>	<i>Other Issues</i>
6. Bonuses	• Usually \$25K for series pickup	• May be prorated based on the number of episodes produced
7. Backend	• 1.5%–5% of MAGR • Most commonly 2.5%	• Miscellaneous backend definition issues (see Chapter 9)
8. Credit	• Directing credit per DGA (pretty much never shared) • Executive Producer credit, as applicable	• Further EP credit issues as negotiated in writer/producer or NWEF deals
9. Perks	• Business-class travel, first-class accommodations, per diem • Ground transportation or rental car • Parking, office, and assistant	• Negotiate exclusivity of office and assistant and of ground transportation • Engagement of personal assistants • May use flat weekly or monthly living allowance for extended stays on location
10. Subsequent Productions	• May receive first opportunity to direct spinoff pilots • If also engaged as series NWEF, first opportunity likely also covers NWEF services	• Similar conditions, rolling rights, and potential floors as apply for series creators (but contingent on pilot directing rather than creation credit) • May be further limited or altogether eliminated on franchise projects

B Producing Director Agreements

As the ambition of the medium has grown larger, television shows have gotten harder to produce. One way that studios and networks have sought to meet the growing challenge is to rely more heavily on producing directors.

Also known as “producer/directors,” these individuals are engaged to help run the set for the full span of production, personally directing some episodes while supervising or working closely with one-off episodic directors to ensure consistency of look/feel/style across the season. Producing directors can be hugely impactful in keeping a difficult series on track, working closely with the line producer to manage the day-to-day hiccups that plague every show, while giving every newly arrived episodic director the benefit of the producing director’s intimate familiarity with the production. Producing directors also provide the full cast and crew with stability and continuity of creative leadership, reducing the need for spread-thin showrunners to spend extensive time on set (if they are not otherwise inclined to do so).

The job of producing director has existed for decades, but was used relatively infrequently in linear television, especially given the more formulaically produced sitcoms and procedurals that have long dominated broadcast and cable programming. In the mostly straight-to-series world of streaming and pay TV, however, producing directors have become virtually standard hires for complex productions.²³ In some cases, a pilot director commits to stay with the series as a producing director. More often, a new director is brought in, ideally working alongside the pilot director during prep and shooting for the first episode (or block) before taking over as the supervising director for the balance of the season.

The deals used to engage these producing directors are structured as a hybrid combining elements of non-writing executive producing,²⁴ staffed writing,²⁵ and episodic directing deals (with a few distinctive twists).

i Producing and Directing Fees

Producing directors are compensated in two separate ways: (1) episodic “non-writing producing” fees (typically in the range of \$20,000–\$50,000 per episode),²⁶ guaranteed for all episodes produced for the season, and (2) applicable DGA scale compensation for each episode they themselves principally direct. The producing fees compensate the director for their exclusive services throughout the season’s full formal prep and production period, while the directing work remains subject to DGA jurisdiction and minimums (with some exceptions).

The most unique feature of a producing director deal is the director’s functional waiver of their right to additional compensation that they would otherwise be entitled to under the DGA Basic Agreement if engaged on an ordinary episodic basis. The DGA’s usual rules on continuous employment do not apply for full-time producing directors, who therefore are not entitled to receive any fees for “intervening days.”²⁷ In addition, the producing director’s DGA-minimum compensation for work days they pick up on behalf of other directors,²⁸ or for occasional second unit²⁹ work, is recouped against their producing fees,

23 Count the author as a fan.

24 See Chapter 6, Section D (pg. 248).

25 See Chapter 6, Section B (pg. 236).

26 Usual disclaimer for outliers applies.

27 See Section C.i.

28 E.g., overschedule or reshoot days for which the initial director was unavailable or waived their right to direct.

29 The term “second unit” refers to a group of crew members who work largely independently of the production’s “main unit” to capture scenes that are too time-consuming, too dangerous, or not important enough for the main unit to handle. Common assignments for second units include scenes with stunts, drone and other aerial photography, establishing shots, B-roll, inserts, cutaways, and pickups.

meaning that the producing director does not personally see any incremental compensation for picking up those “additional days”³⁰ (although the show nevertheless pays applicable DGA fringes for them).³¹ The DGA, which is fiercely protective of its “single director” concept and rules, is also more flexible about cross-coverage of directing work when it comes to coverage performed by a designated producing director.

Some studios also require a reduction in the episodic producing fee payable for each episode the producing director personally directs. The logic behind these reductions is that, for episodes that they personally direct, the demands of that job alone mean they cannot meaningfully perform the “producing” side of their producing director duties, at least not at the same level as if they were not sitting in the director’s chair. Therefore, the studios argue, the producing director should accept a discount for their diminished executive producing services on that episode—anywhere from \$5,000 to 50% off the usual fee. Directors and their representatives tend to view this as a petty cash grab and try to strongly resist. Though not as common as it once was, this practice lives on mostly in broadcast (like so many other classic approaches), though it still has its adherents elsewhere too (usually with more modest reductions).³²

ii Options/Locks

Producing director deals typically cover one initial season of services (as usual, pay-or-play for all episodes produced, with possible negotiation as to a minimum number), with one or two additional seasons at the studio’s option (with appropriate negotiated option periods, possible paid extension rights, and standard compensation increases).³³ One-season deals are not unusual, though one plus one seems to be the most common term. The only sort of “lock” that exists is if a high-end pilot director has a rare unilateral right to opt in for the exclusive producing/director services tier.³⁴

30 There is frequently an exception made to this waiver of “additional days” for the producing director’s own episodes, such that they are compensated for episodes they personally direct equivalently to how they would be if engaged on a freelance episodic basis.

31 The same dynamic applies with UPM allocations for line producers, discussed in Section D.v.

32 As I interpret it, this reflects the studio and/or studio negotiator’s sincerity about the essential fairness of this concept, as well as their belief that the producing director, as a steward of production, should see it the same way, balanced against the recognition that it’s also sort of obnoxious.

33 Cumulative annual bumps of 4%–5%, or flat increases of \$2,500–\$5,000 in episodic fees.

34 Of course, like so many other deal terms across all kinds of deals, a director with the leverage to get a protection like that in their deal almost certainly does not need it in the first place.

iii Backend

Producing director deals virtually never provide for backend, unless the producing director's engagement is part of a broader pilot directing deal that provides for more (or more vesting of) backend points if the director renders higher-tier services for the first season.

iv Credit

The majority of producing directors are credited as Executive Producers, although up-and-coming directors may be forced to accept Co-Executive Producer credit for their first season of services, especially on projects with long development histories and numerous existing Executive Producers. High-level directors may seek logo credit but, as with backend, it would be unusual for anyone other than continuing pilot directors under a broader deal.

v Quick Reference Guide**TABLE 7.2** Producing/Director Agreements

<i>Deal Term</i>	<i>Main Issues/Ranges</i>	<i>Other Issues</i>
1. Producing and Directing Fees	• \$20K–\$50K per episode for producing (pay-or-play for all eps produced) • Directed episodes at DGA scale, including applicable “additional days” • Director waives DGA fees for “intervening days” on all episodes, and for “additional days” on other directors’ episodes	• Possible reductions in EP fee (\$5K to 50%) for episodes the P/D personally directs • Show pays fringes on recouped directing days • Directing services are DGA-covered; producing is non-union
2. Options/Locks	• Usually 1+1 deals, but zero or two options are not unusual	• High-end pilot director might have a unilateral (not mutually approved) right to opt in for P/D services
3. Backend	• None	• . . . unless connected to broader pilot director/EP deal)
4. Credit	• Typically executive producer credit • Logo credit if connected to broader pilot director/EP deal	• Up-and-comers on shows with many existing EPs may get CoEP credit in Y1 • Usual details for EP credits regarding main titles, ties, separate cards, etc.

C Episodic Director Agreements

Episodic directors have a job like no other in television. They are asked to parachute into a series (that they may know only a little about); immediately take primary creative control over the execution of its production; balance that leadership and vision with that of the writer/showrunner who created the show and is now its primary creative and production leader and decision-maker; coordinate with a line producer whose primary professional responsibility is to not allow them to go overbudget or overschedule; inherit a creative/production team that long predates their arrival; also inherit who-the-hell-knows-what problems from the weeks of production preceding their arrival; work according to very specific measured-by-the-day schedules; and adhere to and replicate an established look and feel for the series, while still finding opportunities for individual creative expression and invention. They are underappreciated workhorses.³⁵ (The line producers too, by the way.)

Episodic directing deals are generally made simply by confirming the intended production schedule (including any intervening days), the range of dates within which the director commits to be professionally available (so that the studio may freely shift any scheduled dates within the range), applicable scale fees, the extent of the guarantee (whether for the DGA minimum period or for the ingoing scheduled period), and travel requirements. Credit is governed entirely by DGA rules on credit determination and placement.

In the standard production model, episodes are generally produced one at a time and usually in sequential order of episodes, but the internal schedule for each separate episode is designed to maximize production efficiency (and therefore generally not shot in sequential order of scenes). One popular technique to adapt to the increased complexity of many series, however, is “block shooting,” in which episodes are produced with a single director in two- or three-episode blocks. The benefit of this model is that all of the episodes within a block can be “cross-boarded,” meaning that they are scheduled for production so as to maximize the efficient use of common locations, actors, or other resources across multiple episodes (rather than only across a single episode, as in the traditional episodic production model).³⁶

35 Also, in later seasons of successful series, lead actors may be rewarded with episodic directing assignments.

36 In a non-cross-boarded production, if two separate episodes of a series include scenes to be shot at a single in-the-field production location, the production would have to come to the location multiple times to shoot scenes overseen by the individual directors for each episode. Alternatively, if such scenes have separate episodic directors but are scheduled to shoot consecutively as part of a single visit to the location, the production may run up significant expenses for the “intervening days” of non-consecutive employment for both directors, as they are both engaged and actively on payroll (for two separate episodes) at the same time. In a cross-boarded production, multiple scenes from separate episodes handled by a single director may be shot in a single block of days, without

i Fees and Services

Episodic directors are generally hired on an episode-by-episode or block-by-block basis (according to the production plan), for a finite number of days corresponding to the actual production period for each episode or block (although their pay-or-play guarantees are usually based only on the DGA-guaranteed minimum work periods, even if the real budget and schedule might contemplate additional work days payable at the pro rata daily rate).

The standard episodic directing fee is the applicable DGA scale minimum rate—for the 2024–25 contract year, ranging from roughly \$15,000 for the cheapest basic cable half-hours (with three prep days, three shoot days, and zero post days³⁷ guaranteed) to \$64,000 for High-Budget streaming one-hours (for seven prep days, nine shoot days,³⁸ and two post days).³⁹ Once commenced, DGA directing days must be scheduled and paid consecutively. Hiatus days (whether planned or unplanned) are called “intervening days,” and, as of the 2023 DGA Basic Agreement, a director is entitled to receive payment for seven intervening days per episode before the studio can treat further hiatus days as unpaid.

Pre-production and photography services are rendered exclusively and on location, while post-production services are usually rendered on a non-exclusive basis and may be handled near the production location, near the writer’s room, in a third location, or remotely. Such post-production services, which continue until delivery of the director’s cut of the episode, have historically been uncompensated, but the 2023 DGA Basic Agreement introduced paid post-production days for pay TV and High-Budget Major SVOD projects.

ii Pilot/Feature Outs

Usually, the only negotiable issue in an episodic director deal is the “pilot/feature out”—the director’s right to opt out of the deal (with at least three or four weeks of advance notice) in order to accept a conflicting (and more lucrative) outside pilot directing, feature directing, or (sometimes) producing/directing opportunity. Such pilot/feature outs are very reasonable and common, but their use should be very clearly communicated and agreed upon among the business affairs, production, and executive producer teams before being confirmed in a negotiation.

requiring repeat visits or triggering inefficient ongoing compensation for multiple episodic directors pursuant to generally prevailing consecutive employment rules.

37 Historically, post-production days have been uncompensated for episodic directors. One of the 2023 DGA Basic Agreement’s key achievements in its 2023 deal was opening the door to paid post-production days, securing (as of the 2024–25 contract year) two guaranteed post days for one-hours, and one guaranteed post day for half-hours, in pay TV and High-Budget Major SVOD productions.

38 Another of the DGA’s key achievements in its 2023 deal was securing an additional (ninth) guaranteed shoot day (for pay TV and High-Budget Major SVOD one-hours), the first such addition in decades.

39 See the “Streamlined Schedule of DGA Minimums” in Section E.

iii Quick Reference Guide

TABLE 7.3 Episodic Director Agreements

<i>Deal Term</i>	<i>Main Issues/Ranges</i>	<i>Other Issues</i>
1. Fees and Services	• May engage directors episode-by-episode or block-by-block (2–3 episodes per block) • Episodic directing almost universally paid at applicable DGA scale • Directors entitled to up to 7 paid “intervening days” if services are non-consecutive	• Guarantees generally cover only DGA minimum work periods, even if shorter than actual ingoing schedule • See “Streamlined Schedule of DGA Minimums” (Section E) for applicable scale minimums
2. Pilot/Feature Outs	• Episodic director may have the right to opt out of directing in favor of taking a more lucrative feature or pilot directing or producing/directing job	• Must agree on what types of outside opportunities may trigger an opt-out right • Must agree on minimum notice period (usually no later than 3–4 weeks before director’s first work day in prep)

D Line Producer Agreements

There are few roles that have as much impact on the health and success of a production as that of the line producer, who—in collaboration with the series showrunner and studio executives—is primarily responsible for creating a production budget and schedule, and then making sure the show sticks to it as successfully as possible. Line producers are often the first major hire after a pilot or series is greenlit to production (or even before, to assist in early production planning and the preparation of a budget to be approved by the network as part of the greenlight decision),⁴⁰ and among the last hires to complete their services (often through delivery). They must assist in recruiting and engaging the crew;⁴¹ anticipate potential problems before they occur;

40 In such circumstances, studios generally make “step deals” with line producers to engage them for a shorter guaranteed period, timed to get the project to an order, with an option to engage the line producer for the full series production (which may be deemed automatically exercised if the project is ordered, and/or be subject to the producer’s professional availability if not ordered within a specific amount of time).

41 While there are several other key contributors to the creative success and smooth physical production of a television series, the deals for such individuals tend to be simpler, and warrant only brief discussion here. Nearly all other crew members—including vital department heads such as the editor, director of photography, production designer, and costume designer—are engaged on a weekly

respond quickly and decisively in identifying, evaluating, and recommending solutions for the challenges that inevitably arise along the way; and provide leadership for the large team across all aspects of production. And they must do all this while usually spending long production periods far away from their usual homes, and always managing overlapping pressure and expectations from (as well as building and protecting trust with) showrunners, other executive producers, and studio executives (who are not always on the same page).

Line producing deals are relatively simple, relying on a small subset of the basic structures and concepts discussed throughout Chapters 6 and 7, with few specific or particularly nuanced issues to address.⁴²

i Fees and Services

In broadcast television, pilot fees for line producers are typically between \$50,000 and \$75,000, while episodic fees range from \$20,000 to \$40,000 for the first season, with standard negotiated bumps for subsequent seasons (usually 4%–5%, or \$2,500–\$5,000)—figures that, like many other aspects of broadcast television (financial and otherwise), have not changed much in many years.⁴³

Since the build-up of the “peak TV” era, the complexity of many streaming originals⁴⁴ has created especially high demand for producers with backgrounds in feature films and a proven ability to manage sprawling, challenging, and high-stakes productions. The showrunners and other producers for these series tend to rely heavily on the line producer as not just the master of budgets and schedules, but as a true collaborator and thought partner for tackling difficult problems whose solutions require marrying and balancing the show’s creative ambitions with the hard practical realities of actually *making* such a thing. Line producer deals in streaming also must be adapted to make sense within the practical realities of such series, including especially

basis, sometimes with a minimum guaranteed number of weeks, with deals often negotiated directly by the line producer or UPM in accordance with the budget, with or without the direct involvement and participation of the studio (other than to approve the identities of the individuals engaged).

42 For this reason, line producer deals are often used as a training ground for early-career studio business affairs executives, who can usually negotiate them effectively with the advice and support of a more seasoned manager/supervisor.

43 As usual, once triggered, these episodic fees are guaranteed for “all episodes produced,” with some producers able to negotiate for a contractually specified minimum number of episodes (in case the production is scrapped altogether and no episodes are ever produced). Line producers at this level also may negotiate for those episodic fees to cover a maximum specified work span, with additional weeks paid at a weekly rate identical or similar to the total episodic compensation divided by the maximum work span.

44 As well as the influx of feature film directors into the medium, the tendency for individual directors to handle many or all episodes of a given season, and the use of production plans that look more like traditional feature (rather than episodic television) productions for such series.

lengthy advanced development and pre-production phases, long production periods (both generally and for location work specifically), and short seasonal orders (by episode count; not schedule). For these reasons, line producers in streaming tend to enjoy better compensation, more favorable screen credit, and higher overall stature than their counterparts in linear television, with fees that usually run between \$75,000 and \$125,000 per episode.⁴⁵ These more substantial fees may also come with a variety of possible bonuses (e.g., for season completion, finishing within the approved budget, series renewals) or separately stated fees for work in other capacities (e.g., as a creative non-writing producer). Depending on the circumstances, the parties may also agree on a weekly (rather than episodic) fee structure, with some kind of minimum guaranteed employment term/compensation. Such weekly fees generally range from \$15,000 to \$25,000 per week (representing total annual compensation from \$750,000 to \$1,250,000).

One reason why deals for line producers for streaming and other premium platforms have become so lucrative so quickly (even as the customs in broadcast remain consistent as ever) is that the already small and fiercely competitive market for top line producers has been made even smaller and more competitive by studios and networks “locking up” many sought-after producers in lucrative, multi-year, exclusive overall deals.⁴⁶ These arrangements give the studio/network flexibility to assign the line producer (with consultation) to whatever show on the company’s slate most needs the help, while eliminating the risk of losing the producer to a new job as soon as they finish their current one. Such overall deals usually provide for guarantees from roughly \$750,000 to \$1,500,000 per year over a two- or three-year deal (which may provide for some or all years after the first to be at the company’s option). Due in part to the proliferation of such deals, the highest-level line producers who remain “free agents” on the open market can often command significant pay-or-play guarantees for each new job, sometimes even covering in full the total compensation they are anticipated to earn over a complete production season, no matter what happens after the point that the pay-or-play obligation is triggered.

ii Options/Locks

In linear television, line producers on new projects are initially engaged for the first production step (usually a pilot, in broadcast), with successive, dependent studio options for the studio to further engage the line producer through the

⁴⁵ Line producers are arguably the highest-level leaders involved in a show who customarily do not receive backend, making it especially important that they be fully compensated and rewarded by their negotiated fees alone.

⁴⁶ See Chapter 10, Section A (pg. 392).

show's third season. Of course, specific circumstances can yield different outcomes; for example, in-demand line producers who have little trouble finding new jobs may insist on deals with fewer and/or mutual options, to allow the producer more freedom to choose when to move on to something new. But, at least in broadcast, three-year deals remain the standard.

For premium shows in the largely pilot-free space of pay TV and streaming, however, line producers have acquired enough market power to more often make one- or two-year deals, and can better negotiate for other friendly terms that retain for them greater control over their lives and careers. Common concessions in these high-level deals include mutual (rather than solely studio-held) options for subsequent years, or such future seasons being subject to the producer's professional availability (with no limitations on their right to seek out new jobs that would render them unavailable as soon as they've completed their services for the first season).

Locks—that is, pay-or-play commitment for the studio to engage/pay the line producer for one or more subsequent production steps, if actually ordered to production—are uncommon, given how disastrous it would be for a studio that just endured a runaway production to be forced to hire (or really, to pay out) the line producer who was in large part responsible for protecting the production from such troubles. However, higher-end line producers who accept pre-greenlight step deals with less initially guaranteed work periods/compensation may be able to negotiate to be locked for the full season if ordered to production (which would be in no small part due to that line producer's assistance).

iii Credit

The base credit accorded to line producers is “Produced by,”⁴⁷ though more experienced line producers may command Co-Executive Producer or (at the highest levels and/or in later years of a series) Executive Producer credit (subject to the usual details around main title credit, credit ties, separate cards, and the like).

Such higher-level credits are especially common in streaming, for the same reasons discussed earlier with respect to the more favorable compensation and option/lock terms for line producers in the medium. Moreover, while such higher-level credits in broadcast are often mostly ceremonial—recognition for years of good and loyal service to a show, or for a long and admirable career, without any additional compensation or any practical difference in the producer's actual role—they are often much more meaningful as used for line

47 That's “Produced by,” not “Producer.” That said, in real life, line producers are routinely referred to simply as “the producer,” with it being understood that the speaker is not referring to a writing or regular non-writing executive producer.

producers in streaming. These producers frequently receive episodic non-writing producing fees on top of their negotiated compensation as line producers, and they expect it to signify that they will have some creative influence and that their voice will be generally welcomed and taken seriously in those conversations.

iv Perks and Reimbursements

If a series is filmed on location or at studio facilities that are away from the line producer's home, as is usually the case (especially in streaming), they will typically move to that distant location full-time for the run of the production. With a remit that spans all phases of the production and delivery process, line producers are often among the first contributors to a show to move to a location, and just as often among the last to leave. They therefore almost never receive standard "flight/hotel/per diem" travel expenses, and instead negotiate for more expansive flat travel and relocation expense packages that allow the line producer greater control over their own living decisions and an easier time truly settling in at their new (temporary) home. In addition to the flat living allowance, such deals typically provide for self-drive rental cars and additional tickets that the line producer can use at their own discretion (subject to fulfilling their work duties) to fly home to visit family (or to fly family to visit them at the production location).

Line producers are also among a select group of production contributors whose deals typically provide for "box rentals"—small additional weekly payments to compensate a line producer or department head for providing the individual's own equipment for use on the production, from the personal laptops they use in their day-to-day lives anyhow to extremely specialized lens and lighting kits that will be used on set. For personal laptops and comparably minor equipment (such as that used by line producers), the box rental fee is usually \$50 per week, with a maximum number of paid weeks (often twenty).⁴⁸

v UPM Allocations

Perhaps the most idiosyncratic element of a line producer deal is the concurrent engagement of the line producer as a unit production manager (or "UPM"). The UPM is typically a separate crew member who reports to and has overlapping

48 For more expensive and technical equipment that the production would need to rent anyhow, such as lens kits used by cinematographers or lighting kits used by lighting designers, the line producer and studio will often agree to rent it directly from the person they are employing to actually use that equipment (at prevailing fair market rates).

responsibility with the line producer for managing production and protecting against overages. UPMs, however, tend to operate at a more tactical level (often engaging more with mid-level production personnel) than the line producer (who works more on big-picture issues and in collaboration with executive producers and studio executives). Many UPMs aspire to become line producers, and many line producers broke into that role after working for years as UPMs.

UPMs, however, enjoy one thing that line producers *as such* cannot—membership in, and pension and health benefits from, the DGA.⁴⁹ UPM is a union-covered position,⁵⁰ and therefore subject to applicable guild minimums and mandatory studio contributions to these benefits plans. On the other hand, the job of “line producer” is not under the jurisdiction of any union, and in the freelance employment-based world of the entertainment industry, therefore comes with no built-in health or retirement benefits.

As a courtesy, studios almost always accommodate a line producer’s request to be concurrently engaged as a UPM, so they can continue to access the DGA’s favorable health and pension plans (which require that members earn a minimum amount of union-covered compensation during every calendar year to qualify). This is true even if the studio also plans (as it usually does) to engage a separate, dedicated unit production manager (who will probably be selected by the line producer). This engagement “as a UPM” is compensated at applicable DGA scale, which ranges between roughly \$6,000 and \$9,500 per week, depending on the particulars of the show. This compensation is fully recouped against the line producer’s fees, which are inevitably higher than these DGA minimums for UPMs. Therefore, the weekly fees earned by the line producer “as a UPM” do not impact their actual take-home compensation. That said, these allocations still come at real cost to the studio, which must pay PH&W contributions against those allocated weekly minimums—an expense that can really add up over the course of a long production. It is therefore typical for the line producer’s engagement as a UPM to be limited to a specified number of weeks that is sufficient to qualify the individual for their benefits, without further burdening the show with that added expense. This is usually worked out directly between the line producer and the studio production executive overseeing the project and given to the negotiators to memorialize.

49 These benefits are commonly referred to as “pension, health, and welfare” (or “PH&W”), and are financed by direct studio contributions to the union-affiliated plans, calculated as a percentage of the guild member’s compensation, and subject to caps above which no further PH&W contributions are due.

50 On a non-DGA production, this person might instead be referred to as a “production manager” or “production supervisor.”

vi Quick Reference Guide

TABLE 7.4 Line Producer Agreements

<i>Deal Term</i>	<i>Main Issues/Ranges</i>	<i>Other Issues</i>
1. Fees and Services	• In broadcast, \$50K–\$75K for pilot and \$20K–\$40K per episode for series • In streaming, usually \$75K–\$125K per episode • Once triggered, episodic fees are pay-or-play for “all episodes produced” (with or without a negotiated floor for the number of episodic fees) • In streaming, may instead use weekly fees of \$15K–\$25K per week, with significant minimum guaranteed work periods • Top-end producers may be offered exclusive multi-year overall deals	• 5% annual bumps are typical (subject to network policies), but negotiate bigger flat bumps for high-level deals • Episodic fees may be limited to covering a negotiated maximum work span, with pro rata (or other specified) overage compensation for services beyond the bought-out period • Producers joining pre-greenlight projects may agree to “step deals” with initial services period and optional (or locked) extension for full series production
2. Options/Locks	• In broadcast, the standard deal is pay-or-play for pilot with options for 3 seasons of services • In streaming, usually 1- or 2-year deals	• May include producer-friendly terms like mutual options for future seasons or making them subject to the producer’s professional availability • Locks are rare other than for Y1 in step deals for pre-greenlight services
3. Credit	• Standard credit is “Produced by” (not “Producer”) • May receive Co-Executive Producer or Executive Producer credit, especially at higher levels	• Usual details for EP credits regarding main titles, ties, separate cards, etc.
4. Perks and Reimbursements	• Usually robust flat weekly or monthly living allowance • Usually multiple round-trip tickets (taking into account location and schedule) that the producer can use for themselves or family members (at their own discretion)	• Box rental (e.g., \$50/week for up to 20 weeks) for use of line producer’s personal laptop or other devices • Self-drive rental car (with insurance, and business-related fuel and parking costs) standard if appropriate to the location

(Continued)

TABLE 7.4 (Continued)

<i>Deal Term</i>	<i>Main Issues/Ranges</i>	<i>Other Issues</i>
5. UPM Allocations	• Often agree to formal concurrent engagement as DGA-covered unit production manager at scale weekly compensation • UPM fees fully recouped against line producer fees, and therefore have no impact on the producer's take-home compensation	• Line producer and studio production executive usually work out a finite period of weeks for such UPM engagement, sufficient to qualify the producer for DGA benefits without further taxing the production with the cost of DGA fringes

E Streamlined Schedule of DGA Minimums

The following is a heavily edited and streamlined schedule of DGA minimums for the period from July 1, 2024 to June 30, 2026. It represents only a subset of the minimums that business affairs, production, and production finance executives work with, but is offered as a practical, conveniently structured quick reference tool for the scale figures that these executives most frequently consult in their day-to-day work. That said, any reader who is relying on these numbers in a real-world context that demands precision is urged to consult and cross-reference the most recently published official DGA Rate Cards.⁵¹

51 Which have historically been available online at <https://www.dga.org/Contracts/Rates-20XX-to-20YY.aspx> (where “XX” and “YY” are the last two digits of the calendar years spanned by the current contract year). As of this writing, the DGA has published its 2023–24 Rate Cards, reflecting the 5% increases in its new deal (except in pay TV and High-Budget Major SVOD, for which the increase is reduced to 3% to fund the addition of one paid post-production day for half-hours, and two paid post days and a ninth shooting day for one-hours). As with the new WGA deal, the second and third contract years provide for 4% and 3.5% increases, respectively (but 2% and 1.5% increases for pay TV and High-Budget Major SVOD). It is possible that the schedule published here gets the last digit of a number wrong due to the DGA and AMPTP using a different methodology for fractional dollar amounts when compounding annual increases. Like the WGA, the DGA has the right to divert 0.5% from its annual increases for the second and/or third contract years to instead be applied against studio contributions to the DGA's Pension or Health Fund. The figures published here assume no 0.5% diversions in either contract year, because no such diversions have been announced in time to be reflected here. (For the same reason, readers who download the DGA Rate Cards to their computers are advised to check the DGA website at least once per contract year to see if they have been republished to account for a 0.5% diversion.) To save ink and paper, this text will not provide the minimums for the 2023–24 contract year (which will have passed by the time it is published), nor speculate about the increases for the 2026–27 contract year or beyond (as the negotiated increases for the 2023 DGA Basic Agreement reflect the specific inflationary context and related concessions around the deal).

TABLE 7.5 Standalone Pilot Directing Minimums (7/1/24–6/30/26)

<i>Standalone Pilots</i>				
<i>7/1/24–6/30/25</i>	<i>Broadcast,⁵² Pay TV,⁵³ or High-Budget⁵⁴ Major SVOD⁵⁵</i>		<i>Basic Cable,⁵⁶ Mid-Budget⁵⁷ Major SVOD, or Over MBT⁵⁸ AVOD or Minor SVOD⁵⁹</i>	
	<i>1-Hour</i>	<i>½-Hour</i>	<i>1-Hour</i>	<i>½-Hour</i>
Program Rate	\$123,185	\$92,393	\$73,911	\$55,436
Included Days	24 days	14 days	24 days	14 days
Additional Days	\$5,133	\$6,599	\$3,080	\$3,960
Daily Rate ⁶⁰	\$6,416	\$8,249	\$3,850	\$4,950
<i>7/1/25–6/30/26</i>	<i>Broadcast, Pay TV, or High-Budget Major SVOD</i>		<i>Basic Cable, Mid-Budget Major SVOD, or Over MBT AVOD or Minor SVOD</i>	
	<i>1-Hour</i>	<i>½-Hour</i>	<i>1-Hour</i>	<i>½-Hour</i>
Program Rate	\$127,496	\$95,627	\$76,498	\$57,376
Included Days	24 days	14 days	24 days	14 days
Additional Days	\$5,312	\$6,831	\$3,187	\$4,098
Daily Rate	\$6,640	\$8,539	\$3,984	\$5,123

52 Network primetime programs (on ABC, CBS, Fox, and NBC).

53 Premium pay networks (e.g., HBO, Starz, etc.). Due to the substantial integration, on both business and creative levels, of such premium pay networks with their corporate parents’ flagship streaming services (e.g., HBO into HBO Max, eventually rebranded as Max; Showtime into Paramount+ with Showtime, etc.), in practice, most series that would have been governed as “pay TV” shows ten years ago are now usually governed as HBSVOD productions (although, given prevailing budget levels for these shows, this distinction generally has no impact on applicable scale minimums).

54 For the 2023–26 contract term, over \$3,800,000 per episode for one-hours, or over \$2,100,000 per episode for half-hours.

55 SVOD platforms with 20 million or more subscribers in the United States and Canada (including Netflix, Amazon, Apple TV+, Hulu, Disney+, Max, Paramount+, and Peacock).

56 Also subject to minimum budget thresholds, but different than those that govern for HBSVOD—for the 2023–26 contract term, at least \$1,200,000 per episode for one-hours or \$550,000 per episode for half-hours.

57 For the 2023–26 contract term, between \$1,750,000 and \$3,800,000 per episode for one-hours, or between \$1,030,000 and \$2,100,000 per episode for half-hours.

58 Minimum Budget Thresholds for SVOD and AVOD are at least \$1,750,000 for one-hours or \$1,030,000 for half-hours.

59 SVOD platforms with fewer than 20 million subscribers in the United States and Canada (as of 2024, including AMC+ and BET+).

60 In certain circumstances, episodic directors may be engaged on a day-to-day basis (e.g., to handle reshoots for which the original director is unavailable) at a 25% premium over the corresponding rate for days worked beyond the minimum guaranteed work period.

TABLE 7.6 Straight-to-Series First Episode Directing Minimums for One-Hour Programs (7/1/24–6/30/26)

<i>Straight-to-Series First Episodes (One-Hours)</i>					
<i>7/1/24–6/30/25</i>	<i>Broadcast</i>	<i>Basic Cable⁶¹</i>	<i>Pay TV or HB Major SVOD</i>	<i>HB Minor SVOD or AVOD</i>	<i>MB SVOD (any) or AVOD</i>
Program Rate ⁶²	\$83,151	\$45,268	\$80,000 ⁶³	\$63,555	\$54,441
Guaranteed Prep Days	7 days	6 days	7 days	7 days	7 days
Guaranteed Shoot Days	8 days	6 days	9 days	7 days	7 days
Guaranteed Post Days	0 days	0 days	2 days	0 days	0 days
Additional Days	\$5,543	\$3,772	\$5,000	\$4,540	\$3,889
Daily Rate	\$6,929	\$4,715	\$6,250	\$5,675	\$4,861
<i>7/1/25–6/30/26</i>	<i>Broadcast</i>	<i>Basic Cable</i>	<i>Pay TV or HB Major SVOD</i>	<i>HB Minor SVOD or AVOD</i>	<i>MB SVOD (any) or AVOD</i>
Program Rate	\$86,061	\$46,852	\$81,200 ⁶⁴	\$65,779	\$56,346
Guaranteed Prep Days	7 days	6 days	7 days	7 days	7 days
Guaranteed Shoot Days	8 days	6 days	9 days	7 days	7 days
Guaranteed Post Days	0 days	0 days	2 days	0 days	0 days
Additional Days	\$5,737	\$3,904	\$5,075	\$4,699	\$4,025
Daily Rate	\$7,171	\$4,880	\$6,344	\$5,873	\$5,031

61 This is for basic cable one-hours budgeted at over \$3,000,000 per episode in their first seasons. This is a roughly 3% premium over the applicable minimum if the first season is budgeted between \$1,200,000 and \$3,000,000.

62 All stated “Program Rates” do not include the value of any guaranteed post-production days (where applicable)—only guaranteed prep and shoot days.

63 After adding two guaranteed post-production days at \$5,000 per day, the true total minimum guarantee for such an episodic directing engagement is \$90,000.

64 After adding two guaranteed post-production days at \$5,075 per day, the true total minimum guarantee for such an episodic directing engagement is \$91,350.

TABLE 7.7 Straight-to-Series First Episode Directing Minimums for Half-Hour Programs (7/1/24–6/30/26)

<i>Straight-to-Series First Episodes (Half-Hours)</i>					
<i>7/1/24–6/30/25</i>	<i>Broadcast</i>	<i>Basic Cable⁶⁵</i>	<i>Pay TV or HB Major SVOD</i>	<i>HB Minor SVOD or AVOD</i>	<i>MB SVOD (any) or AVOD</i>
Program Rate	\$48,964	\$21,999	\$47,108 ⁶⁶	\$31,776	\$27,219
Guaranteed Prep Days	3 days	3 days	3 days	3 days	3 days
Guaranteed Shoot Days	4 days	3 days	4 days	4 days	4 days
Guaranteed Post Days	0 days	0 days	1 day	0 days	0 days
Additional Days	\$6,995	\$3,667	\$6,730	\$4,539	\$3,888
Daily Rate	\$8,744	\$4,584	\$8,413	\$5,674	\$4,861
<i>7/1/25–6/30/26</i>	<i>Broadcast</i>	<i>Basic Cable</i>	<i>Pay TV or HB Major SVOD</i>	<i>HB Minor SVOD or AVOD</i>	<i>MB SVOD (any) or AVOD</i>
Program Rate	\$50,678	\$22,769	\$47,815 ⁶⁷	\$32,888	\$28,172
Guaranteed Prep Days	3 days	3 days	3 days	3 days	3 days
Guaranteed Shoot Days	4 days	3 days	4 days	4 days	4 days
Guaranteed Post Days	0 days	0 days	1 day	0 days	0 days
Additional Days	\$7,240	\$3,795	\$6,831	\$4,698	\$4,025
Daily Rate	\$9,050	\$4,744	\$8,538	\$5,873	\$5,031

65 This is for all basic cable half-hours in their first seasons, or in subsequent seasons with budgets between \$550,000 and \$1,610,000 per episode. Starting in the second season, DGA minimums for half-hours that cost between \$1,610,000 and \$2,120,000 are roughly 26% higher than the first season minimums (which continue in subsequent seasons for sub-\$1,610,000 shows), and half-hours that cost more than \$2,120,000 per episode get a further increase of roughly 17% over the mid-budget tier.

66 After adding one guaranteed post-production day at \$6,730 per day, the true total minimum guarantee for such an episodic directing engagement is \$53,838.

67 After adding one guaranteed post-production day at \$6,831 per day, the true total minimum guarantee for such an episodic directing engagement is \$54,646.

TABLE 7.8 Episodic Directing Minimums for First Season One-Hour Programs
(7/1/24–6/30/26)

<i>Series Episodes (One-Hours)</i>					
<i>7/1/24–6/30/25</i>	<i>Broadcast</i>	<i>Basic Cable</i>	<i>Pay TV or HB Major SVOD</i>	<i>HB Minor SVOD or AVOD</i>	<i>MB SVOD (any) or AVOD</i>
Program Rate	\$55,434	\$30,179	\$53,333 ⁶⁸	\$42,370	\$36,294
Guaranteed Prep Days	7 days	6 days	7 days	7 days	7 days
Guaranteed Shoot Days	8 days	6 days	9 days	7 days	7 days
Guaranteed Post Days	0 days	0 days	2 days	0 days	0 days
Additional Days	\$3,696	\$2,515	\$3,333	\$3,026	\$2,592
Daily Rate	\$4,620	\$3,144	\$4,166	\$3,783	\$3,240
<i>7/1/25–6/30/26</i>	<i>Broadcast</i>	<i>Basic Cable</i>	<i>Pay TV or HB Major SVOD</i>	<i>HB Minor SVOD or AVOD</i>	<i>MB SVOD (any) or AVOD</i>
Program Rate	\$57,374	\$31,235	\$54,133 ⁶⁹	\$43,853	\$37,564
Guaranteed Prep Days	7 days	6 days	7 days	7 days	7 days
Guaranteed Shoot Days	8 days	6 days	9 days	7 days	7 days
Guaranteed Post Days	0 days	0 days	2 days	0 days	0 days
Additional Days	\$3,825	\$2,603	\$3,383	\$3,132	\$2,683
Daily Rate	\$4,781	\$3,254	\$4,229	\$3,915	\$3,354

68 After adding two guaranteed post-production days at \$3,333 per day, the true total minimum guarantee for such an episodic directing engagement is \$59,999.

69 After adding two guaranteed post-production days at \$3,383 per day, the true total minimum guarantee for such an episodic directing engagement is \$60,899.

TABLE 7.9 Episodic Directing Minimums for First Season Half-Hour Programs
(7/1/24–6/30/26)

<i>Series Episodes (Half-Hours)</i>					
<i>7/1/24–6/30/25</i>	<i>Broadcast</i>	<i>Basic Cable</i>	<i>Pay TV or HB Major SVOD</i>	<i>HB Minor SVOD or AVOD</i>	<i>MB SVOD (any) or AVOD</i>
Program Rate	\$32,642	\$14,666	\$31,405 ⁷⁰	\$21,184	\$18,146
Guaranteed Prep Days	3 days	3 days	3 days	3 days	3 days
Guaranteed Shoot Days	4 days	3 days	4 days	4 days	4 days
Guaranteed Post Days	0 days	0 days	1 day	0 days	0 days
Additional Days	\$4,663	\$2,444	\$4,486	\$3,026	\$2,592
Daily Rate	\$5,829	\$3,055	\$5,608	\$3,783	\$3,240
<i>7/1/25–6/30/26</i>	<i>Broadcast</i>	<i>Basic Cable</i>	<i>Pay TV or HB Major SVOD</i>	<i>HB Minor SVOD or AVOD</i>	<i>MB SVOD (any) or AVOD</i>
Program Rate	\$33,784	\$15,179	\$31,876 ⁷¹	\$21,925	\$18,781
Guaranteed Prep Days	3 days	3 days	3 days	3 days	3 days
Guaranteed Shoot Days	4 days	3 days	4 days	4 days	4 days
Guaranteed Post Days	0 days	0 days	1 day	0 days	0 days
Additional Days	\$4,826	\$2,530	\$4,554	\$3,132	\$2,683
Daily Rate	\$6,033	\$3,163	\$5,692	\$3,915	\$3,354

70 After adding one guaranteed post-production day at \$4,486 per day, the true total minimum guarantee for such an episodic directing engagement is \$35,891.

71 After adding one guaranteed post-production day at \$4,554 per day, the true total minimum guarantee for such an episodic directing engagement is \$36,430.

8

ACTING AND CASTING DEALS

Just as writer/producer agreements reflect television's character as a writer-driven medium, actor agreements illustrate television's character as a serialized medium.¹ Unlike a motion picture—which, in even the most extreme circumstances, seldom requires more than a year of the actors' time to produce, and sometimes as little as a few weeks—a successful television series may be in production for five to twelve months a year, every year, for five, seven, ten, or even more years. And for viewers, actors are the (literal) faces of these series. Actor agreements must therefore strike a balance between the actors' desires to preserve the opportunity to develop their careers and accept work outside of their primary television series on the one hand, and the needs of the studio and network to protect series continuity over a period of years on the other hand.

Most of this chapter focuses on agreements for “series regulars”—the six to ten lead actors (although the list tends to grow in later seasons of a series) who are most central to the show's creative content. These actors enter into complex, multi-year deals that firmly establish the television series as their primary employment obligation for as long as the studio and network wish to continue to employ them. Such deals are distinguishable from “recurring guest” deals—deals that contemplate the actor appearing in multiple episodes of a series, often over long story arcs, but without binding the actor to the series long-term to the same extent.²

1 See Chapter 1, Section A (pg. 13).

2 The term “guest deal” is sometimes used broadly and ambiguously to refer to any type of engagement for a television performer who is not a series regular, but refers more specifically to deals for “guest stars”—major speaking performers in a series who are not series regulars, but who are more prominent than “co-stars” in smaller roles or background actors, and who are explicitly credited as “guest star” (or under the heading “guest starring”). A “recurring guest deal” is any guest deal that

To the viewer, it may be difficult to distinguish which cast members are series regulars and which are recurring guests. Typically, series regulars are credited in a show's main or opening titles, while guests are credited elsewhere under the heading "Guest Starring" or "Special Guest," although in some cases, guests may successfully negotiate to be credited among series regulars. In any given episode, the role of a guest star may be of equal or greater prominence to that of any given series regular. Usually, recurring guest stars appear on a series sporadically or for specific finite runs, but this is not always the case—actors Grizzwald "Grizz" Chapman and Kevin "Dot Com" Brown appeared on over eighty episodes of NBC's *30 Rock* as recurring guests, rather than series regulars. Actors who start out as recurring guests may eventually be promoted to series regulars, as was the case for Jim Rash, who played Dean Craig Pelton on NBC's *Community*, or Michael Emerson, whose performance as Benjamin Linus on ABC's *Lost* persuaded the show's writers and producers to expand his character's role from that of a short-term bit player to the series' principal antagonist for several seasons. Other actors may turn down the opportunity to move from a recurring to a regular role, as was the case with Alison Brie, who reportedly declined an offer to promote her recurring guest role as Trudy Campbell on AMC's *Mad Men* to series regular, in favor of accepting a series regular role as Annie Edison on *Community*.

Rather, the major difference between series regulars and recurring guests is not discernible on-screen, but off-screen, in the actors' contracts. The primary distinguishing features of a series regular agreement, compared to a recurring guest agreement, are threefold—term, priority, and exclusivity. With respect to term, series regulars make an open-ended commitment for multiple seasons, as may be required in the future by the studio and network; recurring guest stars contract for a specified number of episodes at any given time, and only after the studio and network have resolved to actually produce those episodes (although studios and actors often subsequently agree to extend successful runs beyond the number of episodes initially committed). With respect to priority, series regulars generally must preserve their availability to work as, when, and where required by the studio and network as the series proceeds; recurring guest stars can fill their schedules freely with other work unless and until they are firmly engaged, with guaranteed compensation and specified dates, to work on their episodes.³ With respect to exclusivity, series regulars generally agree (for the

engages the actor in multiple episodes of a series (again, without being a series regular). Co-stars and other performers in minor roles (which may or may not be named, have spoken dialogue, or qualify for screen credit) are typically paid scale minimum compensation and engaged pursuant to a simple, usually unnegotiated (and sometimes largely non-negotiable) form "day player" or "weekly player" agreement (depending on the length of the engagement). See Section B.

³ That said, studios will often negotiate for additional protections or process when it comes to managing the performer's availability, and more recent changes to the SAG-AFTRA Basic Agreement have largely simplified this process for guest stars with somewhat higher compensation. See Section B.ii.

benefit of the network that airs the series) to severely curtail their right to take outside work in television; recurring guest stars generally do not submit to any such exclusivity.

As a result of these differences, the same actor may work for vastly different episodic rates depending on whether they are engaged as a series regular or a recurring guest star. Indeed, while the willingness of actors to take discounts on their highest-negotiated fees varies from actor to actor, it is not unusual for an actor to charge anywhere from two to ten times as much per episode to appear as a series regular, versus being engaged as a guest star or recurring guest. To manage their budgets, many shows employ strict limits on the maximum fees they are willing to pay for guest performers. As a result, even major stars who are especially creatively interested in a project (or especially friendly with another performer or writer on the show) may agree to work for as little as “top-of-show,”⁴ a SAG-AFTRA-defined minimum rate for “Major Role Performers” over which an actor’s services are subject to less restrictive work rules.⁵

In effect, then, a significant portion of the episodic fee payable to actors under series regular deals compensates them not only for working for the studio, but also for *not* working for third parties. Consequently, where a studio chooses to employ an actor as a recurring guest rather than a series regular, the studio’s significant cost savings come with a risk that the actor, having no long-term commitment to the series, takes a competing job that prevents them from continuing to portray their role in future seasons.⁶

A Series Regular Agreements

i Test Options

For actors who must “test” for a role, as opposed to receiving a straight offer, the studio must negotiate specific terms for its initial option.⁷ After an actor completes several rounds of auditions in front of a project’s casting director, director, showrunner, and other producers, the casting process traditionally

4 The phrase “top-of-show” may also be used to refer the “top” guest star compensation allowed by studio/network policy (where such a policy exists) on any given series (even if higher than the Schedule C money break for “Major Role Performers”).

5 “Work rules” is a catch-all term for the minimum protections, requirements, and entitlements applicable to an actor under any given schedule of the SAG-AFTRA Basic Agreement (including, e.g., limitations on working hours, scheduling requirements, overage compensation entitlements, and rules on the length, timing, and financial penalties for violating mandatory meal and rest periods).

6 For example, actor Ed Skrein originated the role of Daario Naharis in season 3 of HBO’s *Game of Thrones*. When season 4 debuted after a long hiatus, the character remained, but was now portrayed by actor Michiel Huisman, because Skrein had taken a job portraying a younger Jason Statham in a reboot of the successful *Transporter* franchise, and that theatrical engagement rendered Skrein unavailable to reprise his role in the next *Game of Thrones* season.

7 The “test option” process is explained in Chapter 3, Section A.iv (pg. 112).

culminates in two “tests”—a studio test where the studio’s executives consider options that have been curated by the show’s creative team, and a network test where the network’s executives consider options that have been deemed acceptable by the studio’s executives to show to the network. In the past, either or both “tests” were performed live in front of studio and/or network executives, but today, each actor’s “test performance” is almost always pre-recorded by the casting directors and shown to studio and/or network executives at the appointed date and time. Studio executives generally will not consider, and in no event will present to a network, an actor whose deal is not fully negotiated and executed by the actor prior to the date and time of the test. This policy contributes to the “fire drill” pace of dealmaking for test options, especially during broadcast network pilot season, when there is an extensive amount of simultaneous casting activity across the industry. Casting decisions are usually made by consensus among network, studio, producers, and casting directors, although network approval is mandatory—and in the event of a disagreement, the network’s will tends to prevail. Although most studios and networks prefer to make creative decisions on purely creative grounds, financial considerations often inform which actors are approached and considered for a role in the first place (depending on the amount of money in the pilot/series budget allocated to the role, and the amount of the aggregate cast budget that has already been affirmatively committed to actors engaged for other roles).

The studio takes an option to engage the actor for pilot (or, if there is no pilot, first season) services, which is exercisable within a specified period following the test—usually five business days, often reducible to three business days if the actor receives a bona fide outside offer for another engagement.⁸ During the height of pilot season, and in highly competitive situations, the option period may be shorter. If there are separate tests scheduled at the studio and network levels, the deal must specify which test triggers the option period, and whether the option period automatically shifts or extends if the test date and time changes.

The actor’s engagement may be subject to further conditions, such as the conclusion of negotiations between the studio and network of a license agreement, or the satisfaction of other conditions imposed by the studio or network on the unconditional greenlight of the pilot production. Outstanding conditions that are outside of the actor’s control may cause some actors to hesitate to commit to a test option agreement, and often, deals will provide that all conditions must be waived or acknowledged satisfied within a specified time, or the actor is free to walk away from the deal.⁹

8 Such “engagement” entails guaranteeing the actor’s full pilot services fee, even in the unlikely event that the pilot is not actually produced; however, the studio at all times retains the right to replace the actor, as the agreement does not require that the studio actually use the actor, only that the studio pay the actor as if it had.

9 Because acting engagements are often contingent in this fashion, an actor (and their representatives) may pursue multiple series opportunities during a single casting cycle, by arranging the various offers in precise contractual “priority” relative to one another. Of course, the studio/network may

ii Pilot Services

The pilot component of a series regular deal typically “buys out” (i.e., provides compensation in full for) a specified number of days of services for pre-production (e.g., rehearsal, wardrobe fittings, etc.), production, and post-production (including retakes, added scenes, and audio dubbing/looping work). That number is typically tailored to the pilot production schedule, with a few buffer days. This buyout will usually cover some small number (e.g., two to four) of post-production days that may be non-consecutive with the principal period of pilot production, although non-consecutive services days are usually subject to the actor’s professional availability. Services in excess of the pre-bought days may be paid at the applicable SAG-AFTRA scale minimum rate, though, where an actor’s initial compensation exceeds the applicable SAG-AFTRA scale rate (as is typical for series regular engagements), it is more common for overage days to be paid at a pro rata daily rate, based on the negotiated pilot fee divided by the number of bought-out work days under the actor’s pilot deal.

As discussed throughout this book, in recent years, the use of pilots has been mostly consigned to broadcast television, while streamers tend to favor more extensive on-paper development (including mini-rooms) and straight-to-series orders. Over the years, however, platforms and studios have grown increasingly wary of the risk that comes with committing to an actor for a full season without having had the opportunity to observe their performance in a pilot. In some instances, studios and networks have opted to replace actors early during series production, necessitating not only costly reshoots, but also a pay-out of the original actor’s guaranteed compensation for the first season (on top of the fees paid to the replacement actor).¹⁰ To mitigate this risk, these deals have evolved to frequently simulate the optionality of a pilot structure by giving the studio the right to terminate the actor’s engagement after only one, two, or three episodes, with no further obligation to pay for any remaining “guaranteed” episodes for the first season.

iii Pilot and Series Fees

The fees paid to a series regular actor are a function of many factors, including the stature and quotes of the actor; the prominence of the role in the series; the overall budget of the series and the cast budget in particular; and the amount of budget available for the studio to spend following commitments of the balance of the cast budget to previously engaged actors. Actors and their representatives will generally expect to make no less than the amount negotiated for their most recent deal, and will seek to improve upon such quotes to the greatest extent

consequently elect to pass on an actor whose availability is uncertain when time is of the essence for a casting decision.

¹⁰ See Section A.vi.

possible, especially where the quote was “earned” (i.e., the actor was actually cast in the role, and performed in a pilot and/or series). However, some actors and their representatives will accept slightly lower fees for “straight offers” than for “test options,” because they are freed from having to further compete to win the role. Through 2017, negotiated acting fees tended to be heavily dictated by an actor’s quotes, usually reflecting only incremental improvements from deal to deal unless the actor could point to some significant intervening achievement or success. The 2017 and 2018 passage of new laws in California and New York prohibiting employers from asking about a candidate’s salary history officially brought an end to the “quote system” that had dominated entertainment industry negotiations for decades before.¹¹ Since then, quotes have not disappeared from the negotiating landscape altogether, but their role has become more implicit than explicit, actors are much better able to negotiate substantial increases in their fees from deal to deal, and quotes tend to be disclosed only when convenient and helpful to the actor’s representatives in a negotiation.

Where there is a pilot, an actor’s episodic rate for the first season of a series is typically the same as their pilot fee, though pilot fees may sometimes be slightly above or below the applicable first season fee, depending on negotiating needs and policies. Most studios and networks recognize 5% cumulative annual bumps in this episodic rate (i.e., on a season-by-season basis), though some studios, as a matter of policy, limit such increases to 4%. Some studios will consider granting actors an unusually high fee bump between the first and second seasons, particularly if the actor’s negotiated fee for the pilot and/or first season are below the actor’s quote or otherwise unusually low; however, most major studios tend to avoid this. Fees may be tied to program length (i.e., thirty-minute episodes, sixty-minute episodes, etc., taking into consideration that shorter episodes generally have smaller budgets and take less time to produce), with negotiated increases (which may or may not be on a pro rata basis) for episodes whose running times exceed the presumed program length under the deal.

Finally, the parties may negotiate to deem some portion of the actor’s negotiated pilot and episodic fees—which portion may be denominated as a specific dollar amount or a percentage, often 10%–20% of the actor’s fee—to be an advance against residuals due to the actor under the SAG-AFTRA Basic Agreement for streaming exhibition or from the studio’s foreign or off-network exploitation of the series.¹²

11 See Chapter 6, Section A.i (pg. 213).

12 Acting fees that are deemed to be an advance against residuals are excluded when determining whether an actor’s compensation satisfies any applicable “money breaks” under the SAG-AFTRA Basic Agreement. See Section A.v.

Throughout the 2000s and early years of the 2010s, the “standard” negotiating range for acting fees for a new series was between \$17,500 and \$125,000, with inexperienced adult actors with no preexisting quotes as a series regular usually earning between \$17,500 and \$22,500 per episode, the vast majority of steadily working television actors making between \$25,000 and \$75,000 per episode, and major stars who had appeared in numerous series or who had significant film experience commanding between \$75,000 and \$125,000 per episode (which was, for all intents and purposes, a hard cap for first season compensation across the industry). Child actors tended to earn less—more like \$7,500–\$12,500 per episode for a pilot and first season, with escalations thereafter.¹³

With the arrival of the streamers, the advent of the highly competitive “peak TV”/“Streaming Wars” era, and the influx of movie stars into television, however, these longstanding norms began to collapse. The vast majority of series regulars have continued to command fees that are broadly consistent with the traditional ranges, although shows have grown more willing to bear two or more significant salaries on a single series (well beyond the old \$125,000 maximum for all series regulars). But as shows sought to distinguish themselves in an era of increasingly infinite small screen options, more and more often, they pursued A-list movie stars for lead roles. The arrival of these marquee actors caused the economic market for on-camera talent, especially at the high end, to explode.

The trend arguably began with 2014’s *True Detective* on HBO, which lured stars Woody Harrelson and Matthew McConaughey (the latter of whom won an Oscar that year for his performance in *Dallas Buyers Club*) with reported paychecks of \$300,000 per episode each for a single eight-episode season, with additional executive producer fees for each paid on top.¹⁴ Things escalated quickly from there, as Netflix, Amazon, and HBO in particular drove the market to ever-greater heights—a reported \$350,000 per episode each for Nicole Kidman and Reese Witherspoon for the first season of HBO’s *Big Little Lies*; \$450,000 per episode to Dwayne “The Rock” Johnson to star in and executive

13 Deals with minors have several other unique elements. For example, California law requires that a portion of every child actor’s compensation be placed in a trust account, known as a “Coogan account,” until the child turns 18. (These accounts are named after Jackie Coogan, a 1920s child star—and later Uncle Fester on *The Addams Family*—who sued his mother and stepfather for squandering his film earnings.) In addition, because the law may permit a minor to cancel a prior contract upon turning eighteen, studios usually protect themselves by requiring the child’s parents to essentially co-sign the agreement, and submitting those co-signed contracts to the local state courts for judicial “confirmation” preventing the minor from later disavowing the deal.

14 Harrelson and McConaughey’s deals also started a movement toward actors receiving Executive Producer credit, even in a show’s first season—before then, an exceedingly rare concession. Over the last decade, more and more actors have sought to establish themselves as producers as well, and such Executive Producer credits (and fees) became the norm for actors who help to develop, sell, and shepherd a series to production.

produce HBO's *Ballers*; and \$500,000 per episode to Billy Bob Thornton to star in Amazon's *Goliath*. The market took a further quantum leap when Kidman and Witherspoon were each able to negotiate fees of around \$1 million per episode to return for a second season of *Big Little Lies* (which had been conceived of as a closed-ended limited series, for which the principal actors had all signed one-season deals).¹⁵ They were aided in that negotiation by deals recently struck by Witherspoon and Jennifer Aniston for what would eventually become Apple TV+'s first flagship series, *The Morning Show*, for a rumored \$1.25 million per episode each. By 2019, even the famously frugal FX had promised \$1 million per episode to Jeff Bridges to star in its big-swing limited series, *The Old Man*.¹⁶

That explosion in acting fees even reverberated in the still highly traditional and slow-changing broadcast network world, where the major networks were forced to work harder than ever to lure major stars away from the premium and digital platforms. In 2016, the traditional \$125,000 per episode ceiling was shattered by former *NCIS* star Michael Weatherly on CBS's *Bull* and former *24* star Kiefer Sutherland on ABC's *Designated Survivor*. Weatherly and Sutherland had each proven themselves to be bankable stars in network television, and each reportedly commanded \$300,000 per episode during their new series' first seasons, before lucrative executive producing fees and backend.¹⁷ And while those episodic fees still fell well short of top-market fees in streaming, these network shows still ran for the usual twenty-two(ish) episodes per season, rather than the eight-to-ten episode runs typical for premium and streaming platforms.

Moreover, just as they did in the years before the "peak TV" explosion of acting fees, actors on highly successful series also still have the opportunity to renegotiate their way to massive paydays. By the final seasons of their shows, the core stars of NBC's *Friends*, CBS's *The Big Bang Theory*, and HBO's *Game of Thrones* all reportedly commanded fees around (or a bit north of) \$1 million per episode. In early 2018, *Grey's Anatomy*'s Ellen Pompeo made headlines as TV's "new \$20 million woman," negotiating a deal covering the show's fourteenth through seventeenth seasons that reportedly provided for a seven-figure signing bonus, \$575,000 per episode (with twenty-two episodes per year), and two full backend points estimated in value at \$6–\$7 million per season. As far

15 Afterward, many studios and platforms began pressing actors for at least one or two season options, even on shows that were intended as closed-ended limited series, as "schmuck insurance" in case creative inspiration (or, perhaps more importantly, great success) gave rise to ideas for continuing the series after all.

16 When *The Old Man* finally debuted in 2022, it was largely embraced by critics, but did not necessarily drive viewership numbers that would have justified FX's unprecedented splurge on Bridges' fees. The network seemed to quickly pull back from trying to compete with the streamers or HBO at this end of the market.

17 Backend for actors remains rare, particularly in the first season of a series, and is largely reserved for the highest-level stars.

back as 1998, Jerry Seinfeld reportedly turned down \$5 million per episode to return for a tenth season of *Seinfeld*.¹⁸

One consequence of the explosion of series regular fees, however, has been a squeeze on the fees of recurring and non-recurring guest stars, whose salaries have been compressed to help the studios absorb their growing costs for series regulars. Actors whose roles may have been previously treated as fractional series regulars have more often been engaged as recurring guest stars.¹⁹ Actors who may have commanded huge guest star fees in the late 1990s or early 2000s were often being forced to work for top-of-show, or perhaps double top-of-show, while lower-level actors who may have once been engaged as top-of-show “major performers” were more often engaged as “day players” and “weekly players” and paid minimum scale compensation. All of this played out on shows whose shorter episodic orders satisfied movie stars looking to limit the duration of their commitments, but reduced consistent employment opportunities for working actors lower on the call sheet. These trends helped set the stage for the 2023 SAG-AFTRA strike.

Moreover, to state the obvious, when negotiated for the first season of an unproven series (rather than as a reward for undeniable success), fees of this scale create unprecedented risk for the studios and networks involved and increase the bar for what can be considered a sufficient level of “success” (however measured) to justify the investment. This has been a major contributing factor to the ongoing decline in series longevity (in terms of seasons ordered before cancellation).²⁰

Now that the industry is in the early stages of its post-“peak TV” contraction, studios and platforms have already begun their push to bring acting fees back from these stratospheric heights, with million-dollar episodic fees already mostly a thing of the past. Talent representatives have worked hard to resist the trend (and will continue to do so), but some amount of deflation is widely considered inevitable as the industry collectively tries to reorganize itself for sustainable profitability.

iv Series Services

Except as specifically agreed on a case-by-case basis, series regulars render services on a fully exclusive basis for the full length of series production. This guaranteed availability is one of the pillars on which series production scheduling rests. For all series regulars earning at least \$25,000 per episode (or at least \$190,000 across a thirteen-episode guarantee), the “span” of the performer’s

18 And, as discussed in Chapter 3, Section B (pg. 120), the overall dynamics of streaming have accelerated these renegotiation opportunities to earlier and earlier seasons in a successful show’s run.

19 See Section A.v.

20 See Chapter 2, Section B.v (pg. 88).

services becomes freely negotiable—a phrase that can usually be read to mean “fully waived to the greatest extent permitted by the SAG-AFTRA Basic Agreement.” Over the course of a long production season, many actors will approach the studio with requests to be released from their duties for certain dates to allow them to take on permitted outside jobs (including endorsement and commercial work), or for personal or family reasons. Studios always make sincere efforts to accommodate these requests, even when it requires rearranging production schedules, so long as the cost or disruption is not too great. This frequently requires the studio and outside employer to enter into an agreement directly with one another to lay out clear terms around the actor’s availability.

v *Series Options*

An actor’s pilot fee (where applicable) buys out an initial option to engage the actor to render services on a series (if ordered). During this option period, the actor is precluded from accepting any third-party engagements that would prevent them from rendering series services as required by the studio.²¹ The initial series option date may be set based on a concrete calendar date (typically June 30 for broadcast pilots, which are produced in early spring), or a specified amount of time following the delivery of the pilot (which is standard for non-broadcast pilots that produce year-round, and is usually set to three to six months following the pilot delivery).

Studios also typically build in contractual extensions for such initial options (traditionally to accommodate the right of a broadcast licensee to place a later series order in anticipation of a mid-season launch, but adapted to create similar flexibility for non-broadcast licensees). The historical standard for such extensions is six months (on a broadcast network pilot, to December 31 of that year), subject to payment to the actor of an additional pilot fee, although studios and platforms have experimented with a variety of approaches to the length, cost, and recoupability of extensions. With actors who work substantially in network television, such extensions may prove particularly controversial or difficult to negotiate if they have the effect of keeping the actor off the market for a subsequent pilot season. For the most part, all series regulars engaged for a given pilot are accorded equivalent treatment (with extension fees scaled according to their respective pilot fees) in the option structures under their deals.

Most series regular deals bind the actor to the studio for five or six seasons. This practice derives from California law, under which the so-called “seven years rule” renders personal services contracts with terms longer than seven calendar years unenforceable. In the broadcast world, seven years can

21 To be clear, the studio is virtually never obligated to engage an actor to render services, even if the series is ordered; CBS chief Les Moonves famously demanded that *Big Bang Theory* pilot actress Amanda Walsh be replaced for the series, leading to the subsequent casting of star Kaley Cuoco.

be reliably understood to allow for up to six seasons. Outside of it, given the expansion of series production, post-production, and localization schedules, the reality is likely to be fewer. Nevertheless, even where a character is specifically contemplated to require only a one- or two-year story arc before being written out of the series, the preferred studio practice is to obtain a five- or six-year deal on a blanket, non-negotiable basis, with contract terms aligned across the full series regular cast. Of course, there's "non-negotiable" and then there's "non-negotiable," and the biggest and most sought-after stars have consistently been able to negotiate for deals with two to four options (even when their castmates have agreed to "full-term" deals).

In addition, the series regular deal must specify the option periods within which the studio must exercise such options to engage the actor for subsequent seasons of the series (for which the studio usually accords equivalent terms across the entire series regular cast). For broadcast series, the option date has long been set to June 30 annually. In cable and streaming, studios and platforms have experimented with a wide array of approaches over the last fifteen years, usually defining option periods as some number of months following the completion of photography, delivery, or initial exhibition of the prior season. As of December 8, 2024 (and thorough at least June 30, 2026, after which this may be renegotiated further), the option period for actors earning under the money break for freely negotiable option periods—\$70,000 per episode for one-hour series, \$65,000 per episode for half-hour series, and \$32,000 per episode for minors employed on children's programs—is generally set to the SAG-AFTRA-defined maximum: eighteen months following the commencement of principal photography for the preceding season, extendable up to three times by a period of three months each in exchange for a non-creditable episodic fee (based on the preceding season's rate) per extension.

Over those money breaks, option periods are freely negotiable. In practice, they are usually structured similarly with respect to extensions as those for actors earning under the applicable money break, but often provide for longer initial option periods between seasons. These options may be calendared to milestones at the end rather than the beginning of production, or defined to roughly coincide with the maximum option periods (with extensions) for those actors under the money break. For all actors, services and compensation must commence within three months following the end of the prior option period (and any applicable extensions), which may be extended by an additional two months in exchange for a non-creditable episodic fee (based on the upcoming season's rate).

vi Series Guarantees

A series regular deal will also specify a guaranteed number of episodes per year for the actor. Most series regulars are guaranteed to receive their episodic fees for all episodes produced during any season for which they are engaged,

whether or not they actually appear in every episode. Actors in smaller roles may receive “fractional guarantees”²²—the usual variations for broadcast network series are 7/13 (i.e., a guarantee that the actor will appear in seven thirteenths of episodes produced) or 10/13 (i.e., a guarantee that the actor will appear in ten thirteenths of episodes produced).²³ The most typical fractional guarantee for streaming or cable series is 7/10 (i.e., a guarantee that the actor will appear in seven tenths of episodes produced), although fractional guarantees, where needed, are often determined on a show-by-show or character-by-character basis.²⁴ It is common, though not universal, for roles with fractional guarantees in the first season of a series to escalate to “all episodes produced” by the second or third year of the deal.

Such guarantees are generally driven by the creative needs and expectations of the series creator and producers, but sometimes the decision-making may flow the other way, in either direction. A major actor who is negotiating to play a character that is contemplated for a fractional guarantee may insist on being guaranteed all episodes produced, effectively forcing the studio and creative team to alter their initial creative plan and enhance the character’s significance, or to take on dead-weight financial obligations (paying an actor for all episodes produced, whether or not the actor is actually used in all such episodes), in order to successfully close the deal with the desired actor. On the other hand, a major actor may express interest in a role, but only if it can be scheduled narrowly to fit within their existing schedule; in such circumstances, studios and creators sometimes prioritize securing their desired star and agree to shrink the role to accommodate the actor’s limited availability.

22 With such guarantees, the relationship between the creative content of the show and the business deal with the actor is bidirectional: the deal with a series regular may be made on a 7/13 or 10/13 basis because the series creator and producers have deemed it creatively unnecessary for the character to appear in every episode, but once the deal is struck, the studio may pressure the writers and producers to ensure that the character is not used more frequently than the actor’s guarantee requires (so as to preserve the financial template for the series, which reflects that fractional guarantee).

23 This reflects the fact that, until recently, most broadcast series were ordered in increments of no less than thirteen episodes, and a full season usually consisted of twenty-six episodes. In recent years, a “full order” for a broadcast network has usually been twenty-two episodes rather than twenty-six (though particularly successful series may still be ordered for twenty-three to twenty-six episodes in a given season). The move toward shorter seasons has been driven by a variety of factors, including the more rigorous demands of producing higher production value “premium” television content, the great expense of such series, the preferences of talent and creators, and the emergence of (and need to leave room for) broadcast network “summer seasons” with distinct programming slates.

24 Although such deals may also be referred to more colloquially as, e.g., “seven out of ten” deals, contractually defining the guarantee as a fraction makes it easier to calculate the applicable guarantee if the actual number of episodes produced for any given season is higher or lower than the denominator (with partial episodes rounded up or down to the nearest whole integer). So, for example, a 7/10 guarantee applied to a thirteen-episode order yields “9.1 episodes,” which would be rounded down to nine; while a 7/10 guarantee applied to an eight-episode order yields “5.6 episodes,” which would be rounded up to six.

In addition to stating a series guarantee as a percentage (7/10, 7/13, 10/13, or all) of episodes produced, a series regular deal will also typically provide for a per-season numerical number of guaranteed episodic fees. Because the SAG-AFTRA Basic Agreement requires that an actor be guaranteed no less than seven episodic fees per season for the studio to maintain its exclusive option on the actor's services, most deals across all platforms guarantee actors a minimum of seven episodic fees for the first season of the series (in broadcast, reducible to a minimum of six episodic fees if the initial order is for six or fewer episodes).²⁵ In subsequent years, the annual guarantee will increase somewhat, usually to thirteen episodes for broadcast network series, and to whatever would be considered a "full order" for each season on other platforms (e.g., eight to twelve episodes).

In some instances, an actor's representatives may seek to negotiate maximums as well as minimums for their client's episodic services. This issue typically arises when a high-level film actor is tentative about committing to long annual television production periods, or when a show is being produced for a newer platform with a relatively unestablished order pattern (making it difficult for the actors and their representatives to measure and predict the level of commitment they are undertaking). Studios and networks are both typically very resistant to such maximums—for studios, more episodes generally correspond to more revenue; for broadcast networks, there is always a full broadcast year to fill; and outside of broadcast, even in an era of declining episode counts, networks still typically want to keep their options open, especially when it comes to their most successful series. In lieu of agreeing to "maximums" as such, studios may sometimes agree that production of more than a specified number of episodes per season automatically triggers an annual fee bump. In addition, in the rare instance where a studio actually agrees to limit the number of episodes for which an actor may be required to render services in any given season (as was reportedly the case for Kevin Bacon on Fox's *The Following* and Viola Davis on ABC's *How to Get Away With Murder*), that studio will nevertheless—*just in case*—reserve the right to produce as many episodes per season as the studio (and/or its commissioning network) desires (without paying the actor for unworked episodes in excess of the negotiated maximum).²⁶

25 Some studios and networks will voluntarily pay actors on six-episode seasons an additional seventh episodic fee to maintain their options for subsequent seasons.

26 Because there's always another complication to come up with, actors' representatives sometimes then negotiate for the actor to have the option to agree to appear in such additional episodes if produced, thereby extending the "all episodes produced" guarantee to include those episodes (whatever the studio's creative plans might otherwise have been).

vii *Backend*

Backend for actors is another area of negotiation that has been substantially transformed by the influx of movie stars into television and the increasingly star-driven character of the medium.

Backend has long been part of the dealmaking landscape for television actors, but very much as an exception rather than a rule. Many stars only earned a share of backend as part of later lucrative renegotiations of their contracts for successful established series, rather than as part of their initial deals. Those actors who did receive backend from inception usually had an established track record for successfully carrying long-running series, and those entitlements were seldom greater than 2.5% of MAGR (and could be as low as 0.5% MAGR). More than one actor receiving backend in a single series, from inception, was nearly unheard of. For many years, when planning out how to allocate a 35% backend pot across all participants in all development deals on any given series, by default, studio negotiators frequently did not bother to proactively set aside points for actors.

Today, studios and platforms routinely plan for one or two lead actors (as appropriate for the creative content of the project) to be included in the participations pot for the series from the outset. A rough default reference point remains 2.5% of MAGR, though high-level actors in single lead roles frequently seek 5% (while the co-leads in a “two-hander” may expect at least that much to be allocated to the two leads collectively). In addition, it has become much more common for actors to also be attached to projects as executive producers (especially but not exclusively when joining a project during early development), which may entitle them to two separate streams of backend—one “as an actor,” and another “as a producer.”²⁷

Although backend for actors is defined equivalently to that granted to other participants,²⁸ it vests uniquely. For most participants, backend entitlements usually vest more or less immediately (e.g., for underlying rightsholders and pilot directors who complete their pilot/first episode services), or over the first two seasons of series production. And for these participants, backend, once vested, is vested for the life of the series—thus, a creator/showrunner who departs a series after its second season enjoys their full allocation of backend for the entire series, even if it runs for ten times as long without its original creator/showrunner. The underlying logic of these vesting schemes is that the participants are rewarded for setting the project on its feet, and that once they do so successfully, they are entitled to share in the resulting spoils for life.

27 This is similar to underlying rightsholders, who may also receive separate contingent compensation streams “as rightsholders” and “as producers.” See Chapter 5, Sections A.iv (pg. 196) and A.viii (pg. 201).

28 See Chapter 9 (pg. 351).

On the other hand, the underlying logic for actor backend vesting is that the value added by the actor is directly tied to the actor's ongoing appearance (as a series regular) in the show. Thus, actor backends are never "fully vested" for the life of a series until that series has completed its run. Until then, some studios account to actors on a non-cross-collateralized basis, reporting revenue and expenses only from seasons in which the actor actually performs as a series regular. Thus, if an actor is entitled to 5% of MAGR and appears as a regular in seasons one through five of a series, but not in seasons six through ten, the actor will receive a full 5% of MAGR, but limited to revenue and expenses generated from those first five seasons. Other studios apply the backend to the entire series on a cross-collateralized basis (as is typical for participations accounting generally), but provide for the actor's backend share to effectively "de-vest" based on the production of episodes or seasons in which the actor is not engaged as a series regular.²⁹ Thus, the same actor from the prior hypothetical would receive backend reflecting revenue and expenses from the entire ten-season run of the series, but they would be considered only 50% vested for their backend, making their actual functional stake 2.5% (rather than 5%) of MAGR.³⁰

viii Awards Bonuses

When making deals for roles that they anticipate may put them into contention for major awards, stars sometimes look to negotiate cash bonuses to reward them financially for such acclaim.

Such bonuses are typically borne by networks because it is networks—not studios—that principally enjoy the branding affiliation with a successful or acclaimed series. And in fact, it is common practice for networks to pay cash bonuses to actors to reward them for major awards nominations and/or wins,

29 In such deals, the actor is often deemed to have appeared in every episode of any season for which they were engaged as a series regular (thus protecting them from dilution from a "bottle episode" or other uniquely focused or structured episode in which the star does not appear. The distinction between episodes and seasons can still be salient, however, to the extent that there are different numbers of episodes produced in different seasons. If seasons produced after an actor leaves a series have more episodes than the seasons in which the actor appeared as a regular, then the "de-vesting" of the actor's backend will be more substantial; if subsequent seasons have fewer episodes, then the actor's level of vesting will diminish more slowly.

30 This can create some accounting complexity, as the actors' vesting declines from season to season—e.g., in the hypothetical described in the body text, after five seasons, the actor is vested for 100% of their 5% of MAGR; but after the eighth season, they are vested for only 3.125% of MAGR (five-eighths of 5%). In such circumstances, the actor's actual backend entitlement is recalculating on an ongoing basis, from participations statement to participations statement, reflecting their most current level of vesting. To the extent that an actor has been overpaid based on prior participations checks based on a higher vesting percentage, such overpayment is treated as an advance against further participations that may become due based on the actor's reduced, "de-vested" backend stake.

even when such bonuses are not contractually owed.³¹ For that reason, many networks resist formally committing to such bonuses, even while reassuring talent representatives that their client will be appropriately awarded for such success.³²

Independent studios may take competing views with respect to awards bonuses. Some studios will only agree to such bonuses on the condition that the network agrees to assume the obligation to pay them, reasoning that the bonuses are customary network expenses and that the studio should not be forced to bear the risk of a network refusing to cover them. If the network is known when the deal is being made, the studio might approach the network to approve and assume the bonus commitment before agreeing to it in the actor's deal. If the network is yet to be determined when the deal is made, the bonuses may be explicitly contingent, in whole or in part, on the future network's agreement to honor them (which the studio will use good faith efforts to obtain). On the other hand, other independent studios adopt an intentionally liberal attitude toward such bonuses, confident that the network will likely eventually honor them (and willing to take the risk that it does not). For such studios, awards bonuses are part of a broader patchwork of "talent-friendly" policies and practices that they use to distinguish themselves from the more conservative major companies, and to sell talent on the value of working with an intermediary studio rather than selling directly to buyers.

When they are agreed upon contractually, awards bonuses typically take the form of flat cash payments (usually between \$25,000 and \$50,000) to reward individual nominations in the major acting categories at the Emmys and Golden Globes, applicable against larger bonuses (usually between \$50,000 and \$100,000) for wins in those same categories. Policies vary, however, and specific companies may provide bonuses for wins but not nominations, bonuses for Emmys but not for Golden Globes (or smaller bonuses for Golden Globes), and/or aggregate caps on how much money the actor can earn in awards bonuses in a single year.

ix Credit/Billing

Series regulars are generally guaranteed that their screen credits will appear in the series's main or opening titles,³³ grouped with other series regulars, and in

31 In fact, because it is studios—not networks—that are in contractual privity with actors, networks may pay these bonuses without any formal and direct contractual or financial relationship with the actor at all.

32 This probably has more to do with managing emotions and optics than reserving the discretion not to pay. Entertainment companies are constantly trying to cultivate good relationships with major stars, and a cash payment made "as a voluntary and generous reward" may generate significantly more gratitude and goodwill than one paid in accordance with a contractual obligation.

33 The terms "main titles" and "opening titles" are sometimes used interchangeably to refer to an opening title/credit sequence that precedes the actual action of each episode of a television series,

a size and style that is the same as—or in common contractual jargon, “no less favorable than”—the credit accorded to any other series regular actors.³⁴ Duration ties (referring to the amount of time a credit actually appears on screen) are also common, but less universal. Series regulars’ credits typically appear on every episode of the series, whether or not the actor actually appears, although on shows with particularly large casts, the credits for each episode may be revised to reflect only actors who actually appear therein.³⁵

Higher-level actors, or actors who know that they are negotiating for a particularly prominent role, will negotiate for guaranteed credit position—that is, a requirement that their credit will appear first (or in some other numerical position) among all credited series regulars. Credit position is usually a creative decision, combining considerations of the prominence of the actor and the prominence of the role in the series. Position guarantees are generally styled as “no less than ____ position,” to allow the studio to accord even more favorable credit position in its own discretion. Prominent actors in smaller supporting roles often negotiate to receive the final credit among series regulars, with the word “and” before their names (called “last/“and” credit). If this credit has already been committed to an actor, a subsequent actor in a similar position may negotiate for credit in penultimate position, with the word “with” preceding their name.³⁶ Occasionally, multiple actors may receive last/“and” or

which may be elaborately animated or produced. More precisely, however, the latter phrase refers to credits that appear superimposed over the actual filmed action at the beginning of each episode, often appearing after and separate from a dedicated main title sequence.

34 Main title credit is generally accorded to the series’s writers, producers, and series regulars, with the final three credits going, in order, to the series creator(s) (on every episode), episodic writer(s), and episodic director. On some “premium” programs for streaming, high-level department heads (e.g., directors of photography, composers, editors, production designers, costume designers) and/or casting directors may also be credited in the main or opening titles. Occasionally, shows divide these top-level credits between main and opening (or main-on-end) titles—for example, a brief main title sequence referencing only the show’s title and creator (or only those plus the series regulars), while all other individuals are credited in the opening or main-on-end titles. Billing provisions generally allow for such separation of top-level credits by category, so long as all individuals within a given category are credited together. In main-on-end formats—in which the main titles appear immediately after the action of the episode rather than before—the standard order of main title credit groupings is reversed, but credits within each grouping (e.g., all series regular credits) appear in the same order as they would in standard main titles.

35 For instance, this was the case on HBO’s *Game of Thrones*, which sported a particularly massive cast of series regulars, none of whom consistently appeared in every single episode of the series.

36 CBS’s long-running sitcom *How I Met Your Mother* (which premiered in 2005) offers a helpful example of how such credits are allocated. Over its nine seasons, the show maintained a cast of five series regulars: Josh Radnor (playing Ted Mosby), Jason Segel (playing Marshall Eriksen), Cobie Smulders (playing Robin Scherbatsky), Neil Patrick Harris (playing Barney Stinson), and Alyson Hannigan (playing Lily Aldrin). Although Radnor was perhaps the least experienced actor of the group, he received first billing by virtue of his character, Ted Mosby, being the principal protagonist of the series. Segel, one of the stars of the critically acclaimed series *Freaky and Geeks*, received second billing. Smulders, another relative unknown at the time *How I Met Your Mother* debuted, received third billing. Harris, who had found fame as a child star in 1980s sitcom *Doogie Howser*,

penultimate/“with” credit (though this is much more common in features). Early in the casting process, a studio negotiating with a prominent actor may negotiate for credit position options that it may choose among in its discretion (e.g., a credit that will appear in no less than second position, or in penultimate/“with” position, or in last/“and” position, at the studio’s discretion). Alternatively, a studio may preserve its right to credit all series regular actors in alphabetical order, or to accord so-called “Laverne & Shirley” credit (a form of joint first-position credit granted to two co-leads, in which both credits appear on a single card, with one name positioned to the bottom-left and the other to the upper-right).

Finally, higher-level actors may seek to require the studio to credit them in all paid advertising for the series (e.g., billboards, magazine and newspaper advertising, etc.). Such prominent mentions of the actor’s name in advertising bolster the individual’s stature in the industry and celebrity with the public. Although the studio may consider the actor’s name valuable in marketing and may intend to mention the actor’s name in any event, the studio generally also wants to reserve as much discretion as possible to craft advertising as it sees fit. As a result, studios tend to resist these requirements; or, if they agree to any paid advertising provisions at all, agree to “ties” rather than absolute entitlements. In other words, the studio may not guarantee that the actor’s name will be used in paid advertising, but agree that, if the studio elects to use any *other* actor’s name in a piece of advertising, it will *also* use the name of the actor who has the “paid ad tie.”³⁷ This retains flexibility for the studio, while reducing the risk of embarrassment for the actor should the studio try to promote the series solely around one or more of their co-stars. In addition, independent studios often specify that such commitments apply only to advertising released by or under the control of the studio, while talent representatives try to require that the studio contractually bind the network to comply with these requirements (or to at least advise the network of them and request that it comply).

x Dressing Room

The type of dressing room accorded to an actor during production of the series is generally considered a material substantive term of the actor’s deal, as actors

M.D. and parodied himself in the 2004 film *Harold & Kumar Go to White Castle*, received the penultimate/“with” credit. Hannigan, who had concluded a successful run on *Buffy the Vampire Slayer* in 2003, received the last/“and” credit.

37 “Paid advertising” is often a contractually defined term and is subject to a variety of exclusions that fall under the heading of “excluded advertising.” The effect of “excluded ads” is that, even where an actor receives an entitlement to paid ad credit or a paid ad tie, those rights do not constrain the studio’s actions for excluded ads. The “excluded advertising” category often includes such obvious and important types of advertising as television and radio commercials. As a result, actors may also seek an “excluded ad” tie in addition to their “paid ad” tie.

will spend a considerable part of each shooting day preparing (or waiting) for their calls off-set. When a show is filmed on a studio stage location (as is common for multi-camera comedies), actors are generally provided with private dressing rooms within the studio facility. However, when a show is filming on location, actors will be provided with spaces in dressing room trailers and may negotiate fiercely for favorable accommodations. Single “star” trailers (which have a single compartment, for a single actor) are fairly uncommon in television production, and because of cost considerations, many studios have strict policies against providing such dressing rooms. That said, single “star” trailers are one of the many once-foreign practices that have followed movie stars into the television business.

Most series regulars (as well as high-level guest stars) are accorded one compartment in a so-called “double banger” (i.e., a 40+-foot trailer with two separate side-by-side private compartments). Lower-level series regulars (and most guest stars) may be accorded one compartment in a so-called “triple banger” (i.e., a trailer with three smaller side-by-side-by-side private compartments).³⁸ Triple bangers are especially common for shows that film on location in New York City, where space constraints are a major production consideration. Nearly every actor will seek (though not every actor will receive) contractual assurances that their dressing facility will be no less favorable in any material respect than that accorded to any other actor on the series.³⁹ Such ties may be negotiated to exclude certain other lead actors or roles.

Finally, the actor’s deal may specify whether the actor’s dressing facility is provided “for the actor’s exclusive use,” or only “for the actor’s exclusive use *on days on which the actor is rendering services.*” The former language indicates that the dressing room is dedicated to that actor for the duration of their services, and cannot be reassigned to other actors on days when its principal occupant is not working. The latter language would permit such reassignment, and effectively force the actor to clear their personal belongings out of their dressing room between work days.

38 Lower-level guest stars and co-stars may receive a compartment in a “Honeywagon,” a large trailer with four to six small separate dressing rooms. This would be unusual for a series regular, and likely reflect very specific and significant logistical challenges limiting the studio’s ability to provide more favorable facilities.

39 It is difficult to overstate how important dressing room issues can become for some actors, and therefore, for the negotiation of some actor deals. For instance, many actors negotiate for extremely specific dressing room furnishings and amenities. Moreover, while such details are never negotiated contractually, the most particular actors may insist on being assigned whatever trailer (or trailer compartment) is physically nearest to the actual filming area, as a way of reflecting that actor’s superior importance to the production.

xi Photo/Likeness/Biography Approvals

Most series regulars negotiate for approval rights over still images, non-photographic likenesses,⁴⁰ and biographical information depicting or concerning the actor that are used in publicity for the series. Studios have widely disparate policies with respect to the granting of such rights; some studios accord them to series regulars as a matter of course, while others steadfastly reserve such rights only for higher-level actors (sometimes by requiring, as a matter of policy, that an actor must receive higher than a threshold fee to qualify to receive such approval rights).

When an approval over still photographs is granted, it may be granted solely for photographs in which the actor appears alone, or extended to photographs in which the actor appears with others (or with others possessing comparable approval rights). Actors must typically approve no less than 50% of photographs in which they appear alone and, if applicable, no less than 75% of photographs in which they appear with others, and must exercise such approvals (typically through their representatives) within short time windows or those approvals are deemed granted. For non-photographic likenesses, the actor negotiates for how many rounds of comments (or “passes”) they are permitted to make on a proposed rendering before it is deemed approved—one or two passes being the standard.

Historically, even when a studio may have agreed to accord such approval rights to an actor, networks—which actually control the majority of advertising activity around a series—almost never agree to assume the corresponding obligation and honor such approval rights (although they would typically be advised of them and would often work collaboratively with talent as a matter of course). In such circumstances, the restrictions are limited to advertising materials that are created by or under the direct control of the studio (thereby excluding most advertising, which would be produced and distributed by the network). But the streamers are not organized as distinctly into studio and network organizations as the legacy media companies, and they do not license their content to other platforms, rendering the distinction between “studio” and “network” largely meaningless. Between that and the arrival to the medium of high-level feature talent accustomed to robust photo/likeness approvals, it has become much more common for these approvals to explicitly apply to and bind the platform.

xii Merchandising Rights

Typically, series regular deals expressly provide for the studio’s right to use an actor’s name, voice, and likeness in merchandising and commercial tie-ins. Actors, in turn, often seek a right of approval over such merchandising and/or

40 Think of the stylized artistic rendering of Harrison Ford as Indiana Jones on the poster art for *Raiders of the Lost Ark*.

commercial tie-ins using their names, voices, or likenesses. Such approvals are seldom granted to series regulars (whose significant guaranteed compensation is generally understood to include compensation for exclusivity, likeness rights, and the like), as opposed to high-level guests (who may appear in as little as one episode, for what may be a modest fee, and therefore have greater basis to resist granting such rights).

Instead, series regulars are customarily granted a limited right of approval over the use of their names or likenesses in specified restricted categories (e.g., firearms, alcohol, tobacco, pharmaceuticals, personal hygiene products, etc., as well as product categories that directly compete with the actor's preexisting branding and endorsement obligations for third-party brands).⁴¹

In addition, studios generally agree to pay an actor a percentage of revenues from merchandising featuring that actor's likeness. The standard royalty rate is 5% of the studio's "net merchandising receipts" (the studio's merchandising receipts, less distribution fees for the studio or its subdistributors and out-of-pocket expenses), reducible by royalties granted to other actors featured on the same piece of merchandise to a floor of 2.5% of the studio's "net merchandising receipts" from each such product (a 5/2.5 royalty formula).⁴²

xiii Other Approvals/Consultations

Generally speaking, actors are only able to negotiate fairly limited approval and consultation rights (and true approval rights, as opposed to meaningful consultations or "mutual approvals" with studio tiebreakers, are exceedingly rare). Like many other deal terms, the according of such rights depends on the stature and bargaining power of the actor.

Very high-level actors who are attached at the development stage of a project, when the details of the creative team and content are not yet certain, may seek and receive consultation rights over the pilot screenplay, the pilot writer, the pilot director, principal filming location, and/or the showrunner, to the extent that such elements have not already been determined before the actor makes their deal. Many such top-level actors also seek approval over networks to which the project may be pitched or sold (which often results in the negotiation of a list of pre-approved buyers). Any such rights would be considered exceptional as a contractual term, but studios tend to be very deferential to their stars on such matters regardless.

41 One contested but highly valuable category is gambling. Although some actors may be sensitive about the use of their names or likenesses in lottery games, slot machines, and comparable contexts, these rights can be extremely valuable to the studio (and, by extension, to the actor who receives a royalty for the use of their likeness). Sony in particular has profited immensely from *Wheel of Fortune* slot machines.

42 In some instances, however, studios may seek further reducibility of their royalty obligations from products that feature a large number of (royalty-earning) cast members from an ensemble cast.

More customarily, series regulars have a contractual right to consult with producers with respect to the look and feel of their hair, makeup, and wardrobe for the series. Higher-level actors may also receive contractual consultation or approval rights over the actual personnel engaged to render hair, makeup, and wardrobe services (within studio parameters). Approval over the distribution of bloopers featuring the actor is relatively common, though approval of non-blooper behind-the-scenes or deleted scenes footage is often sought but seldom granted.

xiv Travel/Relocation

For any shows that film outside of Los Angeles, studios must provide actors with business-class transportation⁴³ and living expenses of at least \$5,000 per month for up to six months (i.e., a maximum of \$30,000) per season, with no cap on the number of seasons.⁴⁴ For pilots, travel for limited work at a distant location⁴⁵ from the show's principal shooting location (or "production base"), and guest stars,⁴⁶ the standard travel package is business-class transportation,⁴⁷ first-class hotel accommodations, ground transportation⁴⁸ (or potentially a rental car, where appropriate), and a per diem (subject to a union minimum of

43 Technically, studios may fly actors economy plus on domestic flights under 1,000 miles, or between Los Angeles and Vancouver, or between New York and Toronto, and some studios formally limit actors to these union requirements, rather than applying an across-the-board requirement for business-class travel (although in practice, some studios nevertheless routinely provide business class tickets for all but the shortest flights, so long as the cost difference is reasonable enough).

44 The requirement of monthly expense allowances for every season of a series was one of SAG-AFTRA's major achievements in its 2023 Basic Agreement, and the culmination of a concerted effort over the preceding decade. Into the 2010s, studios—especially those producing broadcast shows that were in production for roughly nine months per year—routinely presumed (realistically or fictitiously) that actors would relocate to the series shooting location permanently (or at least for the life of the series), and therefore provided them with relocation expenses only for the first season, limited to a flat non-accountable allowance of \$7,500 to \$10,000 (although high-level stars could negotiate for more). As cable and later streaming emerged and orders shortened, relocation fees were largely extended to subsequent series seasons, but remained at these levels (well below the actor's likely actual cost of living for each production season). Between 2017 and 2023, the SAG-AFTRA Basic Agreement required only \$10,000 per season for a maximum of two or four seasons (based on the series order). As of this writing, there has been little time for new dealmaking norms to arise based on the 2023 deal's new minimum requirements; it seems likely that the union minimum will be the going rate for the vast majority of actors, while major stars may still get the opportunity to negotiate for better.

45 Usually defined as more than fifty or seventy-five miles from the actor's principal residence.

46 Below the "guest star" level, studios almost always limit casting to local hires.

47 Again, the entitlement to business-class transportation may be negotiated with or without the union-permitted exclusions for travel under 1,000 miles or for the Los Angeles/Vancouver and New York/Toronto routes.

48 To get really in the weeds about it: usually exclusive to/from airports, and subject to sharing with other cast, directors, producers, or studio/network executives to/from set.

\$75 per day).⁴⁹ High-level actors sometimes negotiate for first-class transportation (though this is rarer in television than in features), and many actors request a reasonable number of additional tickets for each season (to visit home during production, their schedule permitting, or fly friends or family to visit them on set).

Because many actors are sensitive to where they live and work—and the pursuit of cost-saving tax incentives has attracted production away from traditional entertainment industry centers like Los Angeles and New York (and toward places such as Vancouver, Toronto, New Orleans, Pittsburgh, Atlanta, and Albuquerque)⁵⁰—high-level stars (especially those who attached themselves to a series during development) will often negotiate for approval over a series’s principal production location.⁵¹ Unusually lucrative relocation packages are often the product of a studio’s efforts to persuade an actor to entertain alternative production locations.

xv *Publicity/Promotion*

For a series to succeed, it is vital that it be promoted aggressively, and actors have a unique and critical role to play in the publicity and promotion of a television series. Consequently, series regular deals usually include explicit terms setting forth the actor’s obligation to render publicity services, as directed by the studio and/or the network, to support the series.

Generally, publicity services may be freely required of the actor during series production periods, while publicity services that are to be rendered outside of production periods are subject to the actor’s professional availability, and to the studio or network’s obligation to provide transportation, accommodations, and expenses if the actor must travel in connection with such promotional services. However, studios and networks generally require that the actor remain available to render publicity services on a first-priority basis in connection with key annual promotional events, whether or not these events fall during production periods. Such lists of first-priority promotional obligations are hotly negotiated, particularly for feature actors who want to preserve their ability to work freely outside of series production periods. At a minimum,

49 Effective as of December 7, 2025, i.e., the first Sunday that is two years after the AMPTP received notice of SAG-AFTRA’s ratification of the 2023 Basic Agreement (which was December 5, 2023). Between December 8, 2024 (the first Sunday one year after ratification) and December 6, 2025, the minimum is/was \$70 per day. Sooner or later, it will be increased in future updates to the SAG-AFTRA Basic Agreement.

50 See Chapter 3, Section B.iii (pg. 125).

51 As a technical matter, in lieu of “approval” as such, studios generally prefer to grant this in the form of the actor’s right to opt out of their obligations altogether if the studio moves principal production of the series away from one of a negotiated list of production locations that the actor deems acceptable.

studios and networks require their actors to remain available to appear at the network's annual Upfronts event and the network's presentation at annual Television Critics Association events (or "TCAs"), which are a key part of the network's promotional cycle. In addition, studios and networks may seek to guarantee the actor's availability for other key events (such as major national and international sales and distribution conferences [e.g., MIPCOM in Cannes], Comic-Con, or series or season premiere events), or time periods (such as the one or two weeks immediately preceding the scheduled premiere of a series or season, a requirement favored by streamers with non-standardized programming calendars).

As social media has occupied an increasingly central role in entertainment marketing, studios and networks have come to recognize the impact that actors with strong social media presences can have in mobilizing their followers. Many companies therefore also require that series regulars agree to cooperate with them to promote their projects via the actor's own social channels, in some cases providing for an explicit minimum number of promotional posts and/or mutual approval requirements over the substance of such posts. While some actors have been eager to use their social media platforms to support their shows, others have viewed the networks' efforts to contractually mandate such cooperation as a burdensome expansion of the actors' publicity obligations, as well as an undue intrusion on a space that the actors may view as personal to themselves and their relationships with their fans. Studios and networks generally will not attempt to compel performers who don't have preexisting presences on social media to create new accounts, but for those who are already active on social media, the prevailing expectation is that they will cooperate in leveraging their social media accounts to support the series.

xvi Exclusivity

The majority of negotiated deal points in entertainment services contracts naturally concern what an employee must *do*—what services they must render for their studio employer, what limitations apply to those services, the extent to which the individual must keep themselves available to render services for the studio when required, and of course, the compensation and other perks owed to that individual in exchange for those services. However, series regular agreements are distinct for the extent to which they dictate not just what a contracted performer must do for their employer, but also what they must *not* do *outside of* that employment during the term of their agreement. The first such major term is exclusivity.⁵²

52 To be clear, negotiated exclusivity is not unique to actor agreements. Virtually all personal services contracts in entertainment address the extent to which an individual may render services for third parties (if at all) *during* the active period of their employment, with fully exclusive services

As noted in the preface to this section, exclusivity is one of the key elements that distinguishes a series regular deal from a guest star deal. There is little debate about a studio's need to have effective control over the schedules of all series regulars throughout the span of production, to give the production the flexibility to schedule those regulars' shooting dates around the more scattered and less controlled availability of guest stars, locations, and other major elements. Series regular contracts go even further, however, limiting the types of outside jobs an actor can take even in between production seasons.

This somewhat proprietary attitude of networks toward the performers on their shows is a legacy of the pre-streaming/pre-cable era of three (later four) broadcast networks, during which long orders (generating many episodic fees) and nine-month annual production periods made such exclusivity less of an imposition on actors. It is arguably anachronistic in the modern marketplace, which features a much wider field of competing television networks and digital platforms and actors who jump regularly between feature film and television work, making the appearance of one network's star on a competing network's program much less conspicuous than it would have been in the three-/four-network era.⁵³ But it is nevertheless ubiquitous (particularly among broadcast networks, which often work hard to create a brand association in viewers' minds between a given star and their own network), and networks require that studios obtain network-dictated or approved exclusivity terms in all deals for series regulars. Contractual deviations from such ingoing exclusivity requirements are extremely rare other than at the highest levels, and they require the network's approval in each instance. That said, studios and networks are consistently more flexible in their day-to-day responses to actors' requests for exclusivity exceptions and/or scheduling accommodations than they are in the underlying dealmaking, with contractual exclusivity terms essentially reserving for the networks the right to make any such accommodations at their discretion and on their own terms.

While the details have always varied from network to network, series regulars' services have traditionally been fully exclusive (in all media) during production periods, exclusive in television (subject to limited carveouts) at

generally being presumed other than in certain types of engagements (e.g., non-writing producing services) or where specifically negotiated otherwise. Moreover, writing agreements have long included some amount of negotiated exclusivity—at least in television—even outside of active services periods. See Chapter 6, Sections A.v (pg. 222) and B.iv (pg. 244). However, such out-of-season exclusivity terms have generally grown less restrictive for writers—both as a matter of common practice and as governed by the WGA Basic Agreement—as their employment windows have shortened in the “peak TV” era. In any event, the extent to which a studio is entitled to an individual's fully or substantially exclusive services even outside of active service periods is by far most material to the individual's life and career, and most substantially negotiated, in series regular agreements.

53 In fact, it can be convincingly argued that, in the entertainment marketplace as it exists today, shows can be significant beneficiaries of their stars attracting notice on other projects, increasing their individual profiles, and luring new fans back to their principal series.

all times, and always first-priority with respect to production services (which means that the studio has first call on the actor's time, and can call on the actor to render production services whenever necessary, unless the studio has specifically agreed to waive such priority for specified dates on which the actor wishes to take other work).⁵⁴ Such exclusivity has typically included carveouts for non-recurring/non-regular guest appearances for third parties (which are often limited to no more than three appearances every thirteen weeks), and unlimited appearances in talk, news, radio, game, panel, or variety-type programs. Guest appearances for third parties may also be subject to "time period" protection—i.e., the actor may not agree to make a guest appearance for a series that is likely to be broadcast on the same day of the week and time as the actor's primary series. Some studios also prohibit actors from rendering behind-camera (e.g., writing, directing, or producing) services for outside television series (though this is more commonly a studio, rather than network, prerogative).

Like many other traditional television dealmaking norms, however, traditional series regular exclusivity becomes an increasingly uneasy fit for an evolving streaming-dominated business characterized by shorter episodic orders, longer production periods (relative to episode counts), and longer hiatuses between seasons. Particularly for those actors whose compensation still fell within the traditional pre-streaming range of \$25,000–\$125,000 per episode, these shifts resulted in most series regulars functionally earning less money each year than they used to, while being forced to spread that money over longer and longer periods due to the collapse of broadcast-style series annualization. These challenges were exacerbated by the lack of corresponding evolution in standard exclusivity requirements, which hampered actors in trying to make up some of those lost earnings from other sources. Over several successive triannual MBA negotiations, SAG-AFTRA sought—largely fruitlessly—to negotiate for more union-mandated limitations on exclusivity requirements for series regulars.

When the 2020 bargaining season once again failed to yield meaningful gains on this issue, SAG-AFTRA shifted its efforts from the negotiating room to the state house, lobbying California legislators to enact a new state law that would impose on the companies the kinds of restrictions that SAG-AFTRA had to date been unable to secure via collective bargaining. This lobbying campaign quickly gained traction, bringing the AMPTP back to the bargaining table for a rare mid-contract term mini-renegotiation, culminating in an August 2022 agreement introducing a new set of exclusivity limitations to go into effect on January 1 of the following year (about six months before the 2020–23 contract term was set to expire).

54 Performers on unscripted series are generally subject to far more limited exclusivity requirements, such as exclusivity solely in unscripted programming, or in programming of a comparable genre or theme. See Chapter 12, Section B.ii (pg. 473).

Under that 2022 deal, series regulars earning less than \$70,000 per episode for one-hour programs or \$65,000 per episode for half-hour programs⁵⁵ were subject to MBA-mandated limits on their negotiated exclusivity,⁵⁶ which protected these performers' rights to accept: (1) at least three guest star appearances in each thirteen-week period (which may be subject to an agreement that none of these appearances can be in a "continuing role"); (2) unlimited radio guest appearances and unlimited second-position guest appearances on talk shows, game shows, news, panel and award shows (but again, potentially subject to the requirement that none of these appearances be in a continuing role); (3) unlimited guest star appearances on live-action and animated television, including the right to recur on up to six episodes of a single season of a series or mini-series; and (4) either one second-position series regular role or one second-position leading role in a mini-series during each calendar year. All such entitlements are on a second-position basis, retaining the studio's traditional control over the actor's schedule during series production.⁵⁷ In addition, after completion of principal photography for each season, studios must provide series regulars under the money break with a "Conflict-Free Window" of at least three months (with "reasonable good faith efforts" to provide wider Conflict-Free Windows), with at least thirty days' notice of each such Conflict-Free Window, during which the series regular may accept permitted appearances without first having to confirm schedule or availability with their first-position studio employer.⁵⁸

55 The 2023 SAG-AFTRA Basic Agreement adopted these same money breaks as the thresholds over which studios may negotiate for option periods in excess of MBA-specified maximums (which apply nonnegotiablely to actors earning under the money break). See Section A.v.

56 Prior the 2022 deal, studios could "bargain freely" for exclusivity with any series regular earning more than \$20,000 per episode for one-hour programs or \$15,000 per episode for half-hour programs—so, in effect, with every series regular.

57 These permitted appearances may also be made subject to additional studio/network conditions, including (1) that the actor's services to their primary series remain in "first position," thereby requiring the actor to confirm availability and scheduling before accepting it (with the studio required to exercise its first-position rights only for "legitimate, work-related reasons"); (2) prohibitions on outside performances in a "substantially similar role" (taking into account the genre, setting, theme, plot, premise, and the "distinct, identifiable and detailed characteristics and storyline(s) of the performer's character"); (3) prohibitions on non-readily reversible changes to the performer's appearance (e.g., temporary hair dye is acceptable, but cutting hair is not); (4) prohibitions on parodying the series regular's role (e.g., on *Saturday Night Live*); (5) requirements that the performer's name and/or likeness not appear either alone or more prominently than any other performer in any key art or other promotional materials for their outside project(s); and (6) prohibitions on permitted appearances that are scheduled to be telecast, to the best of the performer's knowledge, during the regularly-scheduled telecast time period of the first-position series. In any event, however, studios and networks may not use any of the foregoing restrictions as a basis for "automatically" refusing an otherwise permitted outside appearance, and must instead "work cooperatively to give good faith consideration to the performer's request" and maintain records of such efforts for each request.

58 The mandatory "Conflict-Free Window" does not apply where the hiatus between the end of principal photography for one season and the commencement of principal photography for the next is less than four months. During the Conflict-Free Window, series regulars must use best efforts to

While the first two requirements largely formalized preexisting custom and practice, the new allowances for six-episode recurrences and second-position series regular deals, as well as the concept of the Conflict-Free Window, represented major departures from prior norms.

Since the debut of these new requirements on January 1, 2023, some studios and platforms have revised their exclusivity requirements to largely apply the same rules even to actors earning over the money break (thereby allowing the studio to negotiate for more stringent exclusivity). Others have retained their preexisting exclusivity policies, which are now explicitly subject to contrary union-mandated limitations and requirements, where applicable. Even for those studios, however, the existence of these rules has made it easier for actors whose fees are high enough to exempt them from the new limitations to nevertheless negotiate for further protections consistent with those applicable to actors earning under the applicable money breaks.

In addition to submitting to these exclusivity requirements with respect to outside acting work, a series regular typically must also obtain the approval of the studio and network before entering into commercial endorsement agreements during the term of their agreements for a series. Actors with preexisting endorsement relationships must typically disclose these up-front and obtain specific contractual carveouts to allow these relationships to continue. In the ad-supported linear television context, these “commercial exclusivity” provisions were intended to protect advertisers from the embarrassment of seeing actors on shows they sponsor promoting the products and services of their competitors. In pay TV and in streaming’s early ad-free years, this concern did not apply, but platforms nevertheless retained such requirements for general brand safety, and, for Amazon and Apple in particular, protection against their actors endorsing products and services that are competitive with those of the broader conglomerates. Now that advertising is making its way back into streaming, the original logic of these commercial exclusivity requirements is also being restored.

Where actors sign on for limited series or otherwise make only one-year commitments rather than entering into long-term multi-season deals, the foregoing exclusivity requirements (other than full exclusivity during production periods) may be substantially limited in scope or duration or even eliminated entirely.

make themselves available for work on their first-position series (e.g., recalls for added scenes and reshoots, ADR/looping, and promotional/publicity services), and all outside services must be completed within the Contract-Free Window or thereafter become subject to the studio’s first-position rights. Because series regulars on the same series may have substantially different personal shooting schedules, the “Conflict-Free Window” need not be the same, or the same length, for each series regular. In the event the studio fails to provide a series regular with a Conflict-Free Window, it must pay the performer a penalty equal to one episodic fee at the prior season’s rate.

xvii *Morals Clauses*

Morals clauses—legal provisions that give an employer the right to terminate an individual’s engagement for cause based on their personal conduct—are unique in the world of entertainment dealmaking. Like exclusivity terms, morals clauses extend the reach of a performer’s contract to the actor’s actions and choices *outside of* their direct work for their employer. But these provisions go even further, not only creating contractual responsibility for an actor’s private as well as professional conduct, but potentially making performers liable not only for the *substance* of their actions, but also for other people’s *perceptions* of those actions. In part for this reason, morals clauses have a long and fraught history in the entertainment industry, and their use offers a window into the shifting balance of power between studios and stars, and into the evolution of society’s anxieties (and sometimes panics) over the decades.

Morals clauses first emerged in the “Studio System” of the 1910s and ‘20s, when actors (as well as writers and directors) were typically hired as exclusive “contract players.”⁵⁹ Analogous to modern overall deals, these agreements provided actors with guaranteed compensation over a specified term, during which the actor worked exclusively for that studio.⁶⁰ While the specific terms of such agreements could vary wildly for established stars compared to eager unknowns—principally in their duration (from several weeks to several years), compensation (from poverty wages to small fortunes), perks, and personal approvals—the basic structure of these deals was generally consistent, giving studios almost complete control over their actors’ professional lives.⁶¹

When sensationalist media coverage about the debaucherous lifestyles of Hollywood stars began generating controversy and impacting ticket sales, studios responded by introducing clauses into their agreements prohibiting their contract players from engaging in illegal behavior or in any conduct that would “shock, insult, or offend the community,” bring the individual into

59 The twenty-two stars surrounding the Matterhorn in the logo of Paramount Pictures refer to the twenty-two stars that the company had under contract at the time it adopted that logo in 1916, including early megastars of silent film Mary Pickford, Gloria Swanson, and Clara Bow.

60 This exclusivity technically bound the actor more stringently than it did the studio, which generally retained the right to “loan out” the actor to another studio, typically in exchange for a reciprocal loan of another actor or for a cash “loan-out fee” paid directly to—and of course, retained solely by—the actor’s exclusive studio employer. Higher-level actors were eventually able to negotiate for approval rights over such loan-out arrangements, but nevertheless, in this era, studios generally decided what films an actor would perform in, often with little consideration for the actor’s preferences.

61 This included the right not to employ the actor at all. Studios were sometimes known to “teach a lesson” to difficult actors by refusing to cast them in any role at all for a period of time—a move that, in an era in which many stars appeared in three to five pictures per year and relied on studio publicity departments to maintain their celebrity, could do fast and significant damage to the actor’s career.

“public scorn or contempt,” or bring the studio itself into “scandal or disrepute.”⁶² Studios in this era were particularly keen to collect and weaponize information about their stars’ addictions, infidelities, and sexualities, which the studios could keep handy to extricate themselves from long-term contracts with actors whose fading stardom no longer justified their high guaranteed compensation.

In the 1940s and ‘50s, morals clauses became a principal tool in the industry’s fanatical campaign to root Communism out of Hollywood. Routinely, the actors, writers, directors, and producers who were publicly accused of Communist activities or sympathies, or who principledly refused to answer questions on the subject, were summarily fired (without severance) pursuant to their morals clauses, and these terminations were upheld when challenged in federal court. Studios also continued their weaponization of morals clauses against their talents’ private lives, especially their sexualities. As ever, however, the studios’ invocations of morals clauses primarily reflected commercial rather than moral concerns, and studios were apt to sack underperforming actors for their sexualities while going to great lengths to protect or “rehabilitate” their bankable stars from the same kinds of revelations.⁶³

Over the 1960s and ‘70s, the collapse of the “studio system” resulted in actors and other creative principals moving from a primarily term-based employment model to a freelance/project-based model. Now “free agents,” actors had more control over their careers, as well as more negotiating leverage in an industry that remained as “star-driven” as ever, but now featured a growing universe of independent and international alternatives to the traditional studio powers. Now working with actors primarily on a project-by-project basis, studios had less investment in (and were exposed to less risk from) their stars’ personal reputations. Cost-cutting studios substantially dismantled their once-sprawling publicity operations (including their costly networks of “fixers” and private

62 The studios discovered the real financial power of these new “morals clauses” in 1921, when, shortly after signing a \$3 million contract with Paramount Pictures, comedian Roscoe “Fatty” Arbuckle was arrested and charged with rape and murder. Although Arbuckle was acquitted, his reputation was ruined—and with it, his marketability as an actor—leading Paramount to terminate his agreement (and void its lucrative guarantee) pursuant to the morals clause in his deal. Within a few years, studios were actively employing investigators and studio “fixers” to surveil and collect dossiers on their own highly paid talent, which the studios could use to cancel contracts when convenient, or even to extort talent into compliance with the studio’s demands.

63 A report in *Confidential* magazine that up-and-coming Warner Bros. star Tab Hunter had been arrested years earlier at a “gay house party” was countered by studio publicity trumpeting Hunter’s heterosexual interests, along with Hunter’s quick casting in two movies opposite Natalie Wood, designed to position them as a real-life romantic couple. The threat of a similar *Confidential* exposé about Rock Hudson’s sexuality led Universal Studios to hastily arrange a highly publicized sham marriage for him (to his agent’s assistant) to preempt any public allegations about Hudson’s sexuality. In fact, Hudson was relatively open about his homosexuality among friends in the Hollywood community, and it was considered a long-time “worst-kept secret” in the industry, but was never publicly confirmed until after his death from AIDS in 1986.

investigators), as the stars themselves took greater command of their personal publicity. Meanwhile, the general liberalization of American society (including a reappraisal of the “Red Scare” years of the 1940s–50s) and the rise of tabloid culture further reduced the prevailing sense that an actor’s personal reputation or conduct was a studio’s legitimate concern. These factors collectively led to a decades-long decline in the use of morals clauses in entertainment contracts. Such provisions had already become (and remain) ubiquitous in sports and commercial endorsement contracts. But by the mid-2010s, for actors in film and television, morals clauses were seldom seen outside of children’s and teen programming, or certain decades-old forms from slow-changing traditionalist studios and networks.

That long-term trend turned around suddenly and dramatically in October 2017, when *The New York Times* and *The New Yorker*, in rapid succession, published a pair of high-profile articles reporting on dozens of women who had accused powerhouse producer Harvey Weinstein of rape, sexual assault, and sexual abuse over a period of at least thirty years.⁶⁴ Shortly thereafter, actress Alyssa Milano posted to Twitter, “If all the women who have been sexually harassed or assaulted wrote ‘Me too’ as a status, we might give people a sense of the magnitude of the problem,” giving rise to what became known as the #MeToo movement, and with it, a newfound climate of belief and support for accusers who had long been afraid to tell their stories, and of accountability for the powerful men who were the subjects of credible allegations. What followed was a chaotic reckoning for decades of unreported sexual harassment and abuse not only in Hollywood, but across the broader culture. By October 2018, the New York Times reported that the movement had “brought down 201 powerful men” across business, news media, government, and the arts (of whom nearly half were replaced in their positions by women).⁶⁵

In entertainment specifically, within a few weeks after the Weinstein revelations, credible allegations had emerged not only against several other powerful executives, but also against many high-profile actors, writers, and directors, including Kevin Spacey, Louis CK, Brett Ratner, and Danny Masterson, most of whom were quickly and publicly dropped by their employers and business

64 Weinstein was later tried and convicted on multiple counts of rape and sexual assault by courts in New York and Los Angeles, and he will likely spend the rest of his life in prison.

65 Prominent Hollywood executives to lose their jobs over this period, in addition to Weinstein, included Head of Amazon Studios Roy Price and long-time CBS CEO Les Moonves. In addition, moguls like NBCU vice chairman Ron Meyer, Warner Bros. Chairman and CEO Kevin Tsujihara, and NBCU CEO Jeff Shell were later fired or forced to resign in the face of revelations of extramarital affairs with employees and actresses that would likely have been viewed as private indiscretions only a few years earlier, but had now come to be seen as unacceptable abuses of power.

partners from their projects and deals.⁶⁶ Before 2017 had even ended, Spacey had been fired from his lead role on Netflix's *House of Cards*, and his performance as oil tycoon J. Paul Getty in Ridley Scott's already-completed upcoming film, *All the Money in the World*, was erased and replaced over nine frenzied days of reshooting with Christopher Plummer in the role.

As swift and decisive as these early firings and terminations were, however, many of them were also very costly for the studios involved. Virtually as soon as allegations against celebrities began appearing in the news, studio lawyers and business affairs executives dusted off their contract forms and Standard Terms and Conditions exhibits to check the language of their morals clauses, only to find that many of the contracts they had entered into over the preceding years did not contain such clauses at all. Because all contracts generally required employees to comply with applicable legal requirements and studio policies, an actor who had engaged in harassing or abusive conduct toward co-stars, crew, or executives could be suspended or terminated for cause easily enough. But in the absence of a morals clause, misdeeds and indiscretions committed in an actor's private life or in *other* jobs were generally beyond the scope of such requirements. The fact that such conduct had eviscerated the actor's marketing value to the employer or caused others to be unwilling to work with them—or that it was simply morally reprehensible—was usually insufficient by itself to entitle the studio to terminate the actor “for cause.” Studios and other employers under public pressure to quickly end their associations with targeted individuals could always avail themselves of their “pay-or-play” rights under an agreement; but, because such terminations were technically considered “not for cause,” studios often had no choice but to quietly pay those fired individuals any outstanding guaranteed compensation under their deals.⁶⁷ By early 2018, morals clauses had largely resumed their prior ubiquity in entertainment services contracts, especially (but not

66 Spacey was later tried and acquitted for sexual assault in London. Masterson was tried and convicted on two counts of forcible rape in Los Angeles in May 2023, and was sentenced to thirty years to life in prison.

67 Studios that had at least a colorable argument supporting a termination “for cause” often sought to withhold some or all of that outstanding guaranteed compensation; and because studios and talent in such situations were usually both equally keen to get the story out of the public eye as quickly as possible, confidential settlements were much more common than public litigation. Nevertheless, studios could and did take more strident positions, especially when it came to misconduct on set (for which the studios had much stronger legal positions to terminate performers without pay). For example, although many of the most damning allegations against Kevin Spacey were based on the actor's private life, the fact that he had also been accused of improper behavior toward crew members on the set of *House of Cards* enabled studio MRC to terminate him for cause *and* to sue him to recover the millions of dollars spent to suspend, rewrite, and resume production of the show's sixth and final season without him (eventually resulting in a \$31 million damages award, though MRC

exclusively) in acting agreements. Several companies also revised their corporate anti-harassment and anti-discrimination policies—generally applicable to executives and other corporate employees, but also frequently incorporated by reference into talent services agreements—to apply more expansively to conduct outside of obvious workplace settings.

Since reintroducing morals clauses in late 2017 and early 2018, studios and platforms have deployed them liberally and drafted them expansively, usually reserving the right to terminate an individual's engagement "for cause" based on an allegation (and not necessarily the actuality) of misconduct; for non-criminal (as well as criminal) misconduct; based on the studio's perceived risk of public offense or reputational harm (independent of the substance of the individual's actions); and without any required investigation, consultation, or other form of due process prior to termination. Some companies will agree to exercise their judgment "reasonably" when invoking a morals clause, or may waive their right to invoke it for misdemeanor crimes that do not involve "moral turpitude" or for actions or statements related to an individual's religious, political, or philosophical beliefs. In addition, the negotiators on new deals involving individuals whose personal histories suggest that such "morals" concerns are more than merely academic may have to address more specific issues, such as whether a morals clause may be invoked (1) for preexisting (as of the time of the agreement) acts or statements based on a change in public sentiment or the emergence of additional information; (2) for new actions or statements of the same character as known prior "misconduct"; and/or (3) within a limited or unlimited amount of time after the studio first becomes aware of new alleged misconduct.⁶⁸ In general, however, the social climate in which these morals clauses were broadly reintroduced has, at least in recent years, largely empowered studios to treat them as functionally non-negotiable in all but the rarest cases.⁶⁹

later settled with Spacey for a fraction of that amount in exchange for the actor's cooperation in the studio's ongoing litigation with its insurer).

68 The negotiating dynamics here can be interesting. A studio might cite an individual's checkered personal history as supporting its demand for strict protections against future misconduct. On the other hand, talent representatives may argue that a studio knowingly getting into business with someone with that kind of personal history should be expected to assume any associated reputational risk.

69 That said, the same could have been said of the morals clauses of the 1910s–50s, and talent may once again get fuller opportunities to more finely hone or altogether resist such provisions as the #MeToo movement fades into memory and the pendulum of negotiating power in the industry swings back toward talent more generally.

*xviii Quick Reference Guide***TABLE 8.1** Series Regular Agreements

<i>Deal Term</i>	<i>Main Issues/Ranges</i>	<i>Other Issues</i>
1. Test Options	• 3–5 business days from “test” to elect to engage actor for pilot (or, if no pilot, series) on pre-negotiated terms	• Option period may be reducible for bona fide third-party offers • May agree to shorter options in competitive situations
2. Pilot Services	• Buy-out of specified production period, including some post-production days	• Non-consecutive services usually subject to professional availability • Overages usually paid pro rata based on negotiated fee and initial bought-out period
3. Pilot and Series Fees	• For entry-level actors, usually \$17.5K–\$22.5K per episode • For most working actors, usually \$25K–\$75K per episode • For high-level, experienced working actors, usually \$75K–\$125K per episode • Major theatrical actors may now command \$300K–\$1M per episode • For children on primetime shows, usually \$10K–\$20K per episode • On children’s shows, usually \$7.5K–\$12.5K per episode	• Fees may be renegotiated during an active contract on a successful series • Fees may be negotiated even higher when an initial contract for a successful series is set to expire • A portion of fees may be deemed an advance against SAG-AFTRA-mandated residuals
4. Series Services	• “Span” freely negotiable (bought out) for regulars earning over \$25K/ep (or over \$190K for a 13-ep guarantee)	• Studios regularly attempt to accommodate requests to carve out dates for outside work
5. Series Options	• Almost always 6-year (or 6-season) deals • Option periods covering engagement for series (after pilot) and engagement for subsequent seasons (after each season ends)	• For high-level theatrical talent, may negotiate significantly shorter-term deals • For closed-ended limited or anthology series, may negotiate 1-year deals

(Continued)

TABLE 8.1 (Continued)

<i>Deal Term</i>	<i>Main Issues/Ranges</i>	<i>Other Issues</i>
6. Series Guarantees	• Fees guaranteed for “all episodes produced” or for specified fractions (e.g., 7/13, 10/13, 7/10) • Typically guarantee at least 6 episodes for first seasons, and at least 7–13 episodes for subsequent seasons, depending on order patterns (broadcast vs. cable)	• Roles may start with fractional guarantees and escalate to higher fractions or “all episodes produced” in subsequent seasons • High-level actors may negotiate for maximum episodes per year
7. Backend	• Benchmark of 2.5% MAGR (general range of 0.5%–5% MAGR) • Actors may receive points both “as an actor” and “as a producer”	• Backend vests only for episodes or seasons for which the actor is engaged as a series regular (and thus may exclude later seasons or de-vest over time if the actor leaves a successful ongoing series)
8. Awards Bonuses	• \$25K–\$50K per nomination in major acting categories for Emmys and/or Golden Globes, vs. \$50K–\$100K per win • May be contingent, in whole or in part, on being assumed by network • May be subject to total annual caps	• Paid by networks; common but sometimes reserved as discretionary “gifts” rather than deal terms • Some indie studios avoid unless assumed by network • Some indie studios intentionally grant more generously than major companies
9. Credit/Billing	• Usually main or opening titles for series regulars • Credit position negotiated based on stature of actor and prominence of role • Last/“and” or penultimate/“with” credit for higher-level actors in smaller (non-leading) roles	• Often include size/style/duration ties to other series regulars • Series regular acting credits generally appear on every episode, whether or not the individual actor appears in that episode

(Continued)

TABLE 8.1 (Continued)

<i>Deal Term</i>	<i>Main Issues/Ranges</i>	<i>Other Issues</i>
10. Dressing Room	• Single “star” trailers are uncommon, but may be granted to high-level theatrical stars • Most series regulars have one compartment in a “double banger”	• Lower-level series regulars may get one compartment in a “triple banger” • May negotiate for “no less favorable” ties to other actors • “Exclusive” use vs. “exclusive on days when rendering services”
11. Photo/Likeness/ Biography Approvals	• Approval of publicity stills (at least 50% of stills alone and, if applicable, 75% of stills with others) • Usually one or two “passes” on non-photographic likenesses in publicity • Approval or consultation on biography in publicity	• Approval/consultation rights generally bind studio but not network (which controls most publicity)
12. Merchandising Rights	• Standard royalty for merchandise including the actor’s name or likeness • Usually 5% of net merchandising receipts if actor appears alone, reducible to 2.5% if actor appears with others	• Typically restrict use of name/likeness in sensitive merchandising categories (e.g., firearms, alcohol, hygiene, etc.) • In rare cases, may grant actor approval over other use of name/likeness in merchandising
13. Other Approvals/ Consultations	• Actors usually may consult on look and feel of hair, makeup, and wardrobe • High-level actors may consult on or approve hair/makeup/wardrobe personnel • Actors frequently may approve bloopers	• Approvals on non-blooper behind-the-scenes is less common • High-level actors attached at development stage may receive formal or informal approvals or consultations over pilot screenplay, pilot writer, pilot director, showrunner, and/or buyer network

(Continued)

TABLE 8.1 (Continued)

<i>Deal Term</i>	<i>Main Issues/Ranges</i>	<i>Other Issues</i>
14. Travel/ Relocation	• Usually business-class travel (with possible guest ticket(s) for each season) • SAG-AFTRA requires, for each season, relocation allowance of at least \$5K/month for up to 6 months • High-level actors may receive the right to opt out if show is to be produced outside of pre-approved locations	• At higher levels, actors may receive more tickets, higher relocation fees, etc. • Highest-level actors may seek first-class or private travel (SAG-AFTRA requires at least business-class in most instances)
15. Publicity/ Promotion	• Actor must render publicity services, subject to professional availability if outside production periods	• Major publicity events (e.g., Upfronts, TCAs) and release windows may be firmly required and not subject to availability • May require actor to promote via social media
16. Exclusivity	• Services are usually fully exclusive during production periods • By default, actor is exclusive in television for life of deal, subject to standard exceptions and specially negotiated carve-outs • Network generally has sponsor protection and right to approve new sponsorship or endorsement deals	• Exclusivity usually allows for non-recurring guest appearances • Permitted guest appearances may be subject to “premiere week” or “time period” protections • Exclusivity may also limit television producing, directing, etc.
17. Morals Clauses	• Covers non-criminal as well as criminal conduct • For crimes, usually limited to felonies or crimes of moral turpitude • Usually may be triggered based on allegations alone, without an investigation or other due process	• May require studio to exercise its discretion “reasonably” • May exclude preexisting (as of when the agreement is made) misconduct (or similar new conduct) • May exclude matters of religious, political, or philosophical conscience

B Guest Star Agreements

Unlike the other agreements discussed throughout this book (including series regular agreements), guest star agreements are typically negotiated not by business affairs executives, but by casting directors (or their associates), using forms and policies assigned by the studio for each production.⁷⁰ Casting professionals therefore do more than just creatively cast a series—they directly negotiate and document the agreements for the substantial majority of on-camera performers (with necessary support and approvals from studio business affairs, casting, and/or legal executives). For the most part, these deals are very simple, usually requiring the parties to settle only on episodes, dates, compensation, credit, trailer, and (if applicable) travel expenses.

On the whole, although “guest stars” are generally less prominent than series regulars over the course of a full season, it can be difficult to distinguish them from the series regulars while watching any given episode in isolation (and without credits): guest stars may appear on screen in a single scene or extensively throughout an episode; may be featured in a single episode, several, most, or all episodes of a season; and may appear sporadically or be woven into a major serialized arc. Instead, as explained in the preface of this chapter, what distinguishes guest stars from series regulars⁷¹ is less the creative content of their roles than the structure of their deals, particularly the extent to which they are obligated to keep themselves professionally available to perform for a series (or are otherwise limited in the outside employment they can accept).

Creators, producers, and executives usually identify roles as being “series regulars” or “guest stars” at the outset of casting according to the anticipated prominence of each character, but these initial determinations are subject to change until the role is cast—and sometimes even after that. Any given non-lead role may be “downgraded” from series regular or “upgraded” from guest star, depending on the creative team’s excitement and confidence about the available actor(s) in each role. A low-level series regular role might be reduced to a less-expensive guest star role to “make room” for unexpectedly large fees for a different series regular. A series regular might be “written down” to a guest role to accommodate a star actor’s limited professional availability, or a guest role might be “written up” to a series regular to secure the participation of a star who is creatively interested but requires a prominent role. A guest star or character who “pops” for the show’s creative team and/or especially connects with audiences might be written into additional episodes or even “upgraded” to a series regular in subsequent seasons.⁷²

70 The casting team also handles all necessary deals for “co-stars” in smaller roles, as well as for all background actors.

71 Other than the form of their screen credit, and even that is not always an unambiguous signal. See Section B.v.

72 A guest stars might even be “converted” to series regular during the production season (rather than in between seasons), if necessary to prevent the actor from accepting an outside job that could render them professionally unavailable when needed later during production.

i Fees and Breakage

Guest stars are usually engaged as “Major Role Performers” under Schedule C of the SAG-AFTRA Basic Agreement, which applies to performers whose compensation exceeds 100% of the daily minimum with a guarantee of eight days for a one-hour program or five days with a half-hour program—for the 2024–25 contract year, \$10,595 and \$6,622, respectively.⁷³ Work days may be scheduled anytime during such eight- or five-day period (as applicable), and additional work days are paid at the performer’s pro-rata daily rate. Major Role Performers are subject to less restrictive work rules than co-stars working under daily (Schedule A) or weekly (Schedule B) contracts (usually for applicable scale minimums).

Because many broadcast series had historically limited guest star fees to the Schedule C money break, it became commonly known as “top-of-show” (although even in such circumstances, long-time recurring guests in subsequent seasons could command “double top-of-show”). Policies on guest fees have tended to be more liberal in streaming, where stars and/or those in major recurring roles are often paid in the range of \$15,000–\$50,000 per episode.⁷⁴

When the opportunity arises to cast a prominent actor as a guest star but would require paying that actor more money than is provided for the role in the series budget, the creative team must seek approval from the studio. The studio may, in turn, condition that approval on the network agreeing to pay “breakage”—extra amounts paid by a network, beyond its initial negotiated license fee, to support proposed “creative enhancements” to a series that are not contemplated by the ingoing budget.⁷⁵ Such network breakage usually covers anywhere from half to all of the additional expense. Studios may agree to pay, as “approved overages,” additional fees not covered by network breakage, but this is more common in broadcast/deficit-based license deals (in which the studio may benefit directly from the creative enhancement when monetizing its reserved rights) than in streaming/cost-plus ones (in which the lack of reserved rights reduces the studio’s financial incentive to independently invest in the production).⁷⁶ If the studio/platform are creatively interested but unwilling to incur additional out-of-pocket expense for the enhanced casting, the casting

73 The SAG-AFTRA Basic Agreement’s provisions and minimums for “Major Role Performers” were not technically applicable to series in streaming or pay TV until the 2023 MBA.

74 In the most extreme cases, studios aggressively courting reticent actors may even offer guest fees equal to what the actor might have commanded as a series regular (but without the more extensive exclusivity and/or options for subsequent seasons that are typical for series regular deals). That said, even in streaming, many shows have managed their guest stars budgets—which studios sometimes reduce to help absorb ballooning fees for lead actors—by adopting their own “top-of-show” rates (which may be higher than the SAG-AFTRA minimum for “Major Role Performers”).

75 In the weekly releasing cadence of broadcast television, a major guest star can be an especially powerful marketing tool to drive viewership of a particular episode. The casting of an especially significant star in a relatively minor supporting role is sometimes called “stunt casting.”

76 See Chapter 3, Section C.ii (pg. 139).

directors and producers may be asked to “find it in the budget” (i.e., make offsetting reductions elsewhere in the budget—either within the cast accounts or beyond—to cover the difference in cost).

ii Guarantees and Schedule

Guest stars who are intended to recur over multiple episodes of a season are often guaranteed (on a pay-or-play basis) multiple episodes in their deals. Unlike series regulars, however, guest stars are not generally required by the studio to keep themselves available to render services whenever called upon during the production season. Rather, the SAG-AFTRA Basic Agreement has historically required that a studio designate specific work dates and guarantee the associated compensation (subject to any notice requirements and/or “on-or-about” allowances under the applicable MBA schedule)⁷⁷ before a non-series regular can be considered contractually “held” for those dates. Consequently, a significant amount of the work in recurring guest deals often goes to setting expectations and building a process for the scheduling of the guest star’s services, and studios have developed several contractual mechanisms to help them manage this challenge. Whatever contractual terms are involved, though, effective casting and scheduling of guest stars relies heavily on robust, good-faith communication between casting/production personnel and talent representatives throughout the course of production.

For lower-paid and/or less essential guest stars, the studio may agree that future services are simply subject to the actor’s then-prior professional availability, thereby taking the risk that the actor takes another job that renders them partially or wholly unavailable for future services (and that the show will either have to recast the actor or rewrite the role to adjust). Typically, a guest actor’s guarantee is automatically reducible for any episodes for which the actor is unavailable to perform when required by the studio.

Studios who need more protection (and are willing to pay for it) may negotiate for “preemption rights” during some or all of the series production period. During this preemption window, the guest star must notify the studio of any proposed outside engagement, with specific dates, prior to accepting work that would render them unavailable for any portion of the negotiated period. The studio may preempt the outside job (usually within three to five business days from the actors’ notice) by designating specific work dates that would conflict with that proposed engagement (and making the actor’s compensation “pay-or-play” for that episode); if the studio declines to do so, then it falls into “second position” behind the outside project for the specific dates that had been

77 As applied to work dates, the phrase “on-or-about” indicates the studio’s right to move an actor’s start date within a specified period (e.g., up to two weeks on either side of a tentatively provided date), to the extent permitted under the applicable schedule of the SAG-AFTRA Basic Agreement.

presented (and again, the actor's "guarantee" is reduced for any episodes for which they are unavailable when required).

For creatively essential guest stars with significant guaranteed compensation (in the form of high episodic fees, many guaranteed episodes, or both), the studio may negotiate for "first position" scheduling rights—equivalent to what they enjoy for series regulars—until the actor has completed their services, or for a specified calendar window. During that designated period, the actor may only accept new outside work if the studio agrees to release them for the applicable dates (although windows may be carved out in advance for previously accepted work). Unlike with a preemption window, however, the studio need not schedule the actor for conflicting work dates to prevent them from accepting the outside engagement, thus affording the studio greater flexibility in both initially crafting and later adjusting its production schedule.⁷⁸

The 2023 SAG-AFTRA Basic Agreement included several new provisions for Schedule C actors based on these dealmaking norms, which are intended to regularize these discussions and better accommodate the complexities of scheduling for the longer and/or cross-boarded productions that are prevalent in streaming.⁷⁹ A studio that is unable to provide a newly-hired recurring guest star with a firm start date must now instead provide them with a "soft work window," during which the studio enjoys limited preemption rights with respect to the actor's schedule.⁸⁰ In addition, the new MBA added two additional "money breaks" for new classes of higher-paid performers—"Modified Guest Performers" (for the 2024–25 contract year, those earning at least \$14,560 per episode) and "Modified Deal Performers" (for the 2024–25 contract year, those earning at least \$22,400 per episode)—who may be subject to more studio-friendly limited "first-position" scheduling requirements.⁸¹

78 If an actor is under an existing contractual commitment at the time they make a new guest star deal, line producers and other personnel from both productions will usually collaborate directly with one another to craft schedules that allow the actor to perform on both projects, with adequate time built in for travel days and (usually) some schedule overages. The studios involved often enter into formal agreements with one another to acknowledge their respective windows for "first position" scheduling rights and to allocate financial responsibility for travel expenses and/or costs resulting from delays.

79 As of this writing, it is too early to evaluate how these new rules have been integrated and implemented in the marketplace, but they appear poised to become the new generally applicable standards for guest deals, based on the level of compensation provided for each performer.

80 The "soft work window" is equal to the guaranteed period of employment in the performer's contract (based on business days), plus five business days before and after the guaranteed period of employment. If a contracted performer without firm work dates wishes to accept an outside engagement during the soft work window, they must notify the studio, which can preempt the outside job by setting a conflicting start date; modify the soft work window (without further compensation) so as not to interfere with the performer's outside opportunity; or allow the performer to take the job (in first position for the specified dates) and reduce the actor's "guarantee" for any episodic engagements that go unfulfilled as a result.

81 The work time for Modified Guest Performers may not exceed eight (8) days times the number of episodes or parts guaranteed within an overall production period, which may not exceed

iii Exclusivity

Guest stars generally render services on an exclusive basis during their active work periods (subject to specifically negotiated carveouts, typically for pre-existing commitments), and the scheduling of their services may be subject to limited studio preemption or “first position” scheduling rights (as described in the preceding section). Outside of active production periods, however, guest stars are not subject to any further exclusivity requirements or other restrictions on their right to accept third-party engagements.

iv Options

Guest deals are generally structured and negotiated somewhat narrowly to account for immediately known or anticipated creative plans for the active production season. In some cases, however, they may include options that allow the studio to later expand the performer’s engagement as those plans develop or change (without the need for a further negotiation at the time).

Most often, such options remain limited to the then-current production season, allowing the studio to engage the performer for additional episodes (as needed) beyond their initial guarantee. Scheduling and professional availability for such additional optional episodes are managed using the same types of mechanisms described earlier.

In some cases, however, options may extend across seasons, giving the studio the right to continue to engage the actor as a recurring guest star in one or more subsequent seasons on pre-negotiated terms (often with built-in increases to compensation and/or episodic guarantees), and/or to engage the performer as a series regular for the next season (which usually entails pre-negotiating a full series regular performer agreement in full, which becomes effective upon the studio’s exercise of its option).⁸² Initially, the studio’s options for services in future seasons are generally subject to the performer’s professional availability.

twenty-three (23) days times the number of episodes or parts guaranteed. The work time for Modified Deal Performers may not exceed ten (10) days times the number of episodes or parts guaranteed within an overall production period, which may not exceed thirty (30) days times the number of episodes or parts guaranteed. In both cases, additional work days are paid at the performer’s pro-rata daily rate; the studio need not pay for unworked days during the overall production period; the performer is free to accept outside employment for such unworked days on a second position basis; and the provisions of Schedule C otherwise apply to the actor’s engagement. Work days during the first thirty (30) days following engagement for a Modified Deal Performer or the first twenty-three (23) days for a Modified Guest Performer must be scheduled and communicated to the performer at the time of engagement; all other work days are subject to the performer’s professional availability unless communicated with at least fourteen days’ prior notice.

⁸² The promise of such a potential future upgrade to series regular status can be a major factor influencing a performer’s willingness to accept a guest role, especially one that would take them off the market for other, potentially more lucrative series regular or feature film acting opportunities.

Once that option is exercised, matters of scheduling, priority/position, and exclusivity for the new season are subject to the generally prevailing rules for guest stars or series regulars (as applicable for the new engagement).⁸³

v Credit

Unlike series regulars (whose credits generally appear in every episode of each season for which they are engaged, whether or not the actor personally appears in that episode), guest stars are generally credited only in episodes in which they actually appear. The standard form of credit is “Guest Star” or “Guest Starring,” and all such credits appear in a grouping of cards together, usually in the end titles of each episode.⁸⁴

Like series regulars, guest stars may negotiate for their credit to appear in a specified position among guest stars on that episode (e.g., “no less than ___ position”), or, if the most favorable positions are already committed to existing performers, in last/“and” or penultimate/“with” position among guest stars.⁸⁵ Performers also typically seek to negotiate for their “guest star” cards to appear on a separate card; this is common, although some shows adopt and enforce policies requiring that all guest star credits appear as a group on a single card (or on as few separate cards as possible, with no individual performer receiving a separate card).⁸⁶

Particularly high-level stars may seek to be credited as “Special Guest Stars” instead—essentially a way for a show to communicate the message that casting this performer in this role was something of a coup. Platforms, networks, and producers vary widely in their attitudes toward such credits.

Finally, a recurring guest star who appears in most of the episodes for a given season, and whose role is of comparable or greater prominence to those of formal series regulars, may occasionally negotiate to be credited among series regulars, usually on every episode of the season (whether the actor appears or not). Such credit effectively eliminates from public view any indication that the guest was engaged on terms any different from those applicable to the performers in any other major role. Crediting a guest star as a series regular is highly unusual, a product of extremely specific circumstances, and on the table only when viewed as mutually beneficial to the show and the performer.

83 See Sections B.ii and A.v, respectively.

84 Broadcast shows that use “opening titles” (credits that appear superimposed over the action in an episode’s first scenes, often appearing after and separate from a dedicated main title sequence) sometimes agree to credit guest stars in the opening titles (while series regulars are credited in the main titles).

85 Thus, it is possible that one actor receives last/“and” credit among series regulars, while a different actor receives last/“and” credit among guest stars. See Section A.ix.

86 On the other hand, “Co-Star” or “Co-Starring” credit for performers in smaller roles seldom appear on separate cards.

vi Perks, Travel, and Approvals

Guest stars must also negotiate many of the same practical elements as series regulars, including the performer's entitlements for trailers/dressing rooms and travel/expenses. In addition, high-level guests seek many of the same basic approvals and consultations as are common for series regulars (and for major stars even in smaller roles in feature films).

For trailers, many productions limit guest stars to no better than a compartment in a triple banger, although some shows maintain additional space(s) in double bangers to accommodate the highest-level guest stars. In addition, studios are more likely with guest stars than with series regulars to reserve the right to re-assign the performer's dressing room to other actors on days when the performer is not working, rather than holding it exclusively for the individual actor throughout the span of their services. Guest stars may also negotiate for guarantees that their dressing facilities will be no less favorable than those accorded to any other actor on the episode (but usually excluding series regulars).

Guest stars generally travel only for relatively short periods of services and are more likely to fly to and from set multiple times than they are to stay on location for extended periods between work days. Therefore, travel and expense provisions for guest stars are usually comparable to those for limited distant location services in pilot and series regular deals: business-class transportation, first-class hotel accommodations, ground transportation (or potentially a rental car, where appropriate), and a per diem. Higher-level actors spending longer stretches of time on location may also negotiate for flat monthly expense allowances like those of series regulars, and/or additional tickets that the performer can use to visit family (or bring family to set) during down-times in their services throughout production.

Finally, high-level guest stars may be particularly insistent on certain approvals and consultations that are relatively common in series regular agreements (but usually somewhat more disfavored in guest star agreements). These include photo, likeness, and biography approvals; blooper approvals; personnel designation rights or approvals/consultations for hair, makeup, and wardrobe; and special requirements on personal grooming or appearance.

In addition, especially high-level guest stars may insist on further restrictions designed to prevent a studio or platform from appropriating too much value from the performer's celebrity given the level of compensation and services involved. These include approvals on the use of the star's name/likeness in merchandising or commercial tie-ins, as well as limitations on the use of the guest star in publicity intended to avoid misleading the public as to the size of the guest's role.

vii Quick Reference Guide**TABLE 8.2** Guest Star Agreements

<i>Deal Term</i>	<i>Main Issues/Ranges</i>	<i>Other Issues</i>
1. Fees and Breakage	• Usually paid at least Schedule C money break for “Major Role Performers” (“top-of-show”) • Generally \$15K–\$50K for more established actors and/or major recurring roles	• May be limited by policy to “top-of-show” (which may be set for higher than Schedule C money break) • May obtain breakage from network for enhanced fees • See “Streamlined Schedule of SAG-AFTRA Minimums and Money Breaks” (Section D)
2. Guarantees and Schedule	• May guarantee multiple episodes • Must provide specific start and work dates, or “soft work window” (with limited studio preemption rights) for recurring guests • May obtain limited “first position” scheduling rights for guests with fees over the money breaks for “Modified Deal Performers” or “Modified Guest Performers”	• Scheduling subject to SAG-AFTRA requirements for notice and “on-or-about” flexibility • See “Streamlined Schedule of SAG-AFTRA Minimums and Money Breaks” (Section D)
3. Exclusivity	• Services usually exclusive during active services (with carveouts for preexisting obligations) • No exclusivity outside of production periods	• Scheduling for recurring guests may be subject to limited studio preemption or first position scheduling rights
4. Options	• May obtain options for additional episodes in the same season, or to engage performer as a guest or series regular for subsequent season(s)	• Initial option exercise subject to performer’s professional availability • Thereafter, scheduling, priority/position, and exclusivity per applicable standards for guest/SR
5. Credit	• Guest Star credit, end titles (grouped together) • May negotiate position and/or separate card	• Occasionally Special Guest Star credit • Very rarely, may credit as though a series regular

(Continued)

TABLE 8.2 (Continued)

<i>Deal Term</i>	<i>Main Issues/Ranges</i>	<i>Other Issues</i>
6. Perks, Travel, and Approvals	• Trailers usually triple bangers (but can sometimes be double, or get MFNs) • Standard travel/expenses for short stays on location • More tickets and/or flat allowances for long stays	• Photo/likeness/bio, hair/makeup/wardrobe, and similar consultations and approvals comparable to SRs (but more disfavored) • Major stars may limit or seek approval on merch/tie-in and/or publicity rights

C Casting Director Agreements

As streaming has pushed television toward being a more star-driven medium, casting directors have become especially highly valued as an essential part of the creative team. Along with line producers, they are usually among the first creative contributors to be engaged on a project (after the show’s creator, producers, and director), and their work can be critical to securing (or clearing the “cast contingency” from) a series order.

i Fees and Services

A traditional “full” initial engagement for a casting director⁸⁷ for a pilot or first episode covers ten weeks of services, at a fee generally between \$45,000 and \$80,000, with additional weeks paid at a pro rata weekly rate. This basic model continues to dominate in the routinized pilot system of broadcast television, and it is still the foundation from which casting deals in streaming and pay TV are derived. However, in a market dominated by script-to-series (and straight-to-series) ordering and protracted pre-greenlight writing and non-writing development, this simple ten-week structure must usually be adapted to meet each production’s needs.

Many casting directors are engaged on “step deals,” guaranteeing them a smaller number of weeks (most often four) to undertake a limited search for

87 Casting directors frequently work as teams, a partnership that can be limited to their overall businesses (while they each manage products individually) or extended to particular projects. They often (but do not always) share screen credit with their partners on all their projects, whether or not they individually rendered significant services. Deals and contracts are usually silent as to whether either or both partners will render active services, but there is always a clear understanding among the casting directors, producers, and executives. In rare cases, casting directors may even accept reduced fees on the understanding that a casting associate will be handling most of the day-to-day work (with the senior casting director supervising and supporting as needed). In any event, this text generally refers singularly to “the casting director.”

one or more specified roles, with the studio having the option to engage the casting director⁸⁸ for the remainder of the “full” initial pilot/first episode term (typically an additional six weeks).⁸⁹ Such step deals are often used when the studio is awaiting a firm series order (or waiver of contingencies) from the network—or is even relying on the casting director to cast a lead role with an actor that will satisfy the network’s casting contingency for an order—and can only secure limited approval for pre-greenlight casting expenses. In such cases, the casting director usually must be engaged for the remaining initial term consecutively to their initial work period (although studios sometimes negotiate for the right to an unpaid hiatus or somewhat extended option period, with such delayed engagements potentially being subject to the casting director’s professional availability). In addition, especially when the casting director’s own work is critical to clearing a network contingency, studios often negotiate for the right to extend the initial step period week-to-week as needed to achieve that goal.

Following the pilot/first episode engagement (as it may be extended), the studio holds an option to engage the casting director to render casting services on the balance of the first season (usually without any further searches for series regular required), at an episodic fee that is typically equal to the casting director’s established weekly rate, on a pay-or-play basis for all episodes produced. This custom was developed in broadcast television, in which a break (of several weeks to several months) between pilot and series was customary, and series episodes were (until quite recently) routinely shot in seven days or less.⁹⁰ In streaming and pay TV, series services are often consecutive (or nearly consecutive) to pilot/first episode services, and series options are usually exercisable at any time prior to the commencement of casting services on the second episode. Nevertheless, such options remain common to allow producers and executives an opportunity to evaluate their working and creative fit with a casting director prior to committing to them for the full season. As for the rule of thumb on compensation, with the longer production periods common in streaming and pay TV, some casting directors attempt to negotiate for span limits or overage compensation for series services, although studios largely resist such requests in dealmaking.⁹¹

88 Occasionally, this may be negotiated as a lock for the casting director.

89 See Chapter 7, Section D.ii (pg. 288).

90 Like many other options in television services deals, these are usually exercisable by June 30 annually in streaming, and are variable in streaming and pay TV (but likely consistent with the option periods used for others rendering services on the same show).

91 Instead, casting directors often reach informal understandings with producers and executives that, on especially long productions, casting associates and/or assistants will handle a larger scope of work (and be paid weekly for the full duration of their services), to make up for the casting director’s episodic fees being spread out over a much longer period of time than traditionally intended.

ii Bonuses

Most casting director deals that involve distinct pilot steps provide for modest “series sale bonuses” if the pilot is picked up to series (presumably based at least in part on the casting director’s excellent work)—generally between \$2,500 and \$10,000, with \$5,000 being common. Such bonuses may or may not be incorporated (as “pickup bonuses”) into deals for straight-to-series productions.⁹²

Because series regular roles are higher-stakes and more intensive to cast, casting director agreements also frequently provide bonuses for successfully casting additional (or replacement) series regulars after the pilot/first episode phase—again, generally between \$2,500 and \$10,000, with \$5,000 being common.

iii Series Options

Like line producers, studios generally obtain successive, dependent options to engage their casting directors for up to two additional series seasons, with (usually) 5% cumulative annual increases to their fees. That said, some studios and platforms are not necessarily strict about requiring options on casting directors, and sought-after feature casting directors working on premium limited series may make one-year deals.

iv Casting Associate/Assistant

Casting directors routinely handle several productions simultaneously. To make this possible, they are virtually always supported by one or more junior casting associates or casting assistants who are engaged by the studio or at its expense. On lower-budget pilots and series, or during pre-greenlight step periods, studios may engage (or reimburse) only an associate *or* an assistant, not both. More often, however, both are engaged for as long as casting and associated dealmaking is ongoing.

Like casting directors, casting associates⁹³ are members of Teamsters Local 399, and are therefore entitled to union minimum compensation⁹⁴—as of this writing and through September 30, 2024, \$26.00/hour, with sixth days at 1.5x and seventh days at 2x the regular basic hourly rate (and twenty hours per week of overtime compensation usually assumed). Because of their union status, casting associates are customarily engaged by the studio or its production

92 When they are, it is often as a tool by which business affairs executives can increase the casting director’s total compensation without breaking studio precedents on casting fees.

93 Sometimes called “associate casting directors,” including by their union.

94 And never more than that union minimum rate, although some casting directors direct the studio to divert a portion of their own compensation to their associates.

entity (which also pays applicable fringes on their compensation directly to the union).

Casting assistants are the most junior employees in casting, with primarily administrative jobs that also give them an opportunity to learn the casting business, develop their skills, and hopefully eventually graduate to casting associate. Major studios typically have a set policy for the hourly rate payable to casting assistants, often at or near minimum wage (again, with assumed weekly overtime). Because many casting assistants (who are not members of the union) are on the full-time payrolls of their casting director bosses, studios frequently reimburse the casting directors for their assistants' wages (including payroll expenses) in lieu of engaging the assistants directly.

v Credit

Casting directors receive screen credit as "Casting Directors" or in the form "Casting by" on every series episode. Traditionally, these credits have appeared in the end titles, but with the greater stature casting directors have achieved over the "peak TV" era, they have more often been able to negotiate for their credits to appear in their projects' main or opening titles.

Casting directors usually request that studios include their casting associates in accorded screen credits. When a casting director is credited in the end titles, their associate is frequently credited on the same card (in 50%–75% of the size of casting director's own credit). When the principal casting director's credit appears in the main or opening titles, the associate's credit nevertheless continues to appear in the end titles.

If a show's original casting director is eventually replaced, the episodic "Casting Director" (or "Casting by") credit goes to the new casting director(s) actually working on those episodes. In these circumstances, the original casting director usually continues to receive "Original Casting by" credit in the end titles of every episode.

vi Office and Expenses

Casting directors are entitled to reimbursement for reasonable out-of-pocket expenses incurred in the course of their work, including long-distance phone calls, messengers, photocopying, and postage. In addition, it was once common for studios to (and some major studios do still) provide casting directors with dedicated office space on their studio lots, in their production offices, or in the studios' own offices. More often, studios now reimburse casting directors for a portion of their existing office lease costs (which are shared pro rata among all of the casting director's concurrent clients who share the same space). Such reimbursements for day-to-day business or office expenses may be subject to weekly, monthly, or aggregate caps.

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TABLE 8.3 Casting Director Agreements

<i>Deal Term</i>	<i>Main Issues/Ranges</i>	<i>Other Issues</i>
1. Fees and Services	• Pilot/first episode deal is \$45K–\$80K for 10 weeks, extendable pro rata week-to-week • Step deals with shorter initial guarantees (e.g., 4 weeks), often to clear network contingencies • Option for series services for episodic fees equal to weekly rate	• Initial term of step deal may be extendable week-to-week • Option vs. lock for post-pilot/first-episode first season services negotiable
2. Bonuses	• Series sales bonuses (\$2.5K–\$10K, often \$5K) • Bonus for additional or replacement series regulars after pilot/first episode (\$2.5K–\$10K, often \$5K)	• May or may not include pickup bonus in straight-to-series deals
3. Series Options	• Usually 2 options for additional seasons (through series Y3)	• May do 1-year deal for major feature CDs on limited series
4. Casting Associate/Assistant	• Casting associates engaged by studio at union scale (including overtime) • Casting assistants reimbursed at minimum wage (including overtime and payroll costs)	• Studio usually engages or reimburses 1 of each (but support staff may be limited in low-budget or pre-greenlight deals)
5. Credit	• “Casting Director” or “Casting by” credit • May be in main/opening titles at high levels • Casting associate credit in end titles	• If replaced, original casting director continues to receive “Original Casting by” credit on every episode • Associate credit in 50%–75% size if on same card as principal CD in end titles
6. Office and Expenses	• Reimburse reasonable out-of-pocket business expenses • Provide office space or reimburse (pro rata) for existing office lease	• Reimbursements may be subject to weekly, monthly, or aggregate caps

D Streamlined Schedule of SAG-AFTRA Minimums and Money Breaks

The following is a heavily edited and streamlined schedule of SAG-AFTRA minimums and money breaks for the period from July 1, 2024 to June 30, 2026. Business affairs executives generally rely on SAG-AFTRA minimums in their day-to-day work much less than WGA and DGA minimums. This reflects the reality that, other than series regular deals (for which fees significantly exceed scale minimums), acting deals are generally handled by casting directors and their staffs rather than by business affairs executives. For that reason, as well as the greater overall simplicity (compared to the other unions) of SAG-AFTRA minimums requirements, this schedule is considerably shorter than those provided for WGA and DGA minimums in Chapters 6 and 7, respectively. In addition to minimums, it also lists the key “money break” amounts over which the applicable SAG-AFTRA Basic Agreement minimum requirements for a performer shift toward studio-friendlier terms. The minimums and thresholds reflected here relate solely to the SAG-AFTRA TV/Theatrical Contract (which was the subject of the negotiations and strike in 2023). News shows, talk shows, soap operas, variety, reality, game shows, and sports programming are governed by the SAG-AFTRA National Code of Fair Practice for Network Television Broadcasting (or “Network Code”); because this book specifically focuses on scripted television, none of the applicable minimums under the Network Code appear here.⁹⁵ Once again, any reader who is relying on these numbers in a real-world context that demands precision is urged to consult and cross-reference the most recently published official SAG-AFTRA Wage Tables.⁹⁶

⁹⁵ As of this writing, the Network Code was last negotiated in 2022, and will next expire/be renegotiated in July 2024 (shortly before the anticipated release of this second edition).

⁹⁶ Which have historically been available online at <https://www.sagaftra.org/production-center/contract/810/rate-sheet/document>. As of this writing, SAG-AFTRA has published its 2023–24 Wage Tables, reflecting the 7% increases in its new deal. As with the new WGA and DGA deals, the second and third contract years provide for 4% and 3.5% increases, respectively. It is possible that the schedule published here gets the last digit of a number wrong due to SAG-AFTRA and the AMPTP using a different methodology for fractional dollar amounts when compounding annual increases. Like the WGA and DGA, SAG-AFTRA has the right to divert 0.5% from its annual increases for the second and/or third contract years to instead be applied against studio contributions to SAG-AFTRA’s Pension or Health Fund. The figures published here assume no 0.5% diversions in either contract year, because no such diversions have been announced in time to be reflected here. (For the same reason, readers who download the SAG-AFTRA Wage Tables are advised to check the SAG-AFTRA website at least once per contract year to see if they have been republished to account for a 0.5% diversion.) To save ink and paper, this text will not provide the minimums for the 2023–24 contract year (which will have passed by the time it is published), nor speculate about the increases for the 2026–27 contract year or beyond (as the negotiated increases for the 2023 SAG-AFTRA Basic Agreement reflect the specific inflationary context and related concessions around the deal).

TABLE 8.4 SAG-AFTRA Minimums and Money Breaks (7/1/24–6/30/26)

<i>Performer Category/ Schedule Money Break</i>	<i>7/1/24–6/30/25</i>	<i>7/1/25–6/30/26</i>
Day Performer ⁹⁷	\$1,204	\$1,246
3-Day Performer	\$3,050	\$3,157
Weekly Performer ⁹⁸	\$4,180	\$4,326
Major Role Performer ⁹⁹ (1-Hour, 8 Days)	\$10,595	\$10,965
Major Role Performer (½-Hour, 5 Days)	\$6,622	\$6,853
Modified Deal Performer	\$22,400/ep	\$23,189/ep
Modified Guest Performer	\$14,560/ep	\$15,070/ep
Schedule F Money Break ¹⁰⁰ (1-Hour)	\$45,000 per episode	
Schedule F Money Break (½-Hour)	\$37,500 per episode	
Schedule F Money Break (Closed- Ended Limited Series)	\$47,500 per episode ¹⁰¹	
Freely Negotiable Span Money Break (<13-ep Guarantee)	\$25,000 per episode	
Freely Negotiable Span Money Break (13-ep Guarantee)	\$190,000	
Freely Negotiable Exclusivity Money Break (1-Hour)	\$70,000 per episode	
Freely Negotiable Exclusivity Money Break (½-Hour)	\$65,000 per episode	
Freely Negotiable Options Money Break (1-Hour)	\$70,000 per episode	
Freely Negotiable Options Money Break (½-Hour)	\$65,000 per episode	
Freely Negotiable Options Money Break (Minors)	\$32,000 per episode	

97 Schedule A.

98 Schedule B.

99 Schedule C. In guest star agreements, the threshold amount is sometimes referred to as “top-of-show,” because some broadcast series traditionally had policies against ever paying guest stars more than that amount.

100 All new “money breaks” under the 2023 SAG-AFTRA Basic Agreement are effective as of December 8, 2024, i.e., the first Sunday that is one year after the AMPTP received notice of SAG-AFTRA’s ratification of the 2023 Basic Agreement (which was December 5, 2023).

101 Or over \$5,150 per week.

9

BACKEND

As discussed throughout the last several chapters, contingent compensation (or “profit participation,” or “backend”) is an essential component of numerous agreements with the key creative talent and underlying rightsholders behind a television series.

Most studios look to control their participations costs by employing a rigid and non-negotiable policy of limiting the contingent compensation granted on any given series to no more than 35% of MAGR.¹ Although differences in backend definitions can make one participant’s 1% of MAGR worth substantially more or less than another’s, for ease of administration, this 35% cap is generally applied in dealmaking without regard to differences in definition. The rigidity of this policy has proven especially important in the modern era of television development, which emphasizes the packaging of numerous high-level elements (i.e., prominent writers, actors, directors, producers, and/or underlying intellectual property) to help projects break through the noise of a crowded marketplace. On a series with many profit participants, the hard 35% cap frequently requires many or all those participants to accept lower backend floors than they may otherwise be inclined to accept, or to renegotiate their existing entitlements to make points available for the studio to allocate to a newly added

¹ Historically, some very conservative studios sought to employ caps as low as 30% of MAGR, but this has grown increasingly rare over the last several years, to the point that, as of this writing, the author is not personally aware of any studios that retain this policy. On the other hand, smaller and mid-sized true independents that rely exclusively (or nearly so) on the cost-plus streaming model—such as MRC, Skydance, Fifth Season, and wiip—have shown a willingness to expand the backend pots on their shows to 40%, 45%, or even 50% of MAGR to win talent over from working directly with streamers (or their larger affiliated studios) by offering more favorable terms.

element on the series (such as a later-attached actor or showrunner). A typical 35% aggregate backend pool may be allocated as follows: 2.5% to underlying intellectual property; 2.5% to the pilot director; 15% to the writer(s)/creator(s), and 15% to non-writing producers. If an actor requires one or more backend points as a condition of joining a project, these points will typically be borne by reductions from the writing and/or non-writing producers.

Profit participants receive regular statements (typically quarterly or semi-annually) and enjoy audit rights, which allow them to review the studio's records of revenues and expenses to scrutinize the studio's calculations and accountings to the participant. Such audit rights are subject to incontestability provisions, which require that a participant commence an audit (or a lawsuit based upon an audit) within a specified period following their receipt of accounting statements (usually two to three years). If they fail to do so, those accounting statements are deemed final and binding upon the participant. However, most studios freely agree to toll such deadlines at the participant's request, which allows a participant's audit to cover more accounting periods at once (making the audit process more efficient for studio and participant alike). In addition, some studios require that any disputes arising out of an audit or accounting issue be submitted to binding arbitration, rather than being litigated in open court. This helps the studio avoid unfavorable publicity arising out of an audit dispute with a profit participant, while also minimizing the risk that an adverse judgment opens the floodgates for other claims.² For studios that prefer arbitration to litigation, such arbitration clauses are usually non-negotiable in concept and scarcely negotiable in detail.

A An Incomplete Recent History of Television Backend (1990–2024)

Backend has always represented the talent's opportunity to share in the upside of a truly successful television series. With a big hit, the value of even a modest share of backend could easily prove far more valuable to the profit participant than whatever upfront fees they received from the budget of the series over the course of its run. The logical foundation of backend has always been one essential assumption: that the interests of the studio and the talent are fundamentally aligned, in that the studio's core mission is to aggressively distribute and monetize every series to squeeze from it as much revenue as possible, and the talent participant is a direct beneficiary of the studio's success in those efforts.

This first cracks in this foundation began to appear in the early 1990s, after the dismantling of the FCC's fin-syn laws³ opened the door for all four major

² Such studios may also require that non-accounting disputes arising out of their agreements with talent be submitted to arbitration, though even studios that do not require arbitration of non-accounting disputes may demand it specifically for accounting disputes.

³ See Chapter 1, Section B.iii.a (pg. 28).

broadcast networks to launch affiliated studios. This was perhaps the starting gun for the intense vertical integration of the industry in the years that followed.⁴ The corporate mandates of these new major studios (which quickly came to dominate the TV buying market) generally required that they give their sister networks the first opportunity to license and exhibit their shows, without “testing the market” to see if an unaffiliated network might offer a better deal. This led to the development of “imputed license fees” (or “ILFs”),⁵ along with

4 “Vertical integration” refers to a combination of two companies, by acquisition or merger, into a single conglomerate that owns/controls multiple entities in the distribution/supply chain that brings a product from creation to consumer. Vertical integration is distinct from “horizontal integration,” which refers to an acquisition or merger of companies that produce the same (or closely related) products, creating a larger-scale business that can operate more “efficiently” (i.e., lay off now-redundant employees) and has greater market power and leverage (due to no longer having to compete with one another). The acquisition of Warner Bros. by AT&T was a vertical combination, while the subsequent spin-off and merger of Warner Bros. with Discovery was a horizontal combination.

Such vertical integration in entertainment was functionally illegalized in 1948 by the so-called “Paramount Decree.” The result of ten years of antitrust litigation between the Department of Justice (“DOJ”) and the then-“Big Five” of the industry (Paramount, MGM, Warner Bros., 20th Century Fox, and RKO Pictures), the Paramount Decree settled the DOJ’s lawsuit following a ruling against the studios by the U.S. Supreme Court. The Paramount Decree functionally prohibited the major studios from owning their own theaters and ended several previously common monopolistic business practices, including “block booking” (forcing independent theaters to accept undesirable films and shorts as a condition of getting the desirable ones) and “blind bidding” (forcing independent theaters to buy the studios’ films without an opportunity to view them first). The Paramount Decree is credited for bringing about the end of the “Studio System” of the 1910s–40s and the rise of foreign and independent films in the 1960s–70s.

Over the decades that followed, however, antitrust law in the United States was largely reinterpreted to focus on “harm to the consumer” from monopolistic practices—basically, high prices or bad quality—rather than harm to competitors or business partners. Over that same period, the studios themselves had grown increasingly weak, frequently bought and sold as playthings by bigger conglomerates like General Electric and Gulf + Western. Because the Paramount Decree was essentially a settlement agreement for the DOJ’s antitrust suit, it technically only bound the original studio defendants who had signed it, and only applied to the specific practices described therein. By the time the conglomerates shifted their focus to television and began vertically re-integrating in that space in the 1990s and 2000s, the Paramount Decree had already effectively lost most of its force. In 2020, over the objections of independent theater owners, the Paramount Decree was formally terminated, and most antitrust scholars believe that, if presented with the same facts, the U.S. Supreme Court would not decide the case against the studios today as it had in 1948.

That said, decades of virtually unchecked consolidation have led to renewed interest from judges and regulators in a more expansive approach to antitrust law, and under the Biden administration, the DOJ and Federal Trade Commission (“FTC”)—the two federal agencies responsible for reviewing proposed combinations—have cast a more skeptical eye on further consolidation in many major industries, including media and entertainment. A federal judge’s 2022 order blocking the proposed acquisition of Simon & Schuster by Penguin Random House (a combination of the once-independent Penguin and Random House publishing houses that was already the biggest book publisher in the United States) was notable for citing potential harm from the combination not to the buyers of the publishers’ books, but to the authors who relied on the publishers to license and distribute their works.

5 Contractually pre-determined license fees, explicitly agreed to by participants in their contracts, imputed by the studio (i.e., credited as receipts, because those fees are never actually negotiated with or paid by the affiliated licensee) to represent its gross revenue from the “initial network license” of the series to its sister network. See Section B.i.

explicit waivers by participants of any claims that the studio should have sought a better deal from other networks. And—at least in these early post-fin/syn years—the studio was thereafter largely free to monetize its shows as it saw fit, restoring the unity of interest between studio and participant.

The interests of studios and participants began to drift somewhat further apart through the 1990s and 2000s, as the major entertainment conglomerates that owned these broadcast networks and studios began expanding their businesses into cable television, international television, and eventually, the industry's first experiments with streaming.⁶ At the same time, the networks also expanded their portfolios of O&O broadcast stations, whose licensing of successful series in syndication had long represented the true “pot of gold” at the end of a show's rainbow. These newly expanded and integrated conglomerates looked to other parts of their own companies for the content to power their various platforms, which meant the major television studios now frequently licensed shows to their affiliates in all kinds of windows and media, not just the initial network run.

To limit their potential liability from these expanded affiliate transactions, studios modified their backend definitions to disclaim any obligation to solicit unaffiliated buyers for licenses of any kind, so long as the studio received from its affiliates an “arms-length, fair-market fee” for the licensed rights in each such affiliate deal.⁷ Affiliate transactions soon became the most common battleground between studios and backend participants in audit disputes, of which two milestone examples stand out in recent industry history.

The first, in 2010, was a \$319 million judgment (following a jury trial) against ABC and the Walt Disney Co. for Celador International, the British company that licensed the rights to the UK-created *Who Wants to Be a Millionaire?* game show format, for profits from the historically successful game show.⁸ One of the critical issues on which the case turned was whether, in calculating Celador's backend interest, Disney/ABC's revenues and profits should be measured at the level of the Disney-owned production entities (Buena Vista Television and Val-leycrest Productions) or the Disney-owned broadcast network (ABC). At trial, Disney presented significant evidence about industry custom and practice, arguing—truthfully!—that profit participants essentially *never* share in profits at the network level, only at the studio/producer level. However, deal correspondence between Celador's agents and Disney/ABC executives, revealed at trial,

6 Initially mostly on the broadcast networks' own websites, then mostly on the network-owned Hulu service, and after that also via applications on smart TVs and set-top boxes associated with each of those.

7 Or, as actual money frequently never changed hands between affiliated buyers and sellers, they further imputed such “arms-length, fair-market” license fees as gross receipts when accounting to participants.

8 See *Celador Intern., Inc. v. Walt Disney Co.*, 347 F.Supp.2d 846 (C.D. Cal. 2004); *Celador Intern., Ltd. v. ABC*, No. 11–55104 (9th Cir. Dec. 3, 2012).

had made imprecise references to both “ABC” and the production companies when referencing contingent compensation, opening the door for Celador to later argue that its deal was an exception to that industry norm. What likely won the case for Celador was its presentation of evidence that the on-paper deal between the affiliated production and network entities essentially *guaranteed* that the series would never show profits in which Celador could share, if they were measured at the production company level alone.

In fact, the deal between Buena Vista/Valleycrest and ABC *did* resemble most “arms-length, fair-market” deals between unscripted producers and buyer networks—which to this day typically commission shows on a work-for-hire basis, at actual cost (including a budgeted fee to the production company), and accord to producers contingent compensation definitions that working producers, lawyers, and agents mostly expect never to be worth a dime.⁹ From ABC’s perspective, the fact that Celador’s backend (received via Buena Vista/Valleycrest) had turned out to be valueless, even for a show as successful as *Who Wants to Be a Millionaire?*, wasn’t a failure of the system—it was the system working exactly as it was meant to. But clearly, the intuitive unfairness of the outcome weighed heavily on the jury, which could not square the obvious success of *Millionaire*—at the height of its popularity, airing on ABC in primetime five nights a week—with Disney’s claim that the format’s creator was not entitled to any share of the upside because, on paper, the show was “not profitable” (and never could be). The massive verdict sent a clear message to studios and participants alike: even when a studio’s accounting practices were consistent with industry custom and practice *and* seemingly authorized by a participant’s contract, judges and juries who, unlike working industry professionals, were not anesthetized to these strange terms could find ways around them if the practices at issue felt too egregious, or the outcomes too unfair.¹⁰

While the *Millionaire* verdict made for interesting conversation at business lunches, it did not fundamentally change the dynamics of backend accounting and negotiation in television. In that case, the specific license terms between the Disney parties were not explicitly spelled out in Celador’s agreement, as they usually are in imputed license fee definitions. Although studios did not contractually pre-bless secondary licenses the same way, the stakes for each of those were much lower. In some cases, the major studios genuinely negotiated with their affiliated licensees, or even required them to bid competitively for rights. After the *Millionaire* judgment, the conglomerates became more mindful of

9 See Chapter 12, Section D.vii (pg. 488).

10 More than ten years later, it remains a complete mystery why, of all its audit disputes, Disney chose to let this case reach trial, let alone a verdict. Even if the company wanted to take a swing at creating formal legal precedent that could more fully immunize it from liability for its usual accounting practices, *this* case—with its problematic record from the email negotiations and the sheer unbelievable (to normal people) of the claim that the most successful game show in generations was “not profitable”—was not the place to try it.

the optics around their accounting practices and the resulting outcomes, but the system continued to operate essentially the same way it had before. And while affiliate transactions grew only more common, the studios involved could still generate significant profits for participants in success.

More jarring to the studios, however, was the second milestone audit dispute, between 20th Television and the cast and producers of the Fox hit *Bones*. Led by producer Barry Josephson, the participants argued that the studio entered into artificially deflated “sweetheart” deals with its affiliated licensees (including the Fox broadcast network, foreign stations, and especially the Fox-co-owned Hulu), depressing the value of the participants’ backend stakes. In February 2019, an arbitrator awarded the participants \$179 million, including an eye-popping \$128 million in punitive damages. A judge later reduced the award to \$51 million, holding that the participants’ contract-based claims did not entitle them to any punitive damages. The case settled before the judge’s ruling on punitive damages could be heard on appeal.

If the *Millionaire* case had put a crack in the edifice of the protective language studios used in their backend definitions to protect themselves from liability for affiliate transactions, the *Bones* decision blew it wide open. In his decision, the arbitrator had seized upon, as evidence of fraud and collusion on the part of Fox, several transactions between Fox affiliates that looked a lot like ordinary business to the eyes of many working business affairs executives. The arbitrator questioned the studio’s grant of full-season “stacking rights” to the Fox network for minimal additional compensation, at a time when all studios were desperately fending off an ongoing “land grab” of digital rights by all of the broadcast networks for little or no additional compensation.¹¹ He also dismissed as dishonest Fox’s argument that its studio unit had legitimately agreed to reduce its license fees for the show’s fifth and sixth seasons—which, as in most broadcast license deals, was set to automatically increase to full cost of production—under threat from the network that it would otherwise cancel the obviously successful series. The presidents and business affairs executives at independent studios knew only too well how willing the broadcast networks were to engage in hardball renegotiations under threat of cancellation, even for seemingly successful shows, to avoid these dramatic spikes in license fees for series entering their fifth and sixth seasons.

As with Disney in the *Millionaire* litigation, Fox’s position in the *Bones* dispute was burdened with some bad facts—in particular, an instance when one executive signed a license agreement on behalf of both parties. Fox was also called out for having forced the producer participants on *Bones* to sign releases of any claims for the reduced license fees, again under threat of cancellation and based on false assurances that the lead actors were making the same

11 See Chapter 11, Section B.iv.b (pg. 456).

concession. Worse still, the arbitrator concluded that several top-level Fox executives had “given false testimony in attempt to conceal their wrongful acts” and that the company had taken “a cavalier attitude toward its wrongdoing.” These factors clearly heavily influenced the arbitrator’s decision.

Nevertheless, the *Bones* decision seemed to drive home once and for all that practices that industry insiders viewed as routine would be viewed skeptically by judges, juries, and arbitrators who were not steeped in the day-to-day arcana of the television business—with potentially dire financial consequences for the studios.¹² And it drove home that message at a moment when most of the legacy studios were preparing to launch their own streaming services and trying to build self-contained “walled garden” ecosystems in which these conglomerates could essentially buy from and sell content to only themselves. It was to pursue this vision of the future that Disney acquired nearly all of Fox’s film and television assets—and their liabilities—in a deal that closed about a month after the arbitrator handed down his judgment in the *Bones* case. In an industry that was fast moving toward affiliate transactions being virtually the only transactions, the *Bones* case highlighted how much exposure studios faced from participants despite their carefully drafted backend definitions.

Meanwhile, in the time between the *Millionaire* judgment in 2010 and the *Bones* judgment in 2019, the emerging streamers began to transform backend entirely to adapt it to their own businesses.

When the streamers first established themselves as buyers for original content, they had little initial impact on how backend was negotiated, calculated, and paid in television, because participants’ backend entitlements still flowed from the studios that were supplying the streamers with those shows. And for

12 The term “Hollywood accounting” is sometimes derisively used to describe the spectrum of accounting practices used by studios to establish the “unprofitability,” for participations accounting purposes, of even extremely successful projects. The results can often border on the absurd for feature films, whose publicly reported blockbuster box office receipts often cannot overcome the high distribution fees, distribution expenses, and overhead charges common in lower-level “net” backend definitions for the medium. For example, in 2010, under the headline “STUDIO SHAME!” Deadline Hollywood published a leaked net proceeds statement from Warner Bros. calculating that *Harry Potter and the Order of the Phoenix*, which grossed \$938.2 million worldwide in its 2007 theatrical release, was over \$167 million underwater—an unsurprising outcome to those familiar with such net proceeds definitions.

In reality, much of the “magical math” that yields such unintuitive outcomes is spelled out in black and white in participants’ signed contracts. While that may not make the mathematical outputs of these defined participations any more satisfying, it feels important to note that such aggressive deductions are not an accounting “trick” being pulled on unsuspecting participants. (Counterpoint: Studios can be extremely intransigent when it comes to meaningfully negotiating the details of such definitions, especially for lower-level participations in “net proceeds.”) (Counter-counterpoint: Studios engage in conservative, policy-driven dealmaking as a defense against talent representatives who do not differentiate between their higher- and lower-stature clients in their approaches to negotiating for “high-level gives.”) (Counter-counter-counterpoint: That’s exactly how they get better terms for their clients, which is their job.) (I could go on.)

those studios—which were totally un-conflicted when it came to negotiating the best deals they could for their projects—the new streaming platforms were just another kind of licensee with another kind of license fee. Backend worked pretty much the same way it always had, with the studio’s license fees from the streamer accounted for as gross receipts at the top of the backend accounting “waterfall.”¹³

In fact, as license fees from streaming platforms quickly evolved into the “cost-plus” model,¹⁴ backend seemed to only become more favorable for talent. Shows on linear networks usually had to reach their fourth or fifth seasons for the participants to see any value from their backend at all. Because the initial license fees for streaming originals significantly exceeded production costs, however, for the first time, classic studio definitions began to “break”—that is, “break even,” or show profits according to the negotiated definition—on the basis of a single produced season.¹⁵ Moreover, because of the “one-stop shop” nature of these rights-intensive streaming deals, studios could now very reliably model the financial performance of these series, including the calculated value of talent backend. And in the rapidly heating-up marketplace for talent, those studios—unprecedentedly confident that the arrival of profits was now just a matter of when (determined by the negotiated license fee and payment schedule with the streamer), not if—began agreeing more liberally to advance significant sums to participants against those pre-calculated backends (while building in some breathing room to avoid overpayment if the production ran overbudget).

Things got more complicated once the streamers made their big push into producing for themselves, and therefore had to roll out their own new backend definitions. In streaming, the foundational assumption of backend—that the studio and participants’ interests were aligned because the studio was naturally incentivized to monetize its shows as much as possible—did not apply. Instead, it was clear that the streamers intended their original content to be available exclusively on their own platforms, and that they had no plan for distributing their shows elsewhere or meaningfully monetizing them in other ways.¹⁶ In traditional studio economics, the relevant accounting unit was the individual series, and backend definitions were designed to cut the talent in on the success

13 A casual term for the flow of distribution revenues through a series of deductions, pursuant to a contractually defined formula, to calculate the value of a profit participant’s contingent compensation. Agreements between co-producing studios also contain waterfalls, but they are defined differently than for talent participants. See Chapter 11, Section B (pg. 444).

14 See Chapter 3, Section C.ii (pg. 139).

15 And, at least in these early days, streaming series were much more likely than linear ones to make it to a second or third season, further enhancing the value of the participants’ backend. See Chapter 2, Section B.v (pg. 88).

16 This might be changing as the streaming businesses mature. See Chapter 2, Section B.vi (pg. 89).

of that accounting unit. In streaming, however, the relevant accounting unit was the platform. With the streamers uninterested in maximizing revenue or profit at the level of the show and firmly unwilling to account to participants at the level of the platform, backend as it had been understood for decades simply no longer worked. But, even with the streamers generally paying higher up-front fees than their traditional studio counterparts, backend was also too deeply ingrained in the custom and logic of television talent deals to jettison altogether.

The streamers therefore set out to define a new kind of “backend,” one which would allow them to retain the comfortingly familiar overall structure of talent deals (including well-established norms around the quantity and definition of “points” accorded to participants), while largely divorcing such backend from any expectation of real-world monetization. And, like the studios themselves, the streamers could confidently model the value of contingent compensation owed to participants by third-party studios producing for streaming. Thus, they could structure and value their own new “backends” to remain competitive with outcomes in the traditional model (so as not to incentivize creators and rightsholders to sell their projects to outside studios rather than to the streamers directly).¹⁷ Netflix and Amazon experimented with a variety of models, including traditional-looking backend formulas with cost-plus imputed license fees, and so-called “dollars-for-points” exhibits—bonus structures adopted by streamers for their self-produced series, replacing traditional contingent compensation formulas with a system of flat bonuses “per point,” tied to benchmarks like renewals and viewership rankings, sometimes with tiered value tables approximating the dynamic of stature-based differences in standard backend definitions.

Whatever model a streamer used at any given time, its overall impact was always the same: the streamers paid everybody like their show was a hit, except the actual hits.¹⁸ Like they had for studios with cost-plus deals, the streamers effectively “de-risked” their talent—both by increasing their up-front compensation and by making it easier than ever for them to see at least some value from their negotiated contingent compensation. But in raising the participants’ financial floors, the streamers also lowered their ceilings. Viewership played little or no role in these imputed streaming license fees or dollars-for-points models—for the most part, any series that ran a particular number of seasons was worth the same to its participants as any other. Creators of hugely

17 Early in the rollout of Apple TV+, its executives actually met with talent agencies and law firms, presenting models that they argued demonstrated that profit participants would see more value in their backends by selling their shows directly to Apple, rather than to an outside studio that then licensed the same series to the platform. The outside studios largely made the same argument they always had—that they had the ability to pitch their projects to multiple platforms, allowing each project to find the best home (and the best deal, hopefully negotiated competitively).

18 The author heard this description at one point over the last several years, but despite diligent efforts, has not been able to recall or identify the original source.

successful streaming originals could be rewarded with generous overalls, and cast could enjoy lucrative (and sometimes repeated) fee renegotiations. But by and large, a streaming point was a streaming point. Whereas traditional contingent compensation tied the profit participant's fortunes directly to those of the studio, the streamers' alternative backends rewarded participants for success *as measured by longevity*, but otherwise largely severed the participants' interests from their own.

The streamers' alternative backend models were still evolving, but well established in the industry, by the time the *Bones* judgment case came down in February 2019. Fox (now owned by Disney) settled the case for an undisclosed amount seven months later. And two months after that, in November 2019, Disney debuted its "Series Bonus Exhibit" (or "SBE"), a streamer-like bonus structure that replaced traditionally defined contingent compensation for shows produced by Disney/Fox studios for Disney+ and Hulu. Before long, Disney expanded its use of the SBE to replace traditionally defined backend entirely at the Disney/Fox studios, without regard for a project's initial exhibition platform.¹⁹ The streaming model of backend had officially landed in the legacy studio world.

Besides Disney, the other major studios largely retained their more conventional backend definitions. But as they began selling more and more of their shows to their affiliated streamers, most rolled out expanded imputed license fee definitions to cover these new in-house transactions. And as the platforms all plotted their international expansions, those imputed license fees grew larger and larger, while buying out more and more territories (or at least giving the streamer the option to buy them out them later).²⁰

19 The SBE was received generally smoothly when introduced for shows produced for streaming platforms, given the acceptance of similar models with the pure streamers, but its expansion to shows produced for linear platforms as well was much more controversial. Disney faced significant criticism—at the time, and again during the 2023 WGA strike—from those who argued that the use of the SBE for shows in linear television was a brazen cash grab. In reality, Disney engineered the SBE to yield average aggregate annual payouts that were a *few percentage points higher* than the company's recent historical averages under conventional definitions. Like the streamers' alternative backend models, the SBE tended to "spread the wealth" of Disney's annual participations budget among more shows and participants—everything a "single" or a "double," nothing a "strikeout" or a "home run." But in the end, it was not a cost mitigation tool; it was a liability mitigation tool. Now on the losing end of two nine-figure judgments in less than ten years and planning to double-down on its "walled garden" strategy, Disney went for a participations system that was modifiable and predictable, while freeing them from any potential liability for aggressively exploiting content across a wide variety of affiliated channels and platforms.

20 Meanwhile, with the legacy companies plotting ways to exhibit their shows flexibly and strategically across multiple streaming and linear platforms, the concept of a "basic cable deal" grew increasingly archaic. In their capacities as buyers/networks, the companies phased out their use of standard basic cable license agreements, instead treating every license agreement as if it was for the company's flagship streaming platform, even if the project was intended (at least for the moment) for a linear network. And the studio streamers' new license templates looked a lot more like Netflix's

All of which has left the traditional concept of backend in a fairly diminished place. Netflix, Amazon, and Apple—which collectively dominate original series production—have pretty much abandoned it. So has Disney, the largest of the legacy studios. The old model lives on with the other traditional majors (a likely soon-to-shrink group), and it remains the only model among the truly independent studios. But if a traditional studio sells a project to its affiliated streaming platform, and accounts to participants based on imputed license fees that (by simulating those streamers’ cost-plus license templates) are high enough for their backends to “break” but functionally buy out every valuable right in every valuable territory, then the studio does not truly need the defined formula anymore—it could simply do the math and turn the combined backend definition and imputed license fee exhibit into a table of bonuses. That said, with network license deals (and the imputed license fees that are designed to simulate them) seemingly poised to revert somewhat toward more traditional models in the post-“peak TV” era, old-school backend may soon become more relevant—and more potentially lucrative—than it has been in years.

B Traditional Television Backend (Modified Adjusted Gross Receipts)

The details of contingent compensation vary in a number of ways among studios, including in their preferred terminology; this book universally uses the term “Modified Adjusted Gross Receipts” (or “MAGR”), which is most common, but some studios refer to their defined form of contingent compensation as “Modified Adjusted Gross” (“MAG”), “Modified Gross Receipts” (“MGR”), “Adjusted Defined Receipts” (“ADR”), “Contingent Proceeds” (“CP”), or by other terms still. Some studios use relatively plain-language backend definitions that are as few as three pages long, while others rely on complex and detailed definitions that can run for literally dozens of pages. And different studios have different policies as to various key aspects of these definitions, with each studio prioritizing the issues that are important to it, and no one studio systematically offering participants the most or least favorable available definition in every respect.

Despite such variation, however, at the end of the day, every television contingent compensation definition is a mostly similar formula, whose main variables are simply the dollars earned by the studio from all forms of exploitation of a series; the expenses incurred by the studio in all aspects of production, marketing, and distribution; and a few defined deductions calculated based on

and Amazon’s than they did like those of the streamers’ affiliated linear networks (whose business affairs executives were often now doing the negotiating on behalf of the studio streamers). See Chapter 11, Section A (pg. 406).

those revenue and expense numbers.²¹ As a series progresses, this formula is regularly calculated and recalculated to account for revenues and expenses as they each mount.

The basic television contingent compensation formula (or “waterfall”) can be articulated as follows:

$$\begin{aligned}
 &\text{Gross Receipts} \\
 &\quad - \text{Distribution Fees} \\
 &\quad - \text{Distribution Expenses} \\
 &\quad - \text{Overhead} \\
 &\quad - \text{Interest} \\
 &\quad - \text{Cost of Production} \\
 &\quad - \text{Third-Party Participations} \\
 &\hline
 &= \text{Modified Adjusted Gross Receipts}
 \end{aligned}$$

What follows is a deeper examination of each of the elements of this formula.

i Gross Receipts

“Gross receipts” refers to all revenue received by (or credited to) a studio from its exploitation of a television series and all rights therein, from all sources. For the most part, this is a straightforward concept. There are, however, some important nuances.

a Accountable Third-Party Revenue

First, it may be necessary to clarify at what level (or, to put it another way, from the receipts of which entity) gross receipts are determined. For instance, if a studio intends to use a subdistributor to distribute any of its rights in a series,

21 For much of the television industry’s history, there were at least three distinct “tiers” of backend in television available to participants according to their stature (and negotiating leverage), of which MAGR was considered the middle option. The most favorable backend definitions were usually known as “Adjusted Gross Receipts” (or “AGR”); compared to MAGR, AGR definitions had significantly lower distribution fees, and lower or even nonexistent interest and/or overhead deductions. The least favorable definitions were usually called “Net Receipts” or “Net Proceeds” (“NR” or “NP”) and provided for significantly higher fees and greater deductions. By 2010, these three tiers had mostly been consolidated into one: MAGR. As this section explores, a single “point” of MAGR can be more or less valuable than another depending on how certain key variables are negotiated. But, assuming a single set of revenue and expense data, the difference in value between a “high-level” MAGR definition and a “low-level” one is significantly smaller than the difference between AGR and NP definitions. This also distinguishes television backend from feature backend, which to this day involves many more distinct tiers of definitions, with many more significant negotiable elements, that generate a much wider spread of outcomes based on the same underlying data.

the gross receipts should generally be measured as those collected by the sub-distributor (as opposed to those remitted to the studio after the subdistributor retains its fees and expenses).²² If the studio enters into contracts through a special purpose production entity, gross receipts should be defined as those received by that special purpose entity *or any of its affiliates*, to ensure that the studio's real receipts are properly accounted for.²³ On the other hand, if a studio is part of a major conglomerate (such as ABC Signature Studios at Disney or Universal Television at NBCUniversal), and the studio's affiliates engage in the kind of exploitation that is customarily performed by third-party licensees, then the definition may need to identify the appropriate revenues *of the studio, as a studio*, and to wall off revenues from affiliates who are acting in the capacity of bona fide third-party distribution partners. This issue commonly arises with respect to revenues from the exploitation of ancillary rights, such as music publishing, soundtracks, and merchandising.²⁴

Second, "gross receipts" often exclude revenues from certain specified sources, even when they seemingly refer to "all revenue from all sources." For instance, although derivative rights—e.g., the right to produce spinoffs, sequels, theatrical feature adaptations, etc.—are among the "all rights therein" for a television series, most backend definitions expressly exclude revenues (and expenses) from these separate productions. The one exception may be license fees received from third parties for the right to create local language adaptations of a series, which may be accountable as gross receipts. Some studios may seek to exclude ratings and other bonuses received from their licensees, or revenues received in connection with product placements or integrations.²⁵ Such exclusions, where sought at all, are often negotiable.

22 The proper treatment of this issue also depends on how distribution fees are assessed on such revenues. For example, if gross receipts are defined at the subdistributor level, then it is appropriate for the studio to assess distribution fees on them; if gross receipts are defined as net of the subdistributor's withholdings, then a distribution fee should not be charged.

23 Studios may favor such one-off companies, sometimes called "special purpose vehicles" (or "SPVs"), for reasons of liability management, union obligation management, and/or tax and accounting preferences, among other considerations.

24 To illustrate, imagine a television series produced by ABC Signature, which spawns a toy that is produced by a Disney-owned consumer products company, which is in turn sold to a customer at a Disney retail store. Although the Disney retail store is owned by an affiliate of ABC Signature, the studio would not account to a profit participant for the money collected at the point of sale by the Disney Store as "gross receipts." Rather, it would rely on a formula to translate the Disney Store's retail revenues into the Disney-owned consumer products company's wholesale revenues, and in turn translate those into ABC Signature's licensing revenues (which would then be deemed ABC Signature's "gross receipts" from that merchandising transaction). This mathematical process essentially simulates the revenues ABC Signature would have realized if it were an independent company that operated solely in the business of television production and distribution and had licensed merchandising rights to a third-party licensee, which in turn placed its merchandise on the shelves of a third-party retailer.

25 See Chapter 1, Section B.vi.b (pg. 40).

Third, nearly all backend definitions include special accounting provisions related to home video revenues. “Gross receipts” are typically defined to include an amount equal to 20% of the receipts actually received by the studio or its affiliated company from home video distribution.²⁶ This unusual royalty-based accounting is a function of the history of home video distribution in the film and television industry. In the 1980s, when the home video market was first emerging for feature films (and was altogether nonexistent for television series), most film studios relied on small outside companies to exploit these rights, which were not perceived as particularly valuable. The film studios’ deals with these outside home video subdistributors generally entitled the studios to a 20% royalty (with the subdistributors absorbing all manufacturing and distribution expenses from their 80% shares). These royalties, in turn, became the gross receipts that were accounted to profit participants in the films. Eventually, however, the major studios made two crucial realizations: first, that home video was quickly developing into a huge business;²⁷ and second, that the home video subdistributors’ costs only amounted to approximately 40% of their revenues, allowing those subdistributors a huge profit margin even after accounting to the studios for their 20% royalties. The studios quickly developed in-house home video distribution arms, effectively increasing their share of wholesale revenue from home video sales from 20% to 60% (while forcing many smaller, independent home video subdistributors out of the business). When the studios did so, however, they decided to retain for themselves the full benefit of that additional 40% margin, by redefining their theatrical contingent compensation definitions to continue to account for home video revenues at a 20% royalty rate (as if the studios were still receiving 20% royalties from real third-party home video distributors). By the time profit participants and their representatives realized the economic impact of this move, the practice was firmly established, and the studios were able to maintain it through sheer stubbornness and superior bargaining power. The 20% royalty rates for home video revenues were eventually imported into the backend definitions of television studios, and by the 2000s, a robust home video/DVD market for television programming had emerged as well. This 20% royalty accounting for home video revenues remains the standard to this day.

Fourth, the historical quirk of royalty accounting for home video receipts has impacted the accounting (and negotiation) around receipts received from digital licensees of television (and other) content, such as Netflix, Amazon, and Hulu. When these digital platforms first emerged as new windows for existing series (but had not yet begun commissioning and producing their own original content), backend definitions that had been drafted years before were silent as to the

26 At very high levels, this royalty rate may be negotiated up to approximately 35%–40%, but this is rare for all studios, and seldom if ever granted by major studios.

27 Indeed, home video receipts (initially based on VHS tapes, and later DVDs and Blu-rays) were critical in economically buoying the entire film industry through the 1990s and early 2000s.

treatment of revenues from such sources. Citing the precipitous collapse of the home video market that coincided with the emergence of these new digital platforms (which had begun rendering physical home video effectively obsolete), the studios initially reasoned that the new digital platforms were effectively successors to the home video market, and therefore that revenues received from digital platforms should be treated as home video revenue—at a 20% royalty rate. They took this position even though the actual physical manufacturing and distribution costs associated with traditional home video distribution (which had been absorbed within the 80% of home video revenues withheld from the profit participant) were virtually nonexistent when it came to the distribution of digital content, in 1s and 0s, to the new platforms. Profit participants and their representatives (including the talent guilds) across the film and television industries eventually revolted against this reasoning, and currently, television studios customarily account for 100% of the revenue received from SVOD and AVOD licensees for both first- and second-run licenses. Most studios, however, continue to treat revenue from TVOD/EST-type licensees (which more closely resemble traditional home video distribution) as home video (and therefore still account for it at a 20% royalty rate).

b Imputed License Fees

Where a studio licenses a television series to its affiliated network (e.g., AMC Studios producing a show for the AMC network, or CBS Studios producing a show for the CBS broadcast network), the studio's backend definition will include an "imputed license fee." The "imputed license fee" is a contractually defined amount that represents the revenues received by the studio from its sister network. This is because sister studios and networks generally do not engage in arms-length negotiations to determine the precise scope of rights granted to, and license fees paid by, the broadcasting network, nor is real money necessarily transferred from the account of the network to that of the studio. In lieu of such a negotiation and payment, the studio's backend definition will identify an amount that the studio is deemed to have received from its sister network for its license (and the studio will continue to account to the participant for revenues received from third-party sources, as actually received). As the legacy studios have pursued "walled garden" businesses over the last several years—with studios increasingly favoring selling shows to affiliated (rather than unaffiliated) platforms, and platforms increasingly favoring buying shows from affiliated (rather than unaffiliated) studios—the use of imputed license fees has expanded substantially.

As with arms-length negotiated license fees,²⁸ the applicable imputed license fee may be denominated as a flat dollar amount (or series of flat dollar amounts)

28 See Chapter 11, Section A.iv (pg. 412).

or as a percentage of the production budget (with or without caps), according to the preferences and policies of the entities involved. In order to induce participants to accept these definitions, the applicable imputed license fees are generally structured and valued to resemble license fees that may have been obtained in a real arms-length negotiation, and the license fee generally buys out a specified scope of exploitation by the network.²⁹ Thus, as licenses between studios and streamers have evolved toward cost-plus (rather than deficit-based) license fees that buy out more and more rights, the imputed license fees used by studios when producing for their affiliated platforms have moved in the same direction. Often, the applicable imputed license fee is non-negotiable by the participant or negotiable only within a narrow range and only for high-level participants. In general, however, participants can expect that such imputed license fees will be close to, but somewhat less substantial than, the license fees that the studio would extract from an unaffiliated network licensee in a bona fide arms-length negotiation.

For licensing transactions with affiliated entities other than the initial network license, to the extent not bought out by the imputed license fee, participants typically negotiate for an express contractual requirement that such transactions be conducted on an arms-length basis.

ii Distribution Fees

In calculating MAGR, the studio first deducts its distribution fee. The distribution fee is a defined percentage of revenues received from nearly all sources, which the studio retains as compensation for its investment of time, effort, overhead, and other resources in the distribution process.

The distribution fees charged by a studio are one of the most critical, and most hotly negotiated, elements of a backend definition. They generally range from 10% to 25%, with some variation among studios regarding the lowest fees they will agree to, and the circumstances under which they will agree to their most favorable available distribution fees. A 15% distribution fee is relatively common, with 10% being considered “A-level.” Some studios distinguish among various revenue sources in defining the applicable distribution fee—for instance, charging a higher distribution fee on revenues from foreign distribution than from domestic, or on revenues received from the exploitation of ancillary rights rather than traditional linear licensing of series episodes (based on the argument that such sales require more effort to generate substantial revenue). Other studios charge a flat distribution fee, as negotiated, on revenues

²⁹ In fact, such imputed license fee definitions should specify an imputed “payment schedule” for such imputed revenue—again, generally modeled on (or at least informed by) prevailing norms from arms-length license agreements—so that interest can be calculated appropriately (as having run for a specific amount of time before the underlying principal balance was fully recouped).

from all sources. Some studios will agree not to charge a distribution fee on home video receipts (because those receipts are already being accounted for on a 20% royalty basis, rather than based on 100% of revenues actually received).

Across the board, studios will generally agree to forego charging distribution fees on revenues received in respect of the initial domestic license for a television series (including extensions, amendments, and renewals thereof). The rationale for this exclusion is that a television series is never produced in the first place without the deal from the original U.S. network, and therefore no distribution resources or separate efforts were actually expended to obtain these revenues. However, where the initial licensee takes rights in multiple territories (as is typical for licenses to global streaming services), the license agreement usually does not expressly allocate the all-in license fee among the licensed territories. In such circumstances, the parties must also negotiate with respect to how much of the license fee is allocated to domestic rights, for purposes of the studio not charging a distribution fee. Such allocations to domestic rights generally range between 75% and 90% of the series budget, though high-level participants may negotiate aggressively for distribution fees to be waived on up to 100% of the series budget (with fees therefore charged only on the “premium” of the license fee over and above the series budget).³⁰ Each studio tends to have a specific policy governing what it will agree to in this regard. As these norms were being figured out in the early years of streaming originals, studios occasionally agreed, for the highest-level participants, not to charge a distribution fee on *any* portion of their license fees from streamers. Such concessions are now exceedingly rare, however, and generally made only by the most aggressive (or desperate) upstart studios. From the perspective of the backend participant, the allocation of revenue from worldwide streaming deals to domestic (no distribution fee charged) vs. international (distribution fee charged) rights is hugely impactful on the ultimate value of the participant’s contingent compensation from the series.

Most studios freely agree that, to the extent they rely on subdistributors to exploit rights in certain media or territories, the applicable distribution fees charged by the studio are inclusive of any distribution fees charged and retained by the subdistributor. If the fee charged by the subdistributor is less than the fee charged by the studio, the studio retains the difference as its own fee (with studios justifying this margin by reference to the amount of effort and resources it takes to engage, manage, and generally police subdistributors). Where the distribution fee charged by a subdistributor is greater than the distribution fee

30 The story of the emergence of these “cost-plus” deals is told in Chapter 3, Section C.ii (pg. 139), while a more detailed explanation of their mechanics is contained in Chapter 11, Section A.iv (pg. 412). As those sections explain in greater detail, deals between studios and global streaming services typically provide for license fees that exceed the cost of production, but the further revenue potential of the series beyond this initial profit is speculative and likely minimal.

that would otherwise be charged by the studio, the backend definition may expressly provide that the higher distribution fee applies (so that the studio is not forced to economically absorb the difference between the distribution fee charged by the subdistributor and the fee specified in the participant's backend definition). Where the distribution fee charged by a subdistributor is equal to or greater than that charged by the studio, the studio may provide for its own right to take an "override" on such distribution fee, meaning a distribution fee charged on the subdistributor's receipts, over and above that charged by the subdistributor (again, citing the effort and expense of managing and monitoring the subdistributor). Such overrides, which have become less common in television over time, generally do not exceed 5% of gross receipts.³¹

iii Distribution Expenses

After retaining distribution fees, studios will next reimburse themselves for all expenses incurred in the process of distribution. Such expenses may include, without limitation, advertising and marketing expenses; costs for subtitling or dubbing of foreign versions; the expense of duplicating and transporting physical materials to licensees; clearance fees that have not otherwise been accounted for as production costs; residuals and reuse fees payable to talent pursuant to applicable union collective bargaining agreements; costs of enforcement (including intellectual property and audit litigation); and other so-called "off-the-tops" (referring to checking, collection, currency conversion, and certain tax [but not income tax] expenses). If negotiated, many studios will agree not to deduct some or all distribution expenses attributable directly to home video distribution, because they are already accounting for the resulting revenues on a 20% royalty basis. While participants sometimes may attempt to negotiate for a cap on deductible distribution expenses (e.g., that they may not exceed 5% of

31 A few illustrative examples may be helpful here. If a studio charges a 15% distribution fee, inclusive of subdistributors and without any override, and then engages a subdistributor that charges a 15% distribution fee, the studio will not retain any distribution fees for itself (because the full 15% of receipts charged as a distribution fee will be retained by the subdistributor). If the same studio employs a subdistributor that charges a 10% distribution fee, the subdistributor will retain 10% of receipts collected by that subdistributor as the subdistributor's fee, and the studio will retain for itself 5% of receipts collected by the subdistributor. If the same studio engages a subdistributor that charges a 20% distribution fee, depending on the nature of the backend definition, the studio will either absorb the subdistributor's incremental 5% distribution fee out of its own profits, or functionally increase its distribution fee to 20% in order to pass on to the participant the full expense of the subdistributor's fee. If, however, the studio charges a 15% distribution fee subject to a 5% override on subdistributors, and then engages a subdistributor that charges a 15% distribution fee, then the subdistributor will retain a fee equal to 15% of the subdistributor's receipts, and the studio will simultaneously retain a distribution fee equal to 5% of the subdistributor's receipts, resulting in a functional 20% distribution fee charged to the participant. If that same studio reserves for itself a 5% override and engages a subdistributor that charges a 20% fee, the functional fee to the participant will be 25% of receipts collected by the subdistributor.

gross receipts), studios seldom agree to such caps for profit participants (due to the risk that legitimate out-of-pocket expenses may, in fact, exceed such limits).

In general, studios recoup their actual, third-party, out-of-pocket distribution expenses. However, larger studios that maintain (whether directly or through an affiliated entity) certain in-house creative services facilities (e.g., to assist in advertising and marketing) may assess fair-market charges for such services, as though they had worked with a third party. Some studios may also attempt, particularly in definitions for low-level profit participants, to charge “advertising overhead” (i.e., a 5%–15% surcharge on advertising expenses). However, this is rare and often waived in negotiation, as the rationale for such a surcharge is essentially duplicative with the rationale for the studio’s distribution fees. In addition, some studios may seek to assess and recoup interest on their distribution expenses, but that is also uncommon in television.³² Many studios will agree to clarify, for the benefit of participants, that expenses charged as production costs may not also be recouped as distribution expenses, and vice versa.³³

iv Overhead

After deducting distribution fees and distribution expenses, the studio will next recoup an overhead charge. This overhead charge is calculated as a percentage of the actual cost of production of the series, and generally ranges between 10% and 15%. It is meant to compensate the studio for the in-house salaries, offices, and other overhead expenses used in the studio’s production business. Implicit in this practice is the assumption that, in general, the size and scale of a production (as reflected by its cost) is roughly proportionate to the demands placed on the studio to manage that production.

Like distribution fees, the percentage amount of the overhead charge is heavily negotiated and has a significant impact on the value of an individual’s contingent compensation—a participant in revenues from a hit series who is entitled to 10% of MAGR with a 10% distribution fee and 10% overhead charge may earn literally millions more dollars than another participant in the same series who is entitled to 10% of MAGR with a 15% distribution fee and 15% overhead charge.

In scripted television, studios generally do not assess production fees (or other fees for in-house executives or staff) within the budget of the show itself.³⁴

32 Such “advertising overhead” and interest on distribution expenses are more prevalent in backend definitions for feature films, especially for lower-level “net” deals.

33 The common phrase for this is “no double deductions.” In general, where an expense may be reasonably justified as a production charge or a distribution expense, the studio will opt to treat it as the former, to take advantage of applicable overhead and interest charges (which, as noted here, apply to production expenses but not to distribution expenses).

34 This is not the case in unscripted television, in which the license fee paid by the network is generally equal to the full cost of production, and the studio or production company typically receives a

Consequently, many studios will freely agree not to charge participants for any production company or supervisory fees, other than the negotiated percentage-based overhead charge. In addition, studios will generally agree not to calculate an overhead charge on interest assessed against the production cost, or on contingent compensation paid to third-party participants.

v Interest

The studio will next charge and recoup interest on the actual expenses it incurred in producing a television series. This interest is generally recouped from gross receipts after the studio has deducted its distribution fees, distribution expenses, and overhead, but before revenue is applied against the cost of production (effectively increasing the amount of time that interest runs on the underlying production costs). Such interest is assessed whether or not the studio actually relies on outside financing to cover its costs of production, as compensation to the studio for its loss of use of the funds (which could have been applied to other production or corporate purposes).

If the studio does rely on outside financing, the applicable interest deduction is likely equal to the studio's actual cost of financing; if the studio relies on its own cash reserves to finance production, interest is usually assessed at a rate between 1% and 2% above the current prime interest rate. Studios will generally agree not to charge interest on the overhead charge assessed by the studio, the contingent compensation paid to third-party participants, or the interest itself (in other words, the interest rate is simple, not compound).

vi Cost of Production

Next, the studio will recoup its actual cost of production of the series. As with distribution expenses, these are generally actual, out-of-pocket, third-party costs that had been paid out by the studio. However, to the extent the studio relied on some of its own facilities (or those of an affiliated entity) in connection with the production, it may also record and assess charges for such resources at fair-market rates.³⁵ The cost of production may also include reasonable

fee within the budget of the series equal to 10% of the hard production costs of the series (perhaps subject to a cap). See Chapter 12, Section D.i (pg. 476). For such programs, studios usually also assess profit participants an overhead charge as part of their backend definitions, but may agree to not calculate such overhead charges on the production company fees retained by the studio from the budget of the series, or even (at higher levels) to reduce such overhead charges in the backend definition on a dollar-for-dollar basis by the production company fees retained by the studio from the budget of the series.

³⁵ As the volume of produced series has rapidly grown over the last several years, stages, offices, and other physical production facilities have grown increasingly scarce, especially in Los Angeles and New York. Consequently, even studios that own their own lots often lack available space to

allocations of the unrecouped portions of the guarantees for any individuals rendering services on the project pursuant to overall term deals.³⁶

Some profit participants are wary of definitions that may allow for the assessment of “overbudget penalties” (e.g., a term that provides that, if a show goes \$1,000 overbudget, the backend calculation reflects a \$1,500 charge for the extra \$1,000 spent, with the \$500 difference being a penalty for the show’s failure to come in on budget). However, such penalties are very rare in television contingent compensation definitions (unlike in feature films, where they are common, especially for participations granted to producers and directors, who have a direct responsibility for controlling budgets).

vii Third-Party Participations

Finally, after recouping the cost of production, some studios also deduct contingent compensation paid by the studio to some or all profit participants on the same show off-the-top from other profit participants. In other words, if Participant A is entitled to receive 10% of MAGR, but the studio retains the right to deduct third-party participants off-the-top and has granted 25% of MAGR to Participant B, then Participant A’s 10% is effectively 10% of 75% of MAGR, or 7.5% of 100%. At the same time, Participant B has Participant A’s participation deducted off-the-top of Participant B’s definition, so Participant B really receives 25% of 90% of MAGR, or 22.5% of 100%.³⁷ When negotiating backend definitions, talent representatives will customarily ask for “no thirds off-the-top,” meaning that the studio is prohibited from deducting third-party participations off-the-top in calculating the participant’s MAGR. When this is agreed, the participant’s backend entitlement is usually styled as being “of 100% of MAGR”—e.g., “10% of 100% of MAGR,” rather than “10% of MAGR.”

Most studios grant “of 100%” participations to all participants, regardless of stature. Some grant “of 100%” participations on a discretionary basis, depending on the stature and negotiating leverage of the participant. Some studios that generally reserve the right to deduct third-party participations off-the-top may grant “of 100%” participations only to those receiving relatively low

house their own productions, requiring the studio’s producing units to rent offices and stages on third-party lots. When a major studio does produce a series on its own lot, it generally must pay (or credit to) its affiliated “studio facilities” division rent equivalent to what could have been charged to a third-party producer for the use of the same space.

36 Such allocation is usually meant to roughly reflect the portion of the individual’s productive time, during the term of the overall agreement, dedicated to that project. Studios use different methodologies to allocate unrecouped term deal guarantees to specific show budgets, considering an individual’s development as well as production work during the term. See Chapter 10, Section A.ii.b (pg. 395).

37 In other words, while the studio has nominally agreed to pay 35% of MAGR between the two participants, its actual commitment is equivalent to 30% (if calculated without such off-the-top deductions).

participations, such as 5% or under (because otherwise the large volume of participations granted to third parties would hugely dilute the individual's already modest backend stake). Studios that reserve the right to deduct third-party participations off-the-top generally will not deduct third-party participations both "off-the-top" and "off-the-bottom." In other words, if Participant A is entitled to receive 15% of MAGR, reducible on a dollar-for-dollar basis by all participations granted to third parties to a floor of 10% of MAGR, the studio will usually at least agree that those third-party participations that have the effect of reducing Participant A from 15% to 10% of MAGR may not also be deducted off-the-top in calculating the value of each percentage point of MAGR (or vice versa).

Such "of 100%" definitions are typically subject to a few exceptions to the general prohibition on taking "thirds off-the-top." First, notwithstanding their general agreement not to deduct third-party participations off-the-top, many studios reserve the right to treat *advances* on participations granted to third parties as production costs (with or without the right to assess interest and/or overhead on them) until such advances have actually been earned.³⁸ In addition, most studios retain the right to deduct participations granted to network licensees, if any, off-the-top.³⁹ Those studios that agree not to deduct network/licensee participations off-the-top generally require that such participations fit within their standard 35% cap on aggregate third-party participations. Finally, for series that are subject to an agency package, studios universally reserve the right to deduct contingent compensation paid to the packaging agency or agencies (which is typically accounted for and recouped as a distribution expense).⁴⁰

Whether and to what extent third-party participations may be deducted off-the-top in calculating MAGR is, together with the percentage values of distribution fees and overhead, one of the most impactful negotiated variables determining the value of a participant's contingent compensation.

38 Accounting for advances on third-party participations as production costs delays the "break point" at which participants will begin to see fresh cash. However, as the contingent compensation against which the advance applies is actually earned, the corresponding cost charged to participants is reduced, so that it equals only the remaining unearned portion of the advance. Once an advance has earned out in full, the corresponding cost deduction disappears from the participation statement altogether. The studio logic here is that such advances are often granted to participants in lieu of additional up-front fees; if the studio had instead agreed to pay higher up-front fees, those fees would be permanently deducted as costs of production (whereas the deduction for the advance will presumably shrink over time, ideally down to zero). In the long run, participants therefore benefit from the studio's ability to use backend advances to close deals with lower fees. This benefit is even greater if the studio agrees not to charge interest and/or overhead on such advances (as it would on ordinary production expenses). And to the extent those advances never "earn out"—i.e., the actual calculated value of the contingent compensation never equals or exceeds the amount of the advance—the excess advanced sums can reasonably be looked at as additional fees.

39 See Chapter 11, Section A.xiv (pg. 443).

40 See Chapter 1, Section B.vii.a (pg. 44).

viii Treatment of Tax Incentives

Although tax incentives are not expressly addressed in the waterfall described here, how a studio accounts for them (if at all) is another major driver of the value of a contingent compensation definition. Tax incentives significantly impact not only whether and where a television series is produced, but how much the studio is willing to invest (in gross dollars) in the show's production.⁴¹ Tax incentives make a significant impact not only a studio's economic position, but that of profit participants as well.

As was the case with the emergence of digital platforms as a source of television licensing revenue in the 2000s, when state and national production incentives rose to prominence in the 1990s, most studio backend definitions were silent as to their impact on the calculation of MAGR. In this vacuum, many studios initially declined to account for tax incentives altogether when calculating contingent compensation for talent participants. Enjoying the subsidy provided by these tax incentives, the studios increased their gross spending on production. This increased spending, combined with the non-acknowledgment of tax incentives, had the effect of diminishing the value of participants' contingent compensation by making it more difficult for the show to achieve breakeven or profit, according to the applicable MAGR definitions. When this practice was eventually discovered by participants and their representatives, a wave of contentious audit disputes ensued.

Today, studios almost always account somehow for tax incentives in their backend calculations. Talent representatives prefer tax incentives to be treated as a reduction in the production cost of the series. This approach is simple and intuitive. However, studios generally reject this approach because, as a practical matter, treating tax incentives this way both reduces the amount of recoupable production costs and reduces the principal base on which overhead and interest charges are calculated. This substantially accelerates the point at which profit participants would expect to see their backends pay off.

Instead, most studios treat tax incentives (net of any actual third-party costs of obtaining, accessing, or otherwise monetizing such incentives) as gross receipts.⁴² Studios argue that this approach is fair in part because, while a tax credit can be reliably estimated, it may take months or even years to actually receive the financial benefits from such programs, during which time the studio is actually out-of-pocket on the full gross production spend for the series. At the same time, this approach preserves a higher principal base for production cost, which generates a higher overhead charge and interest charge that must

41 See Chapter 3, Section B.iii (pg. 125).

42 That said, a few studios continue to account only for a portion of tax incentives they receive. It is difficult to articulate a rationale for this position other than "because they always have" and "because they can."

be recouped from revenues before participants first see payments under their backend definitions.⁴³ In addition, the classification of tax incentive monies as gross receipts, rather than reductions in production costs, may allow the studio to charge a distribution fee on the tax incentive amounts (although talent representatives may specifically negotiate to eliminate such distribution fees).⁴⁴

ix Quick Reference Guide

TABLE 9.1 Traditional Television Backend (Modified Adjusted Gross Receipts)

<i>Deal Term</i>	<i>Issues and Negotiated Concessions</i>
1. Gross Receipts	• Gross receipts at source vs. after deductions • Typically 20% royalty on home video receipts (including TVOD, but excluding SVOD or AVOD streaming, which is treated like television) • Excluding revenues from format fees or subsequent productions • Imputed license fees for affiliate transactions • May require studio to conduct affiliate transactions on an arms-length basis • For studios that are part of large conglomerates, revenue from ancillary rights exploited via affiliates may be “translated” via a series of deductions into studio-level receipts
2. Distribution Fees	• 10%–25% of gross receipts off-the-top; 15% is common, and 10% A-level • No fee on home video receipts (if calculated on royalty basis)? • Inclusive of sub-distribution fees (or subject to 5% override)? • Typically no fee on initial domestic license (including extensions, amendments, and renewals thereof) • For multi-territory initial licenses, no distribution fee charged on amount allocated to domestic rights (typically 75%–100% of budget)

(Continued)

43 According to the studio argument, although a television production that enjoys a tax incentive may ultimately cost the studio less out-of-pocket expense than an identical production without a tax incentive, the scale of the production (and resulting complexity and labor demands of managing that production) is identical to that of its incentive-free counterpart, justifying the studio’s practice of charging its overhead fee on the gross (rather than net) production cost.

44 Studios justify this practice by reference to the substantial time and effort required for the studio to get the benefit of these tax incentive programs. As described in Chapter 3, Section B.iii (pg. 125), these programs are complex and vary widely from state to state, requiring considerable expertise from studio production and tax executives to maximize them. Obtaining a tax credit is far from automatic; it requires meticulous, sometimes burdensome recordkeeping, reporting, and filing with government authorities.

TABLE 9.1 (Continued)

<i>Deal Term</i>	<i>Issues and Negotiated Concessions</i>
3. Distribution Expenses	• May be subject to cap (e.g., no more than 5% of gross receipts), with exclusions from cap • Typically no interest or overhead on distribution expenses • Costs charged as distribution expenses not deducted as production costs and vice versa
4. Overhead	• 10%–15% of production costs • May prohibit production fees in budget on top of overhead charges • No overhead on interest? • No overhead on advances/third-party participations?
5. Interest	• Usually prime plus 1% or 2% • No interest on overhead? • No interest on advances/third-party participations? • No interest on interest (i.e., no compounding)?
6. Cost of Production	• Actual out-of-pocket production costs • Overbudget penalties rare
7. Third-Party Participations	• Advances, network licensee participations, and agency package participations may come off-the-top (or be accounted for as production or distribution expenses) • Studio policies vary as to whether third-party participations come off-the-top against other participations • “Of 100%” signifies a limitation on third-parties coming off-the-top • No deducting the same third-party off-the-top and off-the-bottom
8. Treatment of Tax Incentives	• May be treated as gross receipts or as a reduction in cost of production • If treated as gross receipts, may or may not be subject to distribution fees • If treated as reduction in cost of production, may still need to address calculation of overhead and interest charges
9. Most Financially Impactful Negotiated Terms	• Applicable distribution fee (as percentage of gross receipts) • For multi-territory licenses, portion of license fee allocated to domestic rights • Applicable overhead charge (as percentage of production cost) • Applicable rate for charged interest • Treatment of tax incentives

C Alternative/Streaming Backend

Traditional television backend, as just described, is premised on a studio's aggressive monetization of every series, in every available medium and market. That makes it a poor fit for deals made with the studio arms of global tech streamers, which have long looked to original content solely as assets to support their subscription/platform businesses, rather than as opportunities for monetization and profit-seeking on each individual series. Consequently, since the beginning of their original content programs, these companies have had to devise and iterate alternatives to "traditional" backend to compensate creative talent for the success and longevity of their series, while essentially relieving the streamers from any obligation to (or expectation from) participants to generate meaningful shareable revenue, or to share information about the performance of the series on the streamers' own services.⁴⁵

To make it easier to implement these alternative structures (and get buy-in from talent and their representatives), the streamers retained many of the cosmetic trappings of traditional backend—most significantly, structuring deals with talent and rightsholders to grant them a comparable number of "points" to what those participants would expect to receive in corresponding deals with traditional studios.⁴⁶ The action has been in how those points are defined, and most importantly, what value is ascribed to them for the streamers' direct exhibition of each series.

As of this writing, four companies have substantially moved away from conventional backend at their own studios—Netflix, Amazon, Apple, and Disney.⁴⁷ The fact that there are only four extant models of "alternative" backend in the marketplace presents a challenge for this book, which identifies historical and generally prevailing norms and lays out different ways a negotiated point may be resolved, but generally avoids attributing any specific structures or policies to any specific company.⁴⁸ "Alternative backend" is unique in that it is widely used in the industry and critical to understand, but because the universe of examples from actual practice is so small, it is very difficult to address in a generalized or anonymized way. In addition, as this book was in physical production, both Amazon and Apple began discussions with some prominent

45 See Chapter 2, Section B.iv (pg. 84).

46 See Chapter 5, Section A.iv (pg. 196); Chapter 6, Sections A.x (pg. 227) and C.vii (pg. 254); Chapter 7, Section A.vii (pg. 277) and B.iii (pg. 283); and Chapter 8, Section A.vii (pg. 312).

47 Disney's decision, unique among the traditional entertainment companies, to adopt a streaming-style backend system across the company's television production units is discussed in Section A. For ease of reading, this section refers generally to the companies that use such alternative backend systems simply as "streamers." Uniquely for purposes of this section, that word can usually be read to include Disney as among the companies that rely on this approach.

48 This approach is intended both to respect the natural preference of every company not to widely publicize its proprietary business policies and practices, and to acknowledge the reality that such policies and practices at every company are constantly in flux.

talent representatives about revised backend definitions intended to drive more compensation toward rewarding “successful” series; the details of these new proposed definitions have not been widely shared, and may evolve further prior to being officially rolled out in new deals.

Consequently, this section is organized into a series of broad topics that must be somehow addressed in any “alternative” approach to backend (drawing upon examples from across the four companies that use such definitions), rather than as a list of customary negotiated deal terms (the specifics of which would vary highly according to the idiosyncrasies of each company’s approach, to the extent it is willing to negotiate such terms at all).⁴⁹ In addition, because alternative backends are a recent innovation for a still-evolving market, this section describes not only how the applicable terms *are* structured and negotiated in the current marketplace, but offers greater-than-usual speculation about how they *could* be structured and negotiated.⁵⁰

i To MAGR or Not to MAGR?

Even in a marketplace dominated by studios sending most of their shows to affiliated streaming platforms with global reach, standard MAGR definitions can still provide the foundation for contingent compensation, so long as they are paired with the right imputed license fee definitions. Imputed license fees are a decades-old dealmaking tool, and—like MAGR definitions in general—were flexible enough to be adapted across broadcast, cable, and premium cable.⁵¹ An effective imputed license fee structure for streaming is one that explicitly disclaims any obligation to pursue off-platform monetization, buys out rights and imputes revenue in a way that is recognizably similar to prevailing market terms, and ensures that talent are consistently compensated for any series that

49 It also proactively includes several more “as of this writing” qualifiers than other sections.

50 This section is also sometimes intentionally vague as to whether it describes a current or theoretical practice.

51 Of course, recklessly and ineffectively deployed, such imputed license fees can create major exposure—most notably for AMC, which, in 2021, settled a long-running and exceptionally hostile lawsuit about profits from *The Walking Dead*, brought by series creator Frank Darabont and packaging agency CAA, for \$200 million. The core of the dispute was that AMC’s backend and imputed license fee definitions literally had not been written when Darabont signed his deal with AMC (or for some years after), that AMC claimed virtually limitless discretion to unilaterally designate the imputed license fee terms, and that its chosen imputed license fee terms made it essentially impossible for the talent backends for the most-watched show on television and biggest cable franchise ever to “break even.” AMC eventually faced several similar lawsuits brought by the other participants on the series, which remain ongoing as of this writing. While notable for its longevity (nearly eight years) and the mutual nastiness with which it was publicly conducted, the *Walking Dead* litigation sprang from a very particular fact pattern, and did not have the same kind of structural implications for the industry as the *Who Wants to Be a Millionaire?* and *Bones* cases discussed earlier in this chapter.

could reasonably be deemed a success (based on longevity, success metrics, or otherwise).

As of this writing, the studio units of the traditional majors other than Disney (Comcast/NBCUniversal, Warner Bros. Discovery, and Paramount Global) all continue to use their longstanding MAGR (or comparable) backend definitions for sales to affiliated streamers, with updated imputed license definitions reflecting the requirements (and in some cases, the ambitions) of each company's affiliated streaming platform. Sony Pictures Television, the primary television studio unit of Sony/Columbia (the fifth and final extant "major studio") also uses a traditional MAGR definition; but, because Sony Pictures Television is currently the only such major studio that is unaffiliated with any major streaming service or other consumer-facing platform, it does so without significant reliance on imputed license fees.⁵²

While the tech streamers (and Disney) have opted out of this traditional structure, their alternative definitions retain recognizable elements and jargon associated with television backend, and partially replicate the basic structure of MAGR to varying extents. Ultimately, these distinctions are more a matter of style than substance, because there are enough variables available to play with that streamers can back into any desired set of outcomes in any number of ways. Some definitions prioritize familiarity, looking to facilitate easier negotiations by using terms and structures that talent-side negotiators know how to evaluate. Others place a premium on simplicity, shedding much of the arguably unnecessary math of participations accounting in favor of clear, predictable, and intuitive defined entitlements.

ii On-Platform Streaming Exhibition

The core of these alternative backend definitions is how they compensate talent for the streamer's own exhibition and exploitation of the series.

Where the backend retains a MAGR-based structure (in which production cost and other defined charges are recouped against imputed revenue), the prevailing practice has been for the streamer to impute as revenue 100% of the cost of production⁵³ for the first season of the series, escalating incrementally from

52 This could change if Sony is successful in its ongoing (as of this writing) bid to acquire Paramount Global (and with it, in addition to Paramount's studio business and library, its portfolio of streaming, broadcast, and cable networks).

53 By calculating the license fee against actual production costs (rather than ingoing budget), the streamer not only protects participants from dilution in their backends should the company go over its own budget for the production; it allows the talent to benefit somewhat from such overages in the form of increased imputed cost-plus license fees. (That said, unless the premium is high enough, such gains are outweighed by the added production costs' impact on calculated interest and overhead charges.) This stands in contrast to license fee premiums in license agreements between streamers and supplier studios, in which percentage-based premiums are typically calculated against the

season to season thereafter, eventually maxing out somewhere around 125% of cost. That imputed license fee may be deemed to buy out perpetual exhibition, or only a finite term (typically running until between one and ten years following the initial exhibition of the final series episode), after which further exhibition is subject to defined optional additional imputations or to good faith negotiation, potentially with a “baseball arbitration”⁵⁴ mechanism for resolving negotiating impasses.⁵⁵

As of this writing, however, the more common practice among companies in this group is to eliminate most or all defined accounting for the streamer’s use of the show in favor of flat bonuses for each “point” of backend, primarily tied to the longevity of the series—currently ranging from as little as \$10,000 per point for the first cut-in on a half-hour program, to an aggregate value of \$1 million or more per point by the sixth or seventh season of a one-hour program. These are commonly referred to as “dollars-for-points.”

Dollars-for-points are always defined more favorably for one-hour programs than for half-hours, reflecting the relative value of such programs in recent industry history (at least since the decline of the megahit sitcom).⁵⁶ The incremental value added to each point is generally greater for later seasons than for earlier seasons, but may or may not continue to grow after a show’s seventh season.⁵⁷ They may start paying as soon as after a single season is produced

ingoing budget (and/or subject to an immediately meaningful cap), thus closing what the streamers regarded as a “loophole” in prior license templates that allowed studios to enjoy increased license fee premiums when they went overbudget (also at the streamer’s expense). See Chapter 11, Section A.iv.c (pg. 415).

54 Borrowed from Major League Baseball, baseball arbitration requires both parties to submit their proposed deal terms to a neutral third-party arbitrator, who chooses one of the proposals as-is (without modification or compromise).

55 It is worth noting that, as used by the tech streamers, these imputed license fees buy out exhibition worldwide, whereas the imputed license fee exhibits used by legacy studios producing for their own streamers often provide for an imputation of roughly 90%–100% of cost (with escalations) for domestic rights only, with additional territories (like extended term) being subject to defined optional additional imputations or to good faith negotiation.

56 If further systemic shifts in the industry make half-hours particularly valuable again on a sustained basis, this would presumably evolve to keep up with more recent relative values.

57 Looking only at subscription streamers launched before 2019, as of this writing: Netflix’s longest-running half-hour (and the streaming original with the record for most episodes) is *Grace and Frankie* (7 seasons, 94 episodes), longest-running one-hour is *Orange Is the New Black* (7 seasons, 91 episodes), and longest-running ongoing series is Canadian drama *Virgin River* (5 seasons, 54 episodes, with a sixth 10-episode season ordered in 2023), just beating out *Stranger Things* (4 seasons, 34 episodes, with a fifth and final 8-episode season set to be released in 2024). Treating the one-hour *OITNB* as a comedy, Netflix’s recordholder for drama is *House of Cards* (6 seasons, 73 episodes). Amazon’s longest-running one-hour series is definitive “Dad TV Show” *Bosch* (7 seasons, 68 episodes), longest-running half-hours are *The Marvelous Ms. Maisel* (5 seasons, 43 episodes) and *Transparent* (5 seasons, 41 episodes), and longest-running ongoing series is *The Boys* (3 seasons, 24 episodes, with a fourth 8-episode season set to be released in 2024). Hulu’s longest-running series is half-hour teen drama *East Los High* (5 seasons, 61 episodes), longest-running half-hour comedy is *Casual* (4 seasons, 44 episodes), and longest-running (ongoing and all-time) one-hour is *The*

or may be deferred to as late as the fourth season,⁵⁸ with the second or third season being the most common thresholds. The values of these points may be offered in distinct tiers for participants of different stature (roughly replicating the impact of better or worse traditional backend definitions, primarily differences in distribution fees and overhead charges) or applied consistently to all participants.⁵⁹ They may be tied to specific expectations for episode counts per season and subject to proration up or down for longer or shorter orders. There may be special terms for projects that are specifically intended as limited series (with further adjustments should they subsequently convert to ongoing series).

There is also the matter of scope. Dollars-for-points bonuses may buy out on-platform exhibition permanently, or only for a limited period (again, typically running until between one and ten years following the initial exhibition of the final series episode), after which some kind of further longevity bonus is due.⁶⁰ They also may or may not entitle the streamer to retain certain subdistribution revenues during the bought-out term.⁶¹

iii Success Bonuses/Enhancements

Both MAGR/ILF and dollars-for-points-based structures generally include a selection of bonuses or enhancements tied to different measures of success. For the former, such bonuses are “paid” in the form of additional imputed revenue that is run through the participation waterfall. For the latter, success bonuses usually just mean more and/or bigger cash bonuses paid directly to participants, which may come in the form of “enhanced” valuations to the governing dollars-for-points schedules or separate direct payments to participants, and which may be denominated on a “per point,” “per episode,” or “per season” basis. In addition, some companies prefer to use “pool” bonus structures for certain escalators, in which participants take part in a defined bonus “pool” in proportion to

Handmaid's Tale (5 seasons, 56 episodes, with a sixth and final season scheduled to start production in mid-2024).

58 The fourth season being the earliest point at which a broadcast show could generally be expected to start paying participants pursuant to their defined backends.

59 There is usually an implicit asterisk next to any use of the word “all” when it comes to deal-making practices and policies, which often prove bendable or breakable for the highest-level talent holding all the leverage in a must-have deal. Also, talent and their representatives are usually not egalitarians when it comes to deal terms—especially financial ones—that studios seek to apply on a universal basis without regard for stature. In short, some stars simply aren’t satisfied unless they’re making more than somebody else, and representatives always want their high-level clients to feel like they are getting high-level treatment. For that reason, when a company uses a consistent schedule of point valuations that is not tiered for participant stature, they sometimes “grow the pot” and dole out more points to the higher-stature participants on a series, to create some sense of hierarchy in the participants’ entitlements.

60 See Section C.iii.

61 See Section C.iv.

their share of the total number of “points” accorded on that project.⁶² Any given success bonus can theoretically be derived using any combination of triggers and payment structures.⁶³

There are two forms of “longevity” that can drive increased backend on streaming series (whether in the form of increased imputed revenue for MAGR calculations or increased direct bonuses): many seasons ordered, and many years of exhibition on the service (after the show has ceased producing new seasons). The former is already baked into imputed license fee percentages and dollars-for-points tables, which escalate from season to season (with the largest increments kicking in around the sixth season). The latter typically kick in, if ever, five to ten years after initial exhibition of the final series episode—consistent with when the network’s exclusive license term might be expected to end in a license agreement with a studio, which would require the platform to negotiate additional license fees to extend its exhibition rights (exclusively or otherwise).⁶⁴ It may, however, kick in much earlier—as soon as one year after the premiere of the final series episode. These bonuses for extended exhibition may be referred to as “library bonuses.”

Dollars-for-points schemes may also incorporate additional bonuses or escalators for achieving specified viewership rankings. These tend to specifically be *rankings* bonuses and not *ratings* (or “viewership”) bonuses; this is because ratings/viewership bonuses would require a platform to disclose relevant measures of viewership on a show-by-show basis, whereas ratings bonuses only require a platform to disclose the strength of a series’ performance *in relation to other series during the same time period*—no actual metrics or show-specific performance data required.⁶⁵

62 Because the math here is flexible, such bonuses could theoretically be restructured to be defined and payable “per point.” Pool structures are favored, however, when a platform wants to more clearly communicate to talent and their representatives the extent of its aggregate financial commitments to participants on the series, at least with respect to that particular bonus. If a packaging agency (if any) is entitled to enjoy the same types of escalators as its client(s) (which would be typical, given the way that agency backend definitions are customarily tied to those of their clients), it would need to be included in the pot/pool for proration and payment purposes.

63 For flat bonuses, it is customary to provide for a specific dollar-amount valuation of each such bonus, however otherwise defined and calculated (e.g., point vs. season, individual vs. pool, etc.). For additional imputed license fees in MAGR-based backends, the additional ILFs may be similarly pre-defined (either on a dollar-amount of further percent-of-budget basis), or may be left to future good faith negotiation (with potential dispute resolution mechanisms for negotiating impasses).

64 See Chapter 11, Section A.vii (pg. 430).

65 See Chapter 2, Section B.iv (pg. 84). While this structure is consistent with the streamers’ general hostility toward data transparency, and therefore potentially frustrating for talent who are hungry for a deeper understanding of the performance of their projects, it is also arguably protective of talent, when considering the tendency of such threshold measures to change very slowly (if at all) in response to changing market conditions. For instance, contemporary broadcast network license agreements often feature “ratings and rankings” bonuses tied to viewership thresholds that were set many years ago, have been barely (if at all) adjusted in the intervening years, and have therefore

There are many potential approaches and nuances to the structure and mechanics of such rankings bonuses, including:

- Choices about tiering and thresholds for such bonuses, including the lowest ranking that triggers any such bonus or enhancement (e.g., “Top 3” versus starting lower in the rankings), and to what extent (if any) a higher ranking yields a larger bonus or enhancement than a lower qualifying ranking;
- Whether such bonuses are defined and awarded on “per episode” or “per season” basis;
- Whether such bonuses are defined and awarded individually to each participant, or provided as an aggregate pool to be shared among all participants pro rata;
- Whether the value of such bonuses or enhancements is offered in distinct tiers for participants of different stature;
- Whether successfully achieving a specified threshold triggers a one-time bonus payment or a permanent going-forward enhancement in dollars-for-points entitlements; and
- Whether such bonuses/enhancements are available starting with a show’s first production season, or applicable only once a series has reached a certain number of seasons.

The rankings themselves must be defined with enough specificity to be measured unambiguously, including:

- The relevant metrics on which rankings are to be determined, including (1) the relevant time periods (e.g., calendar year or broadcast year, including how to account for shows whose releases span across two defined periods); (2) viewership windows (specified weeks or months from release dates); (3) viewership measures (e.g., Nielsen or other third-party ratings, minutes viewed, completions, etc.); and (4) adjustments to such measures (if any) for episodic counts and/or program length;
- To the extent that such measures rely on Nielsen (or other third-party-published) data, the relevant Nielsen (or equivalent) metric(s) to be considered, including measurement period (e.g., Live + SD, Live + 3, Live + 7) and demographics (e.g., all viewers, Adults 18–49, etc.); and
- The universe of other series against which the participant’s series is competing, e.g., only other series on the same platform (typical in streaming,

been essentially unachievable for several years as viewership of broadcast television overall has declined precipitously. See Chapter 11, Section A.iv.g (pg. 420). Because rankings requirements are relative rather than absolute thresholds, in practice, they automatically adjust to evolving market conditions that affect the reasonable performance expectations for any given project, in any given medium, at any given time.

where platforms have wildly disparate subscriber counts) versus series on other platforms within the same medium (typical of linear shows, which may compete against all other linear shows, or limited only to other broadcast, basic cable, or premium cable shows, as applicable).

To the extent that rankings bonuses rely on non-public viewership measures that are known only to the company, in lieu of disclosing such data to participants, companies generally agree to confidentially provide it to trusted third-party audit/accounting firms (such as PricewaterhouseCoopers, which tabulates votes and verifies winners for the Oscars), which sign off on or independently determine the rankings for each relevant period on the company's behalf.

Bonuses and enhancements may also be tied to critical acclaim, reflected most simply by major industry awards.⁶⁶ Typically, this would be limited to the Emmys and Golden Globes (the two most prominent and prestigious awards for television), and to the highest non-individual awards ("Outstanding Drama," "Outstanding Comedy," and "Outstanding Limited or Anthology Series").⁶⁷ Bonuses may be payable only for wins, or payable at smaller amounts for nominations with escalations for wins. Like all other bonuses, they may be structured and paid based on episodes or seasons, and calculated and paid to participants individually (according to the number of points in their respective deals) or via aggregate bonus pools (shared on a pro rata basis).

As third-party-measured and self-reported performance data improves in both quality and detail in the years to come, negotiators may devise any number of more sophisticated metrics that can be used to determine rankings or otherwise define a kind of "success" for a series that warrants additional backend compensation for its participants. Because streamers concerned about administrability apply such alternative backend schemes on a substantially consistent basis across all participants, however, significant change in the existing models is likely to be slow, and may work out to be more radical than incremental if companies prioritize rolling out changes infrequently and universally.

iv Off-Platform Streaming Exhibition

The general premise of alternative backends in streaming is to buy out a broad universe of uses of a series by its commissioning platform for fixed defined compensation,⁶⁸ while keeping actual revenue (if any) received from (most)

66 See Chapter 8, Section A.viii for a discussion of such awards bonuses in the context of actor deals.

67 In theory, bonuses could be tied to "lesser" awards shows (e.g., the Critics' Choice Awards) or categories.

68 Which may be in the form of imputed revenue run through a standard or modified MAGR definition, or flat dollars-for-points conversions.

monetization streams (largely) accountable to participants. Where this can get more complicated is with respect to exhibition of library series on third-party streaming services.⁶⁹

Streamers can take any number of distinct but reasonable and good faith perspectives on the accountability of revenue from licensing their original series to competing streamers. Platform A may view such exploitation as equivalent to any other form of exploitation off of the series's original platform.⁷⁰ Platform B may take the view that its alternative backend structure is meant to fundamentally distinguish streaming from all other forms of exploitation, and that its principal imputed license fees or dollars-for-points bonuses therefore should buy out *any* exhibition on streaming, not only by the commissioning platform or its affiliates.⁷¹ Platform C might mostly agree with Platform B, but be willing to distinguish between streaming revenue generated from territories where Platform C operates its own service versus that generated from territories where Platform C does not operate (directly or via affiliates).⁷² Platform D might draw distinctions with reference to the typical "exclusive terms" of the streamers' licenses in their deals with supplier studios.⁷³ Any one of these positions makes sense and is defensible in the context of a coherent, sensible, and

69 Until relatively recently, this was an extremely theoretical consideration, as streamers long demonstrated no interest in making their original series available on any competing platforms. That longstanding taboo among streamers was broken in 2023, and cross-licensing of library originals between streaming services looks likely to become a consistent feature of the market (the scale of which is yet to be determined). See Chapter 2, Sections B.vi–vii (pg. 89).

70 In essence, the attitude here is "money is money, we don't have to try to make it, but if we do, the participants will get their piece."

71 Under this view, a platform that elects to license an original series to a competing streamer must give up something of value to make that deal—at least its exclusive control over the content, and perhaps the right to continue to exhibit it altogether—and that it is therefore entitled to solely retain any revenue from such subdistribution in the same medium to compensate itself for that sacrifice of value.

72 Interestingly, when distinguishing between territories according to whether the platform operates a service locally, one can reasonably support either allocation of shareable vs. non-shareable revenue from off-platform streaming. For example, a platform could justify retaining revenue from licenses within its service territory for the same reason proffered by Platform B. A different platform could take the position that it has not yet had the opportunity to extract any value from its rights in territories it controls but where it does not operate a local service, and therefore it should be entitled to retain revenue from those territories as its first (and perhaps only) means of recouping its investment in acquiring those rights.

73 See Chapter 11, Section A.vii (pg. 430). For example, a platform could treat as non-accountable revenue generated from third-party streaming licenses during the equivalent of the "exclusive term" in third-party agreements, while accounting fully for revenue generated from licenses after that initial period. Alternatively, revenues from third-party streaming licenses may be credited, at least in part (e.g., 50%), against previously paid dollars-for-points bonuses or previously recorded imputed receipts.

holistically fair overall system of backend (with appropriately valued imputed license fees and/or dollars-for-points bonuses).⁷⁴

v Other Off-Platform Exploitation (*Linear, Ancillary, Etc.*)

To quote the immediately preceding section:

The general premise of alternative backends in streaming is to buy out a broad universe of uses of a series by its commissioning platform for fixed defined compensation, while keeping actual revenue (if any) received from (most) monetization streams (largely) accountable to participants.

Such revenues may be accounted for in a conventional MAGR definition (i.e., on a cross-collateralized basis with all other imputed or actual revenue from all other forms of exploitation and all expenses of any kind); in individual “separate pots” (with revenues and expenses not cross-collateralized with any other media/streams); or in any combination of specified streams (cross-collateralized only with each other).⁷⁵ These participations in off-network revenue streams may be defined to cover revenue only from specifically delineated media/types of exploitation, or include some form of “catch-all” to capture any monetization not otherwise governed by more specific terms.

As with conventional MAGR definitions, where the company is part of a vertically integrated conglomerate with operations in related industries like music, publishing, and consumer products,⁷⁶ it may include additional terms designed to translate revenue earned “at source” (e.g., at the Disney Store, on Amazon.com, or in the Apple iTunes store), via a series of deductions and/or royalty calculations, to what the television production unit’s reasonable share of such revenue would have been had it exploited such rights via unaffiliated third parties pursuant to customary terms (and include only those amounts in gross receipts).⁷⁷

In general, in alternative backend definitions that are not MAGR-based, platforms account for 100% revenue from the exploitation of “home entertainment”

74 This is one of many places where one could point out the general desire of talent representatives to stitch together “best of all worlds” deals incorporating the most favorable versions of various terms from across the universe of studios, as contrasted with the desire of most studios’ to put together a mix of policies—some more conservative, some more talent-friendly, all generally reflecting those companies’ own idiosyncrasies and traumas—which, in the aggregate, are not systematically better or worse for talent than the general mass of studios, or which are comparable in aggregate talent-friendliness to a particular subset of close competitors.

75 Outside of the streaming context, studios seldom agree to “separate pot” accounting for any category of revenue, except in limited circumstances for certain merchandising receipts. See Chapter 5, Section A.vii (pg. 197).

76 So, everyone in this group except Netflix.

77 See Section B.i.a.

rights (both physical home media and EST/TVOD), deducting 100% of corresponding expenses. This is distinct from conventional cross-collateralized MAGR definitions, which typically account for receipts from both physical and digital “home entertainment” on a royalty basis (usually 20%, with or without further deduction of associated costs).⁷⁸

Merchandising and ancillary rights are another typically accountable revenue stream in alternative backend definitions, although with a variety of exclusions specific to each platform. For example, streamers with affiliated device manufacturers may claim the right to co-brand and integrate series elements into new versions of the company’s existing products and services without actual or imputed compensation due to participants. Some companies may exclude theme park rights. Others may limit their definitions of merchandising to physical items or accord particular treatment to video game revenues. Certain rights may be excluded with respect to preexisting franchises or series based on library intellectual property. Every platform excludes receipts from derivative productions.

Every alternative backend definition explicitly disclaims any obligation for the streamer to engage in off-platform monetization of any kind, but they may take different views with respect to the consequences of that lack of obligation. One approach is to do nothing, ascribing no value to off-platform rights not actually monetized (and expressly disclaiming any obligation to do otherwise). Another is to impute additional defined license fees if specified revenue streams remain unexploited within a certain time (and these additional fees may also be tiered according to how many total seasons were produced).⁷⁹ A third is to provide for the parties to negotiate in good faith with respect to a revenue imputation for unexploited rights, with a dispute resolution mechanism (such as baseball arbitration) if they reach an impasse in negotiations.

vi Deductions

Like all backend definitions, the streamers’ alternatives to MAGR (to the extent based on actual revenue rather than structured as flat buy-out bonuses) all provide for certain defined deductions from accountable revenue. For legacy studios that use traditional MAGR definitions with imputed license fee exhibits on shows produced for affiliated streamers, those deductions replicate the structure and concepts laid out in Section B. Alternative backends favored by streamers reflect a mix of approaches to deductions that borrow from that traditional model.

⁷⁸ See Section B.i.a.

⁷⁹ As of this writing, these imputed license fees are valued at hundreds of thousands of dollars per episode for revenue streams such as home entertainment and off-platform linear rights.

Revenue streams that are accounted for on a “separate pot” basis are typically subject to the deduction of distribution fees and recoupment of distribution expenses specific to the exploitation of such rights. These distribution fees track the conventions of standard MAGR definitions—e.g., generally ranging between 10% and 25%, potentially with higher distribution fees (e.g., 30%–50%) applicable to certain streams of ancillary revenue, such as music publishing, soundtracks, and merchandising. Often, such distribution fees and distribution expenses are the only deductions applicable to these revenue streams.

Even where talent participations are accounted for in separate accounting streams (rather than via a single cross-collateralized waterfall), a shared set of defined deductions may still be applied across those separate streams of imputed or actual revenue. In other words, MAGR-style deductions for production expenses and associated “soft charges” (i.e., interest and overhead) may be applicable in full against separate revenue streams, one at a time, in a specified order.⁸⁰

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TABLE 9.2 Alternative/Streaming Backend

<i>Deal Term</i>	<i>Issues and Negotiated Concessions</i>
1. To MAGR or Not to MAGR?	• Basic structure may be full standard MAGR with imputed license fee exhibit, defined participation in specified revenue streams that partially replicates the structure of MAGR, or simplified flat-dollar bonus structures • Comcast/NBCU, WBD, and Paramount all use standard MAGR + ILF structure; Sony (the largest “independent” studio) uses traditional MAGR without ILFs; Netflix, Amazon, Apple, and Disney have transformed or replaced it
2. On-Platform Streaming Exhibition (MAGR-Based Systems)	• ILFs start at 100% (for worldwide rights), or lower (for domestic rights only), of cost of production and escalate incrementally to approximately 125% of cost • May provide for GFN or defined additional imputations for additional territories or beyond bought-out term

(Continued)

80 The first revenue stream against which such expenses are deducted will, in effect, be significantly deferred or altogether exhausted before generating value for participants. To the extent that the first revenue stream is insufficient to cover the full recoupable expenses, any unrecouped expenses are applied against the next revenue stream on the list until recouped (or further passed to a third revenue stream if not fully recouped between the prior two streams, and so on).

TABLE 9.2 (Continued)

<i>Deal Term</i>	<i>Issues and Negotiated Concessions</i>
3. On-Platform Streaming Exhibition (Dollars-for-Points)	• Generally higher for 1-hours than ½-hours • May be tiered for stature or flat for all participants • Larger increments for later seasons (may or may not max out) • May start anywhere from Y1–Y4 (with Y2 or Y3 most common) • May be tied to specific episode counts or ranges with proration up/down • May have special terms for limited series • May have library longevity bonus for exhibition beyond a defined term (1–10 years after initial exhibition of final episode)
4. Success Bonuses/Enhancements	• For MAGR/ILF, may provide additional imputed revenue, which may be pre-defined (flat or percentage-based) or left to GFN (with resolution mechanism for impasses) • For dollars-for-points, may be treated as additional flat pay-outs or enhancements to default point value tables • Bonuses may be defined per episode or per season, and may be calculated for participants individually (per point) or by aggregate bonus pool shared pro rata among participants • Longevity bonuses for additional produced seasons (escalating increments for later seasons) and/or long-term library exhibition (e.g., over 1–10 years after premiere of last episode) • Rankings bonus structures must account for tiering and thresholds; defining awards per episode vs. per season; defined for each participant by point vs. shared aggregate pool; tiering for stature; and one-time awards vs. going-forward enhancements • Rankings must be determined by defined criteria, including time periods, viewership windows, viewership measures (third-party or internal), adjustments for episode counts and/or program length, and universe of competing series being ranked • Proprietary data provided to third-party auditors to analyze and determine or verify rankings, not disclosed to participants • Awards bonuses (Emmys and GGs, major categories, nominations vs. wins)

(Continued)

TABLE 9.2 (Continued)

<i>Deal Term</i>	<i>Issues and Negotiated Concessions</i>
5. Off-Platform Streaming Exhibition	• May be bought out (i.e., sublicensing revenue not accounted for to participants) worldwide or for specified territories • Distinctions by territory may be tied to whether the platform operates a service there (directly or via an affiliate) • May be bought out permanently or for a specified initial period (roughly equivalent to the exclusive license term in a license agreement with a supplier studio) • May not be bought out at all
6. Other Off-Platform Exploitation	• May be accounted for in separate pots, in groups of specified revenue streams, or in a full cross-collateralized MAGR waterfall • May be limited to specific defined media/rights, or include a catch-all for “everything else” • Revenues for ancillary streams in vertically integrated conglomerates included in gross receipts, after translating “at source” revenue to studio level according to defined formula • Separate pot home entertainment revenue (physical and EST/TVOD) accounted for at 100% of receipts (rather than royalty basis) • Merch/ancillary sharing always excludes derivative rights, and may exclude theme park rights, plus further company-specific exclusions (e.g., for existing products, use of library IP, etc.) • Company has no obligation to monetize off-platform rights • Definition may include specified (e.g., six-figure) episodic fees to be imputed if specified rights are not exploited within specified time, or provide for good faith negotiation with dispute resolution (e.g., baseball arbitration)
7. Deductions	• Standard deductions for MAGR/ILF-based backends • All off-platform monetization subject to deductions for distribution fees (10%–25%, up to 50% for certain ancillaries) and distribution expenses applicable to accountable rights • Deductions for production costs, interest, and overhead may be applied sequentially across independent accounting waterfalls

10

OVERALL AND FIRST LOOK DEALS

In the highly competitive environment of modern television, the lifeblood of a studio is the writers, directors, and actors who want to work there. Studio creative executives develop and nurture relationships with talent and their representatives, and each studio constantly seeks to make a case for itself as the best home for talent and their most cherished projects. Network-affiliated studios advertise their advantages in winning series orders on their affiliated platforms, the clarity of their creative mandates, and the absence of multiple layers of executive interference with the talent's creative desires. Independent studios advertise their ability to shop projects freely and find the best (and most lucrative) home for every show, their unconflicted motivation to maximize their economic returns on every project (and therefore profit participants' economic returns), and the role they can play in protecting and supporting talent against unreasonable network demands. Virtually every studio claims to offer the best working environment, the most creative freedom, and the most "talent-friendly" attitude.

Most studios structure deals in roughly the same way, and pay roughly the same amounts for similarly situated individuals on a show-by-show basis. Where economic competition really comes into play alongside the aforementioned noneconomic factors, however, is in the context of overall term deals (or "overall deals" or "overalls") and first look deals. Under these agreements, studios offer highly desirable writers, producers, and directors significant, long-term guaranteed compensation, in exchange for the talent's fully or partially exclusive services during the life of the agreement. Overall term deals and first look deals are a vital element of how studios compete to stay relevant, by offering the marketplace of network buyers something that no one else can—the specific creative talent they want to work with.

During the “peak TV” era, overall agreements for prominent creators were one of the fastest-booming areas of the television market (alongside option fees and purchase prices for underlying rights¹ and fees for star actors).² Guarantees rose for creators at all levels, as companies raced to lock down proven creators before their competitors could do so first. And just as the market has borne witness over the last five to ten years to a few wildly expensive and/or unusually structured “black swan” agreements for underlying rights deals, a handful of the most prolific and powerful creator/showrunners have received astronomically lucrative overall deals that would have been unimaginable just a few years before. All of the major players in the industry have participated in this red-hot marketplace since 2017, but two have stood out for their particularly aggressive dealmaking with top-end creators: Netflix struck multi-year deals with Shonda Rhimes³ for a reported \$100 million and with Ryan Murphy⁴ for a reported \$300 million, while Warner Bros. guaranteed a reported \$300 million to Greg Berlanti⁵ and a reported \$500 million to J.J. Abrams⁶—all in unusual and complexly-structured deals, whose reported top-line values have sometimes been questioned and disputed by industry insiders.

Beyond their eye-popping financials (and in part because of them), these deals are also remarkable for being at least partially non-exclusive: Rhimes and Murphy retained their rights to remain involved in (and separately compensated for) their large slates of ongoing series that predated their deals with Netflix, while J.J. Abrams and his company (Bad Robot) retained their rights to continue developing and producing new projects for studios other than Warner Bros. (with some restrictions). In other words, except for in the case of Berlanti (whose deal was truly exclusive, a fact made easier by his longstanding exclusive relationship with Warner Bros.), these companies were paying nine-figure sums for, essentially, timeshares on these creators’ already-crowded schedules.

These mega-deals seem to have generated mixed results. Shonda Rhimes had little substantial output during the first years of her deal with Netflix, but eventually generated smash hits *Bridgerton* and *Inventing Anna*, which reportedly earned her a “significant” raise when the parties extended her deal in 2021. Ryan Murphy’s deal at Netflix was, almost until its end, widely viewed as a bust, generating forgettable vanity projects like *The Politician* and *Hollywood* as Murphy remained heavily engaged with his many preexisting projects at FX. Murphy apparently turned things around toward the end of his deal with

1 See Chapter 5 (pg. 189).

2 See Chapter 8, Section A (pg. 301).

3 Of *Grey’s Anatomy*, *Scandal*, *Private Practice*, and *How to Get Away With Murder*, among others.

4 Of *Nip/Tuck*, *Glee*, *American Horror Story*, and *American Crime Story*, among others.

5 Of the DC Comics *Arrowverse* franchise of CW series including *The Flash*, *Green Arrow*, *Superman & Lois*, as well as other hits like *Riverdale*, *You*, and *The Chilling Adventures of Sabrina*.

6 Of *Felicity*, *Alias*, *Lost*, and *Fringe* (among others), as well as numerous major feature film franchises (including the Chris Pine-led *Star Trek* reboot and the *Star Wars* sequel trilogy).

Netflix, generating mega-hits *Monster: The Jeffrey Dahmer Story* (like many Murphy shows, to be anthologized, focusing on other serial killers in future seasons) and *The Watcher*. But just as his relationship with Netflix seemed to be bearing fruit at last, he decided to move on and sign a new pact with Disney (with whose Co-Chairman of Entertainment, Dana Walden, Murphy had long worked at Fox prior to moving to Netflix in 2018). Berlanti's output took a sudden hit when Nexstar acquired the CW network (home to Berlanti's expansive *Arrowverse* franchise) from prior owners/joint venturers CBS and Warner Bros. in 2022 and immediately pivoted to a much lower-cost operating model that left little room for even mid-budget original dramas. Nevertheless, he has remained prolific, as well as truly exclusive to Warner Bros. in his work, and extended his lucrative overall there in 2023. J.J. Abrams has reportedly been under close scrutiny from the cost-conscious new management at Warner Bros. Discovery and has yet to deliver them any meaningful hits.

In any event, now that the “peak TV” era has ended and belts have tightened across the industry, the market for overall deals has contracted dramatically. Studios are increasingly allowing costly overalls to expire or converting them to lower-cost first look deals (which may be regarded by lawyers and agents as bad deals if the guarantees are too low or the process for getting passes on projects is not tight enough). Many high-earning creators have extended their deals, but with flat or reduced guarantees (sometimes substantially) for the extended term. Studios have been cutting back both in how many overall deals they maintain and how much they spend (individually or across the group), and rising writers who expected to win their first-ever overall deals have especially found little appetite among the studios for making or extending deals with up-and-comers, especially those with little or no proven experience as producers.

A Overall Term Deals

An overall deal is an agreement by which a studio obtains the fully exclusive⁷ services of an individual for the term of the agreement. Studios retain ultimate discretion regarding whether to proceed with development or production of any given project, but even if the studio declines to proceed with a given project proposed by the talent, the talent cannot shop the project to third-party studios during the term of the overall. Studios may enter into overall deals with writer/producers, non-writing producers, or directors, although overall

⁷ In this context, “fully exclusive” generally means fully exclusive *in television*, with the individual retaining the right to write, direct, and/or produce feature films for third parties. However, if a television studio is affiliated with a theatrical motion picture studio, the individual may enter into a comparable deal to be fully exclusive in features with the sister studio. And, to the extent that an individual's non-television services (whether for an affiliated or unaffiliated third party) render that individual unavailable to render television industry services, the television studio may suspend and extend the term of the artist's overall term deal for the duration of such unavailability.

deals with writer/producers are most common. Prolific writer/producers such as Rhimes and Chuck Lorre⁸ can balance numerous projects simultaneously in part because of their carefully managed long-term relationships, via overall deals, with their home studios.⁹

Overall deals are most often offered to highly successful and desirable show creators, and most highly successful and desirable show creators choose to work under overall deals rather than operating as free agents (although they may leave one studio for another when their deals expire). The majority of overalls contemplate that the individual will dedicate a significant amount of their time and energy to developing and launching new projects. However, once a television series truly takes off, even mid-level writers without significant intentions or prospects for development may demand the security of a more modest overall deal as an inducement to stay with (and therefore maintain the creative continuity of) a long-running television show.¹⁰

When granted to non-writing producers, overall deals are often referred to as “pod deals.” A non-writing producer (including their production company team) in a pod deal offers a sort of semi-independent, outsourced team of creative executives and talent scouts. Studios effectively bolster their own creative ranks, without directly taking on all the associated overhead. Pod deals are generally less costly than exclusive overalls for creators. And, because non-writing producers tend to work on many more development and production projects at any given time than do writer/producers, studios looking to quickly build up their slates or to deploy their finite budgets across more deals may focus their investment in overall deals on “pods” rather than writers.

The key negotiables of an overall term deal are as follows:

i Term

The first issue to negotiate is the duration of the agreement. Most overall deals are for a term of between one and five years, with two years being particularly common for new relationships. One-year deals may be favored for especially uncertain new relationships, while three- or four-year deals may be favored

8 Whose expansive slates are discussed in Chapter 6, Section A.v (pg. 222).

9 Sometimes, upon the end of the term of a prominent writer’s overall deal with a given studio, the writer elects to enter into a new deal with a competing studio, rather than renewing their agreement with their prior studio. In such cases, the original studio retains ownership and control of all series created by the writer while working for that studio. In addition, all of the parties may need to negotiate further with respect to the amount of time/level of services the writer may continue to render for their ongoing series with the prior studio, once that writer is on the payroll of their new “exclusive” studio employer.

10 Where such overall deals are entered into solely or primarily to retain the services of the writer for the benefit of a specific ongoing series, they are sometimes referred to colloquially as “showveralls,” and much or even all of the cost of such agreements is accounted for as a production cost of the applicable series.

for high-level creators, especially when the parties already have a long history with each other (and are perhaps entering into a second or third consecutive overall term).

The years under an overall deal may be fully guaranteed, or in part at the studio's option. For instance, a "2 + 1 deal" refers to an overall with a two-year guarantee and a third-year extension at the studio's option. Sometimes, such options can be triggered (i.e., automatically deemed exercised) if the talent achieves certain benchmarks of success, such as having a specified number of pilots or series ordered to production, or getting one or more ongoing series renewed for additional seasons. In success, to reduce the risk of talent poaching by competitors, studios often seek to negotiate extensions to overall deals well before they are set to expire.

ii *Guarantee*

The economic value of an overall deal can be summarized briefly: how much money, for how many years? This, however, is perhaps too much of an oversimplification. In fact, the nuances of the structure of the overall deal guarantee can have a significant impact both on how much the talent may expect to earn over the life of the deal, and how much the deal will actually cost the studio out of its own pocket.

a *Financial Guarantee*

The first aspect of the guarantee to negotiate is that essential question: how much money, for how many years? The "how many years" part of that question was discussed earlier. As for "how much money," before roughly 2015–16 (when these deals entered their "peak TV" boom years), that may have meant anywhere from \$300,000 per year for a mid-level writer whose only job would be to continue working as a staffed writer on an ongoing series, to \$4,000,000 per year for a well-known show creator with a proven track record. As the market boomed, however, aggressive competition for creators with virtually *any* track records pushed the value of such deals to \$6–\$10 million per year even for creators with only one or two significant shows under their belts, \$10–\$20 million per year for especially "hot" creators being courted by multiple bidders, and even higher for the most prolific creators like Michael Schur (creator of *Parks and Recreation* and *The Good Place* at NBCUniversal) or those with megahits on their resumes like David Benioff and DB Weiss (creators of *Game of Thrones*, now at Netflix).

Now that we have collectively passed the "summit" of "peak TV," with shrinking slates and slashed costs the new prevailing industry-wide trends, the once-hot market for overall deals has begun to cool. As of this writing, the overall tenor and trend of the market for overall deals is clear, but the specifics of the

“new normal” are still being worked out. Few people expect to see more nine-figure mega-deals anytime soon. Although the streamers have been burned, sometimes quite badly, by very expensive deals that yielded little or no value (or even output), the expectations of high-level creators and their representatives have grown significantly from pre-“peak TV” norms. Thus, some creators/showrunners are still able to command multi-year deals with \$10 million per year guaranteed—but those same creators/showrunners might have been receiving \$15 million per year or more during the preceding term of their deal. To date, the cooldown has been seen most of all in the newfound conservatism shown by the studios and networks in making or renewing such deals at all. Fewer and fewer writers are now in overalls. In the long run, this climate of less exclusivity may promote a more vibrant market for new pitches, scripts, and series; in the short run, it will probably be a significant financial shock to dozens of creators who had expected to remain in overalls for much or all of the rest of their careers.

Non-writing producers (i.e., pod deals) and directors normally expect to earn annual guarantees toward the lower end of that range, between \$300,000 and \$1,000,000 per year, although major film directors entering into television overalls may command north of \$2,000,000 per year. And, like the market for creators, these deals have risen substantially in value during the “peak TV” years, especially for production companies affiliated with major on-screen talent like Jordan Peele’s Monkeypaw Productions and Michael B. Jordan’s Outlier Society Productions (both in lucrative deals with Amazon as of this writing).

The financial guarantee is typically flat for every year of a deal, although where a studio makes one or more years of the deal at its option rather than fully guaranteed, it may agree to a slightly higher guarantee (e.g., an uptick of 5%–10%) for the optional year(s).

b Recoupability

The guaranteed compensation under an overall deal is almost always, in whole or in part, an advance against fees earned by the talent for services rendered during the term of the overall deal. In other words, during the term of the deal, the talent will not see any new money (or “fresh cash”) for services for which the applicable fees are deemed to be recoupable against the overall guarantee (at least until the total aggregate value of such fees exceeds the guarantee against which they are recouped).¹¹

From the talent’s perspective, recoupability is important because it defines the extent to which the talent may expect to earn any fees, beyond their

11 The term “fresh cash” can be used more generally, whenever someone receives any kind of financial guarantee or advance, to refer to additional sums actually earned and payable beyond that initial guarantee or advance.

guaranteed annual compensation, during the term of their overall deal. From the studio's perspective, recoupability is critical not only because of its effect on the aggregate payout to the talent, but also because it impacts how the expense of the overall is accounted for on the studio's books. In general, as fees are earned and recouped under an overall deal, they are accounted for as expenses of the applicable project (as opposed to general development expenses). In addition to converting the allocated cost from "general overhead" to "cost of goods sold" from an accounting perspective, such "charge-offs" allow the studio to share the allocated cost with third parties in the form of network development expense coverage,¹² percentage-based license fees,¹³ reductions in participations payable to third parties,¹⁴ or cost/deficit contributions from co-production partners.¹⁵

For most writer/producer and non-writing producer (pod) deals, most fees are recoupable, including (as applicable) script writing fees, supervision fees, and pilot and series producing fees, but solely to the extent that such fees are actually earned during the term of the agreement. Post-term fees (i.e., fees earned for work done after the term of the agreement, even if the project was initially developed during the term) are usually not recoupable, absent very specific circumstances informing the negotiation. Studios will consistently agree not to recoup the talent's contingent compensation from any series against an overall guarantee, or any WGA-mandated and defined payments (such as residuals, which may be substantial, and so-called "program fees" and "character fees," which are usually relatively minor). Royalties and pilot production or series sales bonuses may be up for grabs in the recoupability negotiation, with royalties usually being non-recoupable (i.e., "paid on top"), and series sales bonuses potentially being recoupable, non-recoupable, or, as a compromise, paid on top of the guarantee but as a recoupable enhancement to the guarantee rather than as pure fresh cash.¹⁶

For directors, the recoupability is sometimes quite similar to that for writer/producers, with all directing and pilot/series producing fees being recoupable; contingent compensation, residuals, and other DGA-mandated payments being non-recoupable; and royalties and series sales bonuses being negotiable as just described. However, because (for schedule reasons) most pilot directors cannot direct more than two or, at most, three pilots in a year, it is more common in directing overalls for fees to be recoupable against the guarantee only in part—for instance, only the director's first pilot directing fee may be deemed

12 See Chapter 3, Section A.ii (pg. 103).

13 See Chapter 11, Section A.iv.a (pg. 413).

14 See Chapter 9, Section B.vi (pg. 370).

15 See Chapter 11, Section B.iv.d (pg. 457).

16 This gives the studio the opportunity to potentially recoup that amount against future earned fees as well, or at least generates additional unrecouped guarantees to charge as a production cost for purposes of contingent compensation owed to the individual and other participants on their projects.

recoupable, or each directing fee may only be 50% recoupable, with the other 50% paid as fresh cash (i.e., not recouped against the artist's guarantee).

Although these parameters are generally standard, recoupability can be a highly negotiated (and highly peculiar) term from deal to deal. This is because the recoupability structure of the overall deal—and the studio's projections for likely actual recoupment levels—is a critical consideration when negotiating the annual guarantee. The difference between an individual's overall guarantee and the amount recouped during the term of the deal is referred to colloquially as the “vig.” The studio wants to offer a guarantee it believes will be “earned out” (i.e., covered by actual recouped fees) to the greatest extent possible, thereby minimizing the vig.¹⁷ On the other hand, the talent wants to both maximize their opportunity for payments beyond the guarantee (again, “fresh cash”) and minimize the recoupment/maximize the vig under the deal (with the vig representing the premium paid to the talent for their exclusivity during the term of the deal). Because of this dynamic, some particularly complex and high-level deals may provide for recoupability to slow down (e.g., from 100% to 50%) as the guarantee approaches being fully earned out, in order to ensure that the talent continues to enjoy a vig under the deal. An independent studio, on the other hand, would be only too happy to see fresh cash paid if it means that its overall guarantee had been earned out and recouped in full.¹⁸

This deal term may also affect the treatment of the talent's revenue streams from third parties which preexist the overall deal. In general, talent retain for themselves, outside of their overall deal, 100% of fees from their preexisting projects (and are permitted to continue rendering non-exclusive, non-interfering services on these projects, outside of the exclusivity of their deal). However, the studio may be willing to substantially increase the annual guarantee offered to the talent if the talent assigns to the studio their right to compensation from the preexisting projects (at least during the term of the overall), making such fees recoupable against the guarantee. Even if the enhanced guarantee paid by the studio is essentially equal to the expected third-party fees, this may be desirable to the talent as a way to cosmetically improve their deal (and generate a larger quote as precedent), and/or to smooth out the timing of payments (as series producing fees are generally received in irregular bursts as production

17 For so-called “showveralls” in particular, the guarantee may be precisely calculated to cover the writer's anticipated earned episodic fees during the term, plus a specified number of development and/or episodic scripts per year, with little or no premium on top.

18 To reduce the financial impact of the vig, studios generally reserve the right to charge the unrecovered portion of an overall guarantee as a production expense on the show (or allocated amongst multiple shows) worked on by the talent during the term. See Chapter 9, Section B.vi (pg. 370). This has the effect of allowing the studio to effectively recoup the vig from the revenues of these series, while pushing back the (non-recoupable) backend earned by the individual (as well as all other profit participants) on the show(s).

occurs, while overall guarantees are paid in consistent, equal weekly installments over the term of the overall deal).

c Cross-Collateralization

Finally, the parties to an overall deal must determine the extent of cross-collateralization under the deal—that is, the extent to which the guarantees paid and fees recouped in separate years of the deal are aggregated with one another for purposes of determining the vig and the availability of fresh cash. In general, all of the years of the deal are “crossed,” which reflects the reality of the likely work process. During the first year of a deal, when the relationship between the parties is being established and the talent is beginning to develop new projects for their new home studio, it is rare for the studio to recoup significant fees. The pace of development and production dictates that the projects developed during the first year of the deal most likely will not bear fruit (in the form of produced pilots and series, and therefore recouped fees) until later years of the deal; without cross-collateralization, it would be too difficult for the studio to recoup fairly against the first year guarantee, and too easy for the talent to see fresh cash in later years of the deal.

However, when the parties to an overall deal renew or extend their relationship, it is not uncommon for the extension/renewal term to be walled off from the initial term, with the guarantees and earned fees from the latter term *not* being cross-collateralized with those from the former. Alternatively, fees from prior terms may be cross-collateralized with subsequent terms, but deemed only partially recoupable rather than fully recoupable. This is a concession to the competitive nature of the marketplace for desirable talent. If a writer/producer were to leave their home studio when their overall expired and enter into a new overall relationship with a different studio, they would most likely retain their ongoing fees from preexisting projects without recoupment against their new studio deal. Consequently, to avoid losing talent to competing studios, studios often must show flexibility in the recoupment and cross-collateralization structure between the terms of successive deals, by structuring the new deal so as not to leave the talent in a materially worse economic position than they would enjoy by leaving for an otherwise identical deal from a different studio.

iii Overhead

Many writers, directors, and producers of sufficient stature to warrant an overall deal are interested in building their own production companies.¹⁹ Doing so

¹⁹ Building a production company allows an individual to increase the volume of development and production projects they can handle at any given time; affords the individual greater effective control over the projects on which they work; enables the individual to develop a broader portfolio of

requires an investment in expenses such as an office, an assistant, and one or more development executives. In substantial overall deals, studios commonly assume or reimburse some or all of these overhead expenses on behalf of the primary individual engaged under the overall. Ultimately, the studio must consider the cost of these expenses (which are generally non-recoupable), as well as the cost of the recoupable guarantee, in assessing the total cost of the overall deal to the studio.

There are many logistical variations that the parties may agree upon in connection with overhead-type expenses. A studio with available resources may provide office space and/or an assistant to the talent.²⁰ The studio may directly pay for third-party overhead expenses (e.g., by directly leasing and paying rent on an office space, and/or engaging an assistant or executive designated by the talent on the studio's own payroll), or reimburse the talent for verified expenses that the talent incurs directly. In some cases, some portion of the annual guarantee may be deemed a non-accountable, non-recoupable overhead allowance; this approach also effectively reduces the amount of fees that must be earned under the deal for the talent to fully recoup the guarantee and see fresh cash (as well as the amount of unrecouped guarantee that will eventually be charged as a cost of production when calculating contingent compensation, both for the individual in the overall deal and for other participants on their projects).

iv Assignability

In many cases, it may be clear when an overall deal is made what role the studio and the talent collectively envision that the talent will play over the life of the deal. However, the parties may not always see eye-to-eye on such matters, and even if they do, opinions can change over time. Consequently, assignability—that is, whether and to what extent the studio may assign the talent to work on projects other than those originated by the talent themselves—is a key aspect of overall deals.

Many high-stature writers, directors, and producers strongly prefer to work only on projects that they have developed from inception, or, at a minimum, that they joined willingly at an early stage in the process. On the other hand, a studio that has made a substantial financial commitment to an individual may not want to rely entirely on that individual's ability to generate and sell new projects to be able to recoup that investment through earned fees. As a result,

projects on which they can draw fees for part time, non-exclusive services; and generally represents enhanced stature and prestige for the principal(s) of the production company.

20 The term deal assistant job is highly desirable among young creative professionals hoping to work their way up the ranks, offering steady full-time salaried work, health benefits, and significant one-on-one learning (and networking) opportunities with in-demand writers, as well as less intense working conditions than writer's assistant or production assistant positions on active productions.

the parties must hash out the studio's rights with respect to project assignability. The studio prefers the unfettered right to assign the talent to work on any of the studio's projects during the term, while the talent looks for the deal to be non-assignable or, alternatively, assignable solely with the talent's consent.

Many studios retain the right, at least on paper, to assign talent into any project of the studio's choosing. As a practical matter, however, most studios preserve good long-term relationships by consulting meaningfully with talent prior to any such assignments and generally avoiding assigning talent into any projects against their will. The nature of the assignment may also vary substantially depending on the needs of the applicable project and the role the parties envision for the individual being assigned in. A writer/producer with sufficient stature and experience to create and showrun their own projects may supervise a more junior writer/creator with the intention of showrunning the series should it be produced. Alternatively, a writer under an overall may be assigned as a senior staffing writer (perhaps on a part-time basis) to support another show that is in need while the writer/producer's own projects are not in active development or production. To protect the talent's interest in working on their own projects, representatives may seek more favorable recoupment terms to apply (for example, allowing a portion of fees to be paid as fresh cash rather than recouped, or to enhance the overall guarantee) on assigned, rather than artist-originated, projects.

v *Inside Terms*

The "inside terms" of an overall deal refer to the specific terms—fees, bonuses, royalties, contingent compensation, etc.—applicable for every project initiated during the term of the overall deal. The relevant terms are those that are negotiated on a project-by-project basis for individuals who are not under overall deals, but pre-negotiated and applied on a blanket basis for all projects during the term.²¹ Typically, when an overall deal is extended or otherwise renegotiated, the talent will seek improvements on the inside terms, as well as the annual guarantees payable under the deal (to improve their own quotes for future deals, and to expedite the recoupment of their guarantee). Such improvements usually apply only prospectively for newly generated projects, while older projects are grandfathered into the inside terms that governed at the time each project was initiated. In addition, overall deals may provide for inside terms to automatically grow from project to project over the course of the deal (perhaps only after a threshold number of projects have been created/worked under the initial inside terms).

21 See Chapters 6 (pg. 212) and 7 (pg. 270). These "inside terms" are the subject of the negotiation as to recoupability under the overall deal, as described in Section A.ii.b.

Although the overall deal sets out pre-negotiated inside terms, often these terms represent only the beginning, rather than the end, of the negotiation of the talent's entitlements for any given project. For instance, if an individual under an overall deal is packaged with many other high-level elements that render the individual's default inside terms impractical for the project (e.g., because the aggregate executive producer fees and/or aggregate backend payable to all elements for the project would be too high), the studio and the individual will routinely negotiate project-specific reductions to those inside terms. In addition, particularly for writer/producer deals, the inside terms that are initially negotiated may not cover the full range of services that the individual might ultimately render under the deal. For instance, it is not unusual, when entering into an overall deal with an experienced writer/producer who can function as a showrunner, to negotiate inside terms solely in connection with projects that are created and actually showrun by that individual. However, if that individual supervises a junior writer/creator during development, joins a preexisting third-party series as showrunner, or renders part-time consulting services on an ongoing project, the studio and the writer/producer will typically need to negotiate additional terms to allow the studio to budget and "charge off" appropriate fees and accord the writer/producer an appropriate amount of backend (if any) for the services actually being rendered. Similarly, if an overall deal contemplates that an individual works exclusively in scripted episodic television, the parties may need to negotiate revised inside terms if that individual subsequently finds himself working on a television movie, mini-series, or unscripted project.

vi Suspension, Extension, and Termination (Death, Disability, and Force Majeure)

A topic that potentially straddles the line between "business affairs" and "legal affairs," in the context of negotiating an overall agreement, is suspension, extension, and termination. Virtually all services agreements in the entertainment industry are subject to suspension in the event of the talent's disability/incapacity or in case of force majeure events (i.e., "acts of god" such as war, earthquakes and major weather events, union strikes, and other events beyond any party's reasonable prediction or control). In addition, after a negotiated period of weeks (usually with different time periods for disability versus force majeure, and no delay for death), the studio typically has the right to terminate a suspended agreement effective immediately. On the other hand, talent whose agreements have been suspended for extended periods may also eventually get the right to elect to terminate their agreements unless the studio lifts the suspension and resumes compensation (although talent termination rights are often not exercisable for force majeure suspensions based on strikes, especially strikes by the talent's own union).

Although such “death/disability/force majeure” terms are a regular feature of the “standard terms and conditions” for all types of agreements, these provisions are particularly significant in the context of multi-year overall deals with significant financial guarantees that are paid out over time. For such agreements, a studio may elect to extend the term of a suspended agreement by the duration of the suspension (but is not required to, unless expressly specified otherwise). These issues became especially salient during the double WGA/SAG-AFTRA strikes of 2023 (during which virtually every overall and first-look agreement in the industry was suspended, save for those few individuals who were actively rendering some type of important ongoing non-struck non-writing services).²²

B First Look Deals

A first look deal is an agreement by which a writer/producer, producer/director, or, most often, non-writing producer grants a studio an exclusive first opportunity to develop and produce projects that are created, owned, or controlled by that individual/company, before the individual/company may present any such projects to another studio or network for consideration.²³ First look deals operate similarly to overall term deals—they are characterized by a close and preferential relationship between studio and producer, upfront guaranteed compensation in exchange for the exclusive first look, potential overhead cost coverage by the studio on behalf of the producer, and pre-negotiated inside terms that are automatically applicable in the event the studio elects to proceed with a project. However, they also differ from overall deals in a few key respects.

First, most importantly, unlike an overall deal, a first look agreement is not a fully exclusive relationship. If a producer under an overall deal pitches a project to their home studio, and the studio is not interested in proceeding, then the producer is effectively precluded from working on the project until their overall expires and they have the opportunity to pitch it to another studio that may be more receptive. On the other hand, if a studio passes on a project pitched by a producer under a first look deal, then that producer is immediately free to pitch it to third parties and to proceed with the development and production of the project with one of those third parties, so long as that work does not interfere with the producer’s ongoing obligations under the first look agreement.

22 As the 2023 strikes wound down, some studios informed talent of their decision to “suspend and extend” productive agreements (so as not to functionally lose months of the term due to the work stoppage), but to only suspend (and not extend) unproductive agreements (to functionally reduce the guaranteed compensation and avoid delaying the studios’ desired exits from these deals). Unsurprisingly, such decisions not to extend were frequently very controversial with the affected talent and their representatives.

23 First look clauses, in the context of staffing writer agreements, are discussed in Chapter 6, Section B.vi (pg. 247).

Second, because a studio making a first look deal is buying merely a first opportunity rather than a fully exclusive relationship, the applicable guarantee under a first look is typically substantially smaller than would be commanded by the same producer for an overall deal. Similarly, compared to an overall deal, the studio may have a diminished appetite to support the producer's company with overhead cost coverage. On the other hand, particularly with non-writing producers, the studio may seek to negotiate for a first look payment that is only sufficient to cover the producer's overhead expenses, without providing any substantial profit center based on the first look payment alone.

Third, in light of the first two primary differences described here, it is much more common for first look guarantees to be non-recoupable, in whole or in part, meaning that the producer will see fresh cash for all fees (or a higher percentage of fees) earned from projects developed and/or produced under the first look. This is a significant deviation from overall deals, for which the applicable guarantees are typically fully or substantially fully recoupable against fees earned by the producer during the term of the deal.

Finally, the scope of the studio's first look rights must be more carefully defined under a first look deal than under an overall deal (under which there is a simple presumption of total exclusivity during the term). A first look deal must specify whether the first look applies to all television projects, as opposed to solely all scripted or all unscripted projects. It must provide for the parties' rights and obligations in the event the producer is approached to render services on a project the producer does not personally control—must the producer make at least a good faith effort to deliver such a project to the studio's control; and, if they cannot, may the producer proceed on the project with third parties during the term?²⁴ The deal also usually provides for some form of "changed elements protection" for the studio, requiring the producer to resubmit projects for which the studio initially declined to proceed with development if material creative elements are added or changed before the project is set up with a third-party studio or network.

C Quick Reference Guide

TABLE 10.1 Overall and First Look Deals

<i>Deal Term</i>	<i>Main Issues/Ranges</i>	<i>Other Issues</i>
1. Term	• Usually 1–5 years, often 2 for new relationships, and 3–4 for established creators • May include studio options to extend (“+1”)	• Optional term extensions may be automatically triggered by success benchmarks

(Continued)

²⁴ Usually “yes” to both.

TABLE 10.1 (Continued)

<i>Deal Term</i>	<i>Main Issues/Ranges</i>	<i>Other Issues</i>
2. Financial Guarantee	• During “peak TV era,” roughly \$500K–\$25M per year, with outlier mega-deals • Market contracting and resettling post-“peak TV” and strikes.	• Pre-“peak TV,” \$300K–\$4M per year
3. Recoupability	• For writers and NWEs, most fees are recoupable, including script writing, supervision, and pilot and series producing fees, to the extent actually earned during the term (“no post-term recoupment”) • For directors, may follow writers/producers or provide for partial recoupability • Contingent compensation and union-mandated and defined payments (including residuals) customarily not recoupable	• Recoupability of royalties and pilot production, series sale, and series production bonuses may be negotiable • NWEs may have partial or capped recoupability • Usually excludes all revenue from pre-existing projects • Recoupability structures often deal-specific and highly negotiated
4. Cross-Collateralization	• Customarily, all years within negotiated term are cross-collateralized • For competitive reasons, extension terms may be negotiated as partially or fully not cross-collateralized with prior terms	
5. Overhead	• Studios may provide, engage on talent’s behalf, or reimburse for office space, assistant, development executive, independent development fund, and other approved business expenses	• Overhead may be partially or fully non-accountable and/or non-recoupable

(Continued)

TABLE 10.1 (Continued)

<i>Deal Term</i>	<i>Main Issues/Ranges</i>	<i>Other Issues</i>
6. Assignability	• High-stature talent may or may not be contractually assignable to third-party projects in development or production • May need to negotiate special terms for supervision, (co-)showrunning, and/or consulting work	• In practice, discussions are usually practical and collaborative • May specifically negotiate recoupment of fees from assigned services
7. Inside Terms	• Same set of negotiated terms as project-specific deals • May automatically grow from project-to-project or after defined threshold	• May need to negotiate project-specific reduced entitlements for packaged and/or third-party projects
8. Suspension, Extension, and Termination (Death, Disability, and Force Majeure)	• All deals customarily subject to suspension for talent's disability/incapacity or force majeure, with option to terminate after defined time periods	• Studio may or may not elect to extend the term of a suspended agreement • May or may not negotiate terms concerning selective suspension or termination
9. First Look Deals	• Non-exclusive; talent can take passed projects to other studios • Much smaller guarantees than exclusive overalls • Guarantee may be partially or fully non-recoupable	• Carefully define scope of first look rights (e.g., genre, medium, third party-controlled projects) • Usually changed elements protection

11

NETWORK AND STREAMING LICENSES AND STUDIO CO-PRODUCTION DEALS

Chapters 5–10 of this book are focused on the relationships between studios and various categories of rightsholders and service providers who sit down the chain from studios in the visual framework we’ve previously used to describe the television industry:

We now turn our attention to the next linkage up the chain, between studios and networks, as well as a further relationship not directly reflected in this visualization: co-production agreements between two studios—one of which is often affiliated with the commissioning network—to jointly own, finance, and produce a series. In so doing, we pay particular attention to the unique issues affecting the new generation of digital streaming platforms, such as Netflix, Amazon, and Hulu, and the way that traditional license deal structures have adapted to address these issues. These license agreements have easily changed more in the last twenty years than they had in the fifty years before.

A Network and Streaming License Agreements

No single agreement has a greater effect on the ultimate profitability of a television series to its studio than the initial network license agreement, the deal under which a television series is first commissioned and exhibited by an American licensee.¹ If “a television studio makes money by using the divisibility of

¹ Interestingly, despite the critical role these agreements play in the television business, they are sometimes heavily negotiated in their substantive terms, but never actually reduced to a fully executed long-form agreement. Some networks condition license fee payments on the execution of a short-form term sheet and/or an “indemnity agreement” addressing some basic legal liability issues between the studio and network, but never insist on the full execution of their long-form agreements.

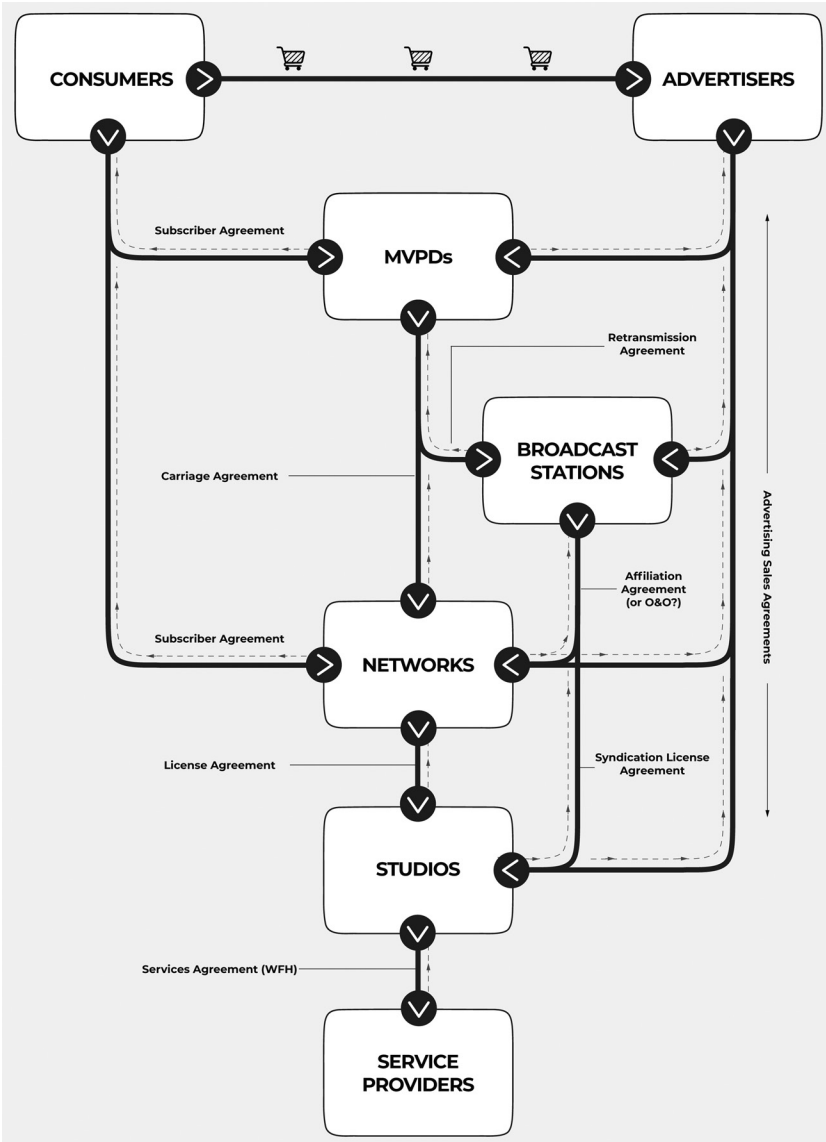


CHART 1 Structure of the Television Industry

In some cases, the network issues a long-form agreement, the studio replies with a set of comments, and the parties reserve their positions in perpetuity while otherwise carrying on business as usual. The willingness of both parties to make huge multimillion dollar investments with such an essential document unresolved further reflects the relatively small, tight-knit, repeat-business nature of the television industry. Streaming services, which are rooted in a technology industry mindset (rather than or in addition to a traditional entertainment industry mindset) are more likely to rigorously insist on signed long-form agreements.

its copyrights to maximize revenue across media, territory, and time,”² then the goal of a studio in negotiating a network license agreement is to grant the network as few rights, in as few territories, for as brief a term and for as much money as possible, retaining for itself as much freedom as it can to further license the same series to additional buyers across various platforms, territories, and time windows.

Historically, the basic core issues being negotiated in a license agreement (such as granted rights, reserved rights and holdbacks, and license fees) have remained essentially consistent regardless of the nature of the licensing platform, but the specific negotiated terms for each of these issues have varied depending on whether the network involved is a broadcast network, a basic cable network, a premium pay cable network, or a digital platform (with distinct templates commonly associated with each of these platform types). In this diversified marketplace of license deals, the studio’s level of risk and reward for each project varied according to the relevant platform type and associated license template.³ Broadcast networks required supplier studios to put significant capital at risk, but left open numerous high-value rights and windows that, in success, could generate wildly profitable returns. Relative to broadcast networks, cable networks tended to demand less at-risk capital from their studio partners, but the shows created for these platforms also tended to generate lower revenues from off-network exploitation. Licenses for premium cable shows could sustain higher total budgets, with lower studio deficits as a percentage of budget, in exchange for the studio giving up even broader rights (which allowed these premium channels to be among the first to expand into streaming-based distribution with comprehensive content libraries).⁴ Finally, rights-hungry worldwide digital platforms virtually eliminated the studio’s economic risk from any given project, but took so many rights off the table, for such a long period of time, that the studio was left with little opportunity to make further profit from other sources.

Over the last several years, however, the efficiency-driven shift within major entertainment conglomerates toward consolidated programming and operations across multiple platforms and platform types, the general decline of the pay TV business (and associated shift of most spending on non-broadcast original content from linear television to streaming), the legacy studios’ ongoing struggles to figure out a sustainable twenty-first century business model, and the industry’s general propensity toward risk-averse decision-making that is perpetually obsessed with “what everyone else is doing” have collectively resulted in significant flattening and simplification in the market for license deals. Increasingly large, global, and diversified buyers, seeking flexibility to exploit new

2 See Chapter 3, Section C (pg. 129).

3 See Chapter 3, Section C.i (pg. 129).

4 See Chapter 1, Section B.iii.c (pg. 31).

series across multiple affiliated streaming and linear platforms, have largely extended their use of rights-intensive worldwide streaming license templates to all non-broadcast shows, even those that are initially contemplated for premiere exhibition on a linear network.⁵ Consequently, contemporary license deals now generally fall into one of only two categories—broadcast licenses, and everything else (all treated as though licensed for worldwide streaming, but with budgets appropriate to the particular intended platform).

And even the foregoing description of the current market as being split between two distinct licensing models somewhat overstates the current breadth and diversity of prevailing deal templates. The general failure of broadcast networks to successfully adapt and evolve their business models to the major structural challenges of the day has made producing for broadcast untenable for most independent studios. As a result, the broadcast content business has grown increasingly cloistered and segregated from the balance of the television/streaming environment, with broadcast networks focused on buying shows primarily from their own affiliated studios, and those studios focused on selling shows primarily to their affiliated networks. While the broadcaster-affiliated studios frequently sell shows to other broadcast networks, as of this writing, outside of those broadcaster-affiliated studios, only Warner Bros. Television continues to maintain a robust business in both scripted comedy and drama for broadcast TV. Streaming-based licensing deals, usually worldwide in scope, are therefore especially and singularly dominant in the current marketplace.⁶

This chapter therefore focuses substantially on the two surviving dominant models, usually explaining the broadcast standard first for each issue (which has often remained mostly or entirely unchanged for many years) and then its derivation or adaptation in worldwide streaming deals.⁷ This is because, at the end of the day, streaming license agreements are the product of an industry-wide, decade-long process of reinterpretation, adaptation, and occasional reinvention of various elements of traditional broadcast models. Even negotiators

5 See Chapter 3, Section C.ii (pg. 139).

6 That said, between macroeconomic pressure on platforms to reduce their spending on original content—see Chapter 2, Section B.ii (pg. 75)—the industry’s apparent “re-discovery” of windowing—see Chapter 2, Section B.vi (pg. 89) and Chapter 3, Section C.i.a (pg. 129)—and the proliferation of FAST channels and of advertising in streaming generally—see Chapter 2, Sections A.vii (pg. 60) and B.i (pg. 72)—there is reason to hope for a return to more creative, diverse, thoughtful, and tailored dealmaking around license agreements in the years ahead. (Counterpoint: a friend and fellow business affairs executive who reviewed an early draft of this chapter wrote, next to this footnote, “LOL.”)

7 The footnotes provide additional information about typical approaches in early streaming deals that have evolved over time (but still govern many older and longer-running series in the medium), as well as previously common standards in license deals for other types of platforms (such as pay cable, premium cable, and domestic-only streaming) that are, at least for the time being, largely outdated and out of use. Streaming license deals (including deals for linear television shows currently being negotiated using equivalent templates) certainly represent the bulk of the modern marketplace.

who never personally work on a broadcast series can benefit from a basic understanding of these deals as effectively providing the scaffolding on which current dealmaking models have been—and future models are still being—built.

i Development Contributions and Production Commitments

At the time a series is first set up with a network for development, the studio and network negotiate for the network to cover some portion of the development expenses incurred by the studio in connection with the project. The key parameters of this negotiation are discussed in Chapter 3, Section A.ii (pg. 103).

ii Pilot and Series Options

When a studio sets up a project with a network for development, it grants that network the exclusive option to order a pilot and/or series episodes of the project.

Broadcast networks generally insist on “two bites,” meaning two opportunities to order a pilot or series to production. At the pilot phase, the “bites” refer to the network’s customary annual “pilot seasons,” with pilot production orders placed by February 28 of the applicable year; at the series phase, broadcast networks must generally order production of a series for a fall start no later than May 31 of the applicable year, or for a mid-season start no later than December 15 of the applicable year. However, when a project is set up with a broadcast network in a competitive situation, the studio will often negotiate for the network to have only “one bite” for pilot and/or series, making it easier (and faster) for the studio to solicit interest from a competing network if the original network declines to proceed with the project.

Outside of broadcast television (with its rigid traditional annual calendar), pilot (or, if no pilot step, series) option periods are defined based on a certain number of months (usually three to six) following the delivery of the final pilot script writing step commissioned by the network. If the platform requires additional written development materials and/or convenes a pre-greenlight mini-room (as streamers, in particular, often do), the parties will typically negotiate (with each other and with the show’s creator) for redefined option periods running from the delivery or completion of those additional development steps.⁸ Where there is a pilot step, the initial series option period is also based on a certain number of months (again, usually three to six) following the studio’s delivery of the completed pilot.

In addition, the parties must negotiate the timing of the network’s options to order subsequent seasons of the series. For broadcast networks, the applicable option must generally be exercised by May 31 annually. For other platforms, option periods may be fixed to a certain number of weeks prior to the expiration

⁸ See Chapter 3, Section B.iii (pg. 125).

of the network-approved annual cast option dates (effectively deferring a discussion about annual options until the studio starts structuring acting deals for the series).⁹ When defined in the license agreement, annual options are usually set for a certain number of months following the final delivery and/or initial exhibition of the final episode of the prior season (most commonly the earlier of six months following initial exhibition, or nine months following final delivery, of the last episode of the prior season, though the applicable windows may be as short as three months or as long as twelve).¹⁰

iii Series Term

The “series term” of a network license agreement refers to the number of consecutive, dependent options held by the network to order additional seasons.

Traditionally, most broadcast network license agreements had four-year (or four-and-a-half-year)¹¹ terms, meaning that the network had the ability to order a pilot and up to four seasons under its original license agreement before the network would be forced to negotiate a new license agreement with the studio covering additional seasons. In success, a network would be highly motivated to retain the ability to continue ordering and exhibiting new seasons of the series, and the studio would be able to extract a substantial improvement in its license terms commencing with the fifth season of the series. From the studio’s perspective, a traditional 4/4.5-year term license agreement is preferable and remains achievable for especially desirable projects, particularly when multiple broadcast networks are competing with one another for the opportunity to develop such projects.

However, for less competitive projects, broadcast networks generally insist on so-called “extended term” license agreements, which provide for 7/7.5-year terms, thereby delaying the point at which the network may face a costly renegotiation with the studio to a point that few series have the longevity to achieve. Although these extended term license agreements include pre-negotiated

⁹ See Chapter 8, Section A.v (pg. 308).

¹⁰ In the early years of streaming, the season-to-season option date was often annualized based on (at first) the option exercise date or (once studio realized how much easier it would make things for them) option exercise deadline for the initial series option. In other words, if the initial series option was exercisable by October 31 of a given year, the option for subsequent seasons would have to be exercised by October 31 each year. This system fell out of favor as streaming and pay TV platforms found they could not maintain a regular annual releasing cadence for most of their series. Early streaming licenses also sometimes tied network renewal and/or cast pick-up option deadlines to the completion of principal photography for each season, but increasingly long and unpredictable post-production periods resulted in the custom shifting toward delivery and/or initial exhibition as the relevant milestones.

¹¹ Again, the half-year refers to a first season of a series with a mid-season start, which will entail fewer episodes (typically thirteen) than a full season with a fall start (which is usually comprised of twenty-two episodes). This same “half-year” concept is incorporated into the term of series regular actor agreements for broadcast network series. See Chapter 8, Section A.iv (pg. 307).

improvements in the license fee structure that kick in with the fifth season of the series,¹² and may include a premium even on the license fees for the first four years that the network pays in respect of receiving the extended term, these negotiated improvements are often less substantial than those the studio would expect to negotiate for a successful series entering its fifth season following the expiration of a traditional 4/4.5-year term deal. In addition, networks routinely engage in hardball renegotiations around the cancellation or renewal of shows after their fourth seasons to get out of significant pre-negotiated increases to the network's license fees for fifth or subsequent seasons.

Outside of the broadcast network context, most networks insist on even longer, "perpetual term" license agreements, which grant the network unlimited successive, consecutive, dependent options to continue ordering new seasons of the series, for as long as they wish to do so. Like extended term deals, perpetual term license agreements provide for escalations in the economic terms for later seasons that are pre-negotiated at the inception of the deal, when the studio has less leverage than it would enjoy if the network faced the prospect of losing a successful series to a competing network due to an expiring license agreement.

iv Pilot and Series License Fees

The fundamental economic term of a license agreement is the license fee paid by the network in exchange for the rights granted to it under the deal. The size of the license fee commanded by the studio is a function of numerous factors, including the desirability of the project and its elements and the competitiveness of bidding amongst multiple networks; the budget of the series; the scope of the rights (in terms of media, territory, and time) obtained by the network licensee; the series term of the license agreement; and the extent of the network-imposed holdbacks on the studio's reserved rights in the series. The license fee negotiation is, like all television industry negotiation, heavily influenced by the policies and precedents of the parties.¹³ However, it is also often driven by complex financial modeling by both sides. The studio must determine the extent to which its network license agreement will allow it to effectively monetize the series with third parties, and whether these financial opportunities (alongside the network's license fee) will generate an appropriate return on the studio's investment. The network must determine what types of ratings/viewership (and resulting advertising sales) the show must achieve for the network to recoup its investment of license fees and marketing expenses and show a profit of its own

¹² See Sections A.iv.d–e.

¹³ Policy and precedent are powerful forces in the television industry. Many companies maintain inflexible policies compelling them to always require certain deal terms or to never agree to certain concessions under any circumstances. Studios and networks may refuse a request that is reasonable for a particular situation because it would "create a precedent" that unrelated parties in future theoretical deals may seek to take advantage of to demand more favorable terms.

for the series, while also taking into account harder-to-quantify brand goodwill that is created by a major hit. Such evaluations can be especially complex for streaming shows, which are not independently monetized, but instead evaluated for their impact on the platform's overall attraction and retention of subscribers. The early key evaluative metrics for such programs were "cost per stream" or "cost per minute" of viewership, although more recently, streaming platforms have developed more advanced metrics around completion rates, further subscriber engagement with the platform, uniqueness of audiences reached, and attribution for subscriber sign-up decisions.

a Deficit vs. Cost-Plus Models

Scripted television was historically based on a deficit model, meaning that the initial license fee that a domestic network paid to a studio to commission a series was less than the full cost of production.¹⁴ That difference between cost and initial license fee was known as the "deficit," and it represented the studio's at-risk investment in the series: the hole that the studio had to climb out of, by way of revenues from media, territories, and exhibition windows beyond the initial network license, to show a profit. The deficit model remains the default in broadcast television and can still sometimes be found with smaller upstart platforms (which may look to stretch their finite programming budgets by persuading entrepreneurial studios to accept lower license fees in exchange for allowing those studios to retain more rights with fewer encumbrances). Where the deficit model was once the near-universal standard for television licensing, however, it now occupies a comparatively niche place in the marketplace, which is instead dominated by "cost-plus" deals.

The cost-plus deal replaced deficit-based licensing models in streaming once Netflix and Amazon, in particular, expanded their international territorial footprints while committing themselves to offering content libraries that were as complete and consistent as possible across every territory they served. The desire of these platforms to secure worldwide exhibition rights, together with their expectations for long license terms with significant exclusivity, meant that outside studios retained few valuable distribution rights in their original series, and those few were also often subject to significant holdbacks, first negotiation, and buyout rights in favor of the streaming licensees.¹⁵ Consequently, world-

14 This was true not only in broadcast television, but also in basic cable, for most of premium pay cable, and even in the early days of streaming (when the new digital services were focused on their domestic businesses and had not yet begun their aggressive international expansions).

15 In some cases, major media companies have deployed their own wholly owned content across multiple platform types, such as Disney's stunt exhibition of Marvel/Disney+ series *Ms. Marvel* on ABC and Paramount Global's stunt exhibition of *Yellowstone* sequel *1883* on the basic cable Paramount Network (home of the original *Yellowstone* series).

To the author's knowledge, other than Tornante Co.'s *BoJack Horseman* (which appeared on Comedy Central in 2018, with additional runs on the affiliated MTV2 in 2021), no Netflix original series has been licensed for ongoing exhibition on linear television in the United States. *BoJack*

wide streaming license deals evolved to compensate studios for their opportunity cost of diminished or eliminated licensing opportunities in international territories and secondary markets, and to provide for license fees equal to the series' cost of production, plus an additional amount known as the "premium." This all-in license fee, with profit margin built in, has typically been assumed to represent substantially all of the revenue that a studio reasonably expects to earn from its show for the life of the series.¹⁶

b Budgets

For reference, the following budget ranges may be considered typical, although as always, the final number depends on the creative and financial appetite of the commissioning network, as well as the creative demands of the show's subject matter (e.g., major effects-driven science fiction/fantasy vs. small-scale character-and-dialogue-driven comedy) and the number of episodes produced (with larger orders allowing fixed start-up and construction costs to be amortized across a higher number of episodes). The highest budgets are usually found in streaming and premium pay cable, somewhat lower (but still substantial) budgets in broadcast, and the lowest budgets in basic cable and on smaller SVOD and FAST services. Because every project differs in its needs and circumstances (and every platform differs in its resources and competitive aggressiveness), these ranges are intentionally broad, in hopes of capturing most of the market's breadth. Most of the individual series in each category will be budgeted somewhere in the center mass of the range presented, and as always, there may be outliers that fall outside of these ranges altogether (in both directions).

Horseman was one of Netflix's earliest original series and therefore subject to less restrictive holdbacks than imposed on reserved rights in the streamer's more recent license deals with outside studios. Netflix and Amazon have, in some instances, extended their exclusivity over their most important third party-produced originals by negotiating to buy out reserved linear rights as soon as the applicable holdbacks expire, preempting the studios from taking those rights to the open market. Consequently, with pay TV revenue already in decline, the market opportunity for linear exhibition of streaming originals remains speculative at best.

On the other hand, in 2023, Max established a precedent for licensing premium cable/streaming originals to third-party streaming services. As of this writing, Netflix has continued to show no interest in licensing its wholly owned originals to third parties, but Amazon has started looking for opportunities to monetize its original series by licensing them to other platforms. This evolution in Amazon's approach was brought on in part by Amazon's acquisition of MGM and its robust distribution operation, as well as a more general reorientation at Amazon toward extracting full value out of each of its assets. Apple, with its small subscriber base and library, looks unlikely to enter the market as a content licensor anytime soon. But as the studio streamers sharpen their focus on revenue and profit, they look poised to position themselves as both buyers and sellers in a reinvigorated market for second-run streaming of streaming originals. See Chapter 2, Sections B.vi–vii (pg. 60).

¹⁶ For purposes of determining residuals obligations, applicability of distribution fees against revenues in backend calculation, and other accounting-related purposes, there is typically an internal allocation of this license fee between domestic and international rights.

TABLE 11.1 Pilot/Series Budget Ranges

<i>Platform Type</i>	<i>Length</i>	<i>Pilot Budget</i>	<i>Series Budget (per ep)</i> ¹⁷
SVOD or Pay TV (New, Season 1)	½-Hour	\$3 million–\$9 million	\$1.5 million–\$6 million
	1-Hour	\$6 million–\$25 million ¹⁸	\$5 million–\$15 million
SVOD or Pay TV (Hit, Season 3+)	½-Hour		\$2.5 million–\$10 million
	1-Hour		\$10 million–\$30 million
Broadcast	½-Hour	\$1.5 million–\$5 million	\$750,000–\$4 million
	1-Hour	\$5 million–\$14 million	\$2.5 million–\$6 million
Basic Cable or HBAVOD	½-Hour	\$1 million–\$4 million	\$500,000–\$3.5 million
	1-Hour	\$4 million–\$12 million	\$2 million–\$6 million

c Initial License Fees

The premium or total license fee for a series may be stated as a fixed dollar amount, or as a percentage of budget (although even when the license fee or premium is a fixed dollar amount, that figure is negotiated with explicit consideration for the probable budget of the series).¹⁹ As they have with many of their historical business practices, broadcast networks have retained their longstanding preference to negotiate license fees in terms of flat dollar amounts,²⁰ while other platforms are generally more likely to favor percentage-based license fees. Worldwide streamers with cost-plus license models may alternate freely between negotiating premiums as flat dollar amounts or as percentages of budget, depending on the specific dynamics of the negotiations and relevant precedents between the parties.

¹⁷ A television season production budget typically consists of an “amortization budget” (which covers fixed costs associated with the season that do not increase or decrease depending on the number of episodes produced, such as principal set construction) and a “pattern budget” (which covers episode-by-episode costs, based on assumed production parameters, such as the number of speaking parts in each episode and the number of days of on-location production vs. in-studio production). The total episodic budget is the pattern budget plus the amortization budget, amortized over the number of episodes actually produced, which is why the average per-episode expense goes down if more episodes are ordered and produced.

¹⁸ Again, these ranges are intentionally broad and inclusive. While some pilots have been produced at budgets near the top of this range, and a handful undoubtedly will be in the future, in the current market, even streamers who now seem to favor pilots have (not unreasonably) shown little appetite to produce them at such expense.

¹⁹ The parties almost always rely on net budgets for these provisions, but gross budgets may be used, too.

²⁰ For pilots in particular, these license fees are often defined as percentages of the budget up to a cap (which can usually be assumed to be hit based on the actual production budget for the pilot).

At the time a project is set up, the parties often negotiate an ingoing budget range or cap on the “cost of production” portion of the license fee. These terms are usually meant more to memorialize mutual expectations than to serve as a hard cap, and the parties eventually confirm the final mutually approved ingoing budget number on which the license fee is based in a later amendment or other written acknowledgment.

In any event, however, percentage-based premiums are virtually always subject to a cap. This cap might be negotiated to correspond closely with the parties’ actual expectations for the series’s eventual production budget, or it might be set artificially low to reflect the limits of the platform’s financial appetite for the deal. In most cases, the parties assume that the actual premium will inevitably equal the negotiated cap.

As of this writing (with the usual disclaimer for outliers), premiums for one-hour programs generally fall between 20% and 40% of budget, or between \$1 million and \$3 million per episode for the first season, while half-hour programs typically command premiums between 5% and 25% of budget, or between \$100,000 and \$1.5 million per episode for the first season.²¹ For busted pilots (i.e., those that are produced but not picked up to series), studios take the position that the license fee is the license fee and must be paid in full, including the premium. Platforms argue that a license fee premium would be an unjust windfall to a studio for what is, in essence, a failed project, for which the studio is already made whole by the “cost of production” portion of the license fee. Because pilots have been relatively uncommon in streaming until recently, as of this writing, some agreements are still ambiguous as to whether a premium is owed for a busted pilot, leaving the matter up to negotiation.²²

For a broadcast network comedy, the expected license fee would fall between \$1 million and \$2 million for pilot (likely representing 30%–40% of the production cost), and between \$750,000 and \$1.35 million per episode for series (likely representing 50%–60% of the production cost)—numbers that have not meaningfully changed in something like fifteen years (which helps explain the exit of most independent studios from the broadcast network business). For a broadcast network drama, the expected license fee would be between \$3.5 million

21 These high license fees, well over cost of production, were a major factor driving Netflix and Amazon’s initial decisions to invest heavily in developing and producing their own shows, without relying on outside studios. Acting as networks, they must pay more than 100% of the cost of any given series to obtain just the minimum subset of rights they need to feed their businesses worldwide. Acting as studios, they can control 100% of the rights in a series, worldwide, for the cost of production. The huge economic advantages of self-production have driven virtually every platform to heavily prefer in-house projects, but competition for the best programming from the best creative talent has also kept them from ever walking away from their businesses with outside studios (including one another’s affiliated studios) altogether.

22 Or for the platform to use its typical leverage to simply impose its will.

and \$5 million for pilot (again, likely representing 30%–40% of the production cost), and between \$1.5 million and \$2 million per episode for series (likely representing 40%–50% of the production cost).²³

d Payment Schedule

Payment schedules are a sneakily significant component of network license negotiations. It can be easy for professionals who are immersed in the day-to-day demands of production, with distant finance and treasury executives somehow making sure the bank account always has the right number of dollars in it, to forget the power and importance in business of simply holding the cash.²⁴ Negotiations around the timing of the network's payment of its license fee may sometimes feel abstract to on-the-ground studio executives, but in the aggregate can make a real impact on a company's overall fortunes.²⁵

Since time immemorial, the prevailing payment schedule for license fees in broadcast television—and the basis from which, at heart, all other network license fee payment schedules are derived—is, on an episode-by-episode basis, 1/3 upon commencement of principal photography, 1/3 upon completion of principal photography, and 1/3 upon delivery.²⁶ Traditionally, 5%–10% of license fees are subject to an “audit holdback,” payable only after the network waives or exercises its right to audit the studio's reported production expenses (usually within three to six months following delivery), at least to the extent relevant to

23 Prior to streaming's effective takeover of the non-broadcast universe, basic and premium cable series had less expected secondary market value than broadcast series (largely because of reduced license fees from international broadcasters relative to those commanded for network series, and the probable unavailability of a cable syndication deal for a show that was exhibited, from inception, on cable). Consequently, the market generally provided for lower deficits on cable productions, with license fees from the initial U.S. cable networks generally between 60% and 85% of budget (often subject to a cap that corresponded to a probable budget number). These license fees were usually calculated on the “net budget” (i.e., the budget, net of tax incentives obtained by the studio in connection with the production) but the parties could also sometimes negotiate license fees based on the “gross budget” (i.e., the budget without regard for tax incentives, in which case any tax incentives realized would directly and exclusively benefit the studio). For cable comedies with even more diminished off-network revenue potential, license fees could be as high as 100% of budget.

24 At the highest level of running a business, cash-on-hand is both safety and security against unexpected disaster, and fuel and fire for unexpected opportunity. Cash-on-hand is bad debt not owed. Cash held now is worth more than cash receivable in the future; cash paid later costs less than cash paid now. Few things generate goodwill faster than paying one's partners and bills promptly; few things burn goodwill faster than not doing so.

25 For this reason, this section is deliberately broad and non-prescriptive in describing potential payment schedule structures. There is a wide universe of reasonable potential outcomes here, for which the author wishes to take particular care not to skew or limit the creativity of negotiations.

26 Some payment schedules use commencement of pre-production for each episode as an alternative trigger for installment payments on episodic license fees. On pilots, the 1/3 step for delivery may be divided into 1/6 for some major post-production/interim delivery milestone and 1/6 upon final delivery.

calculating the network's license fee or assessing the studio's compliance with applicable requirements under the series license agreement.²⁷

Outside of broadcast,²⁸ license fee schedules vary meaningfully from network to network. The "cost of production" portion of equal or greater license fees is paid incrementally over the course of pre-production, photography, and post-production for the season, and to be paid in full by the time the studio delivers the season in full (or shortly thereafter). License fee installment payments may be triggered by a variety of defined episodic or seasonal milestones across all phases of production (and the traditional standard from broadcast informs such negotiations). For cross-boarded productions (on which individual episodic milestones are delayed and backloaded in the production schedule), the parties may instead negotiate a payment schedule that is based on calendar or other milestones that are distributed more evenly over the full span of production for the season.

The "premium" portion of cost-plus deals has been, on various platforms and at various times over the years, amortized pro rata across installment payments tied to cost-of-production milestones, payable upon final delivery, and divided between delivery and subsequent monthly or annual installment(s).²⁹ In the early years of streaming, license fees were paid on broadcast-style episodic schedules. As of this writing, the complexity of modern production has, over

27 In practice, such audit holdbacks are largely unnecessary where license fees are flat, materially capped, or substantially less than the cost of production, but are not uncommon where a platform pays 100% or more of approved production costs for the series.

28 And, for a time, basic cable.

29 While this book generally avoids attributing any specific policy to any specific company, it is worth making an exception to highlight Netflix's unusual license fee payment schedule for original series, which is well-established and widely known throughout the industry. Hungry for cash to fuel its aggressive expansion, Netflix adopted an outlier payment schedule for license fees on original series, generally paying 35%–40% of the total license fee (cost and premium) upon delivery of the complete season (and nothing before), and the balance over eight equal quarterly installments thereafter. This license fee schedule was materially worse for studios than that used by any other major platform, requiring producers to go out-of-pocket for the complete cost of production of each series (without receiving license fee installments to partially offset cash outlays during production), to remain partially out-of-pocket for several months after delivery, and to wait two full years after delivery to receive their license fees in full. Smaller independent studios have relied on debt financing, secured against their license deals with the streamers, to cash flow production. The Chief Operating Officer of one independent studio once described Netflix to the author as "*my greatest unsecured debtor*." To overcome strong initial resistance to its desired payment schedule, Netflix agreed to allow studios to charge the platform interest based on the delay between Netflix's actual payment schedule and a reference "customary" payment schedule. (This interest was then added to the aggregate license fee, and thus paid out over the same unfavorable schedule as the rest of the license fee. Studios did not get to charge interest on the delayed interest payments.) Now settling into a mature phase favoring margin improvement over growth, Netflix has made moves to replace its longstanding standard payment schedule with one that is more in line with those used by its competitors, but has sought further concessions on rights in return. As of this writing, this potential shift is in its earliest phases and the eventual "new normal" remains uncertain.

time, mostly driven the industry toward seasonally rather than episodically defined milestones.

e Breakage

The network may agree to pay extra amounts, beyond its initial negotiated license fee, in order to subsidize and incentivize the studio to enhance the production value and marketability of the series. This is called “breakage.” Breakage may be paid, for example, to cover the costs of hiring well-known and sought-after actors, or to produce flashy event episodes that are more expensive than the pattern budget for the series would otherwise allow.

Breakage may be pre-negotiated, or addressed by the studio and network on an ongoing basis as proposed production enhancements arise. For instance, many network license agreements include a pre-negotiated “cast breakage” formula, by which the network agrees to pay, on top of its license fee, anywhere from 50% to 100% of incremental costs of the episodic series regular budget over a threshold amount. A typical formulation would be “50/50 over \$250,000,” meaning that, for every dollar in episodic series regular fees committed by the studio in excess of \$250,000 per episode, the network will automatically enhance its initial license fee by 50 cents. In addition, for internal recordkeeping or precedential reasons, some networks choose to internally allocate a portion of the negotiated license fee to “breakage,” even though it is fixed and negotiated from inception; such characterizations are largely cosmetic. More often, however, the studio and network will discuss production enhancements on a case-by-case basis, with networks covering anywhere from 50% to 100% of the proposed incremental expense, depending on the perceived value to the network of the enhancement. Splits with studios for such enhancements are much more common in deficit models (where the value of the studio’s reserved rights might be meaningfully enhanced by the investment).

f Later Season License Fees

Flat premiums (or total license fees) are presumptively subject to 5% cumulative annual increases, although, especially outside of broadcast, studios and platforms commonly negotiate for larger, round-dollar-amount increases for a show’s second and third seasons.³⁰ This arises most often when the studio feels it is making a significant concession in accepting the platform’s best offer for the first season premium or total episodic license fee, and is looking to partially make up that concession in success. Such larger season-to-season increases

30 These are sometimes referred to as “extraordinary bumps,” the same term used to describe larger, usually flat (rather than percentage-based) year-over-year increases to an actor or producer’s episodic fees that do not conform to a standard 4% or 5% pattern.

may also be structured as partial deferrals of a larger negotiated premium—perhaps because the platform views the series as risky or is otherwise reticent about ordering it, or to secure the platform’s approval of a larger production budget.

When the license fee is tied to the production cost (including with respect to the premium), increases in subsequent seasons may be based on flat percentage increases on the approved amount from the first season, or automatically recalculated based on each season’s new approved budget (which may itself be subject to a cap, usually 5%). For creatively successful shows whose renewal prospects are tenuous due to their high costs relative to their viewership, the platform’s agreement to order a new season may be conditioned on the budget remaining flat or even decreasing from season to season.

For most broadcast series (and many other deficated productions, when found outside of broadcast), in most “extended term” or “perpetual term” licenses, the network’s license fee automatically increases to the studio’s full cost of production in the fifth or sixth season of the series. From that point forward, the network reviews and approves the annual budgets for the series, and the studio remains responsible for any overages incurred relative to the ingoing approved budget (other than those also paid by the network as breakage), but the network bears 100% of the ingoing budgeted costs (meaning that the studio has no further deficit and its revenues from other sources are effectively pure profit). This has historically made the fifth season an important benchmark for the studio to reach to maximize the profitability of a series (although the significant financial impact to the network of ordering a fifth season may prove fatal to shows that are already at risk of cancellation at the end of their fourth seasons).³¹

g Success Bonuses

In addition to the license fee increase to cost of production in the fifth or sixth year, broadcast license agreements have traditionally rewarded studios for the success of a series in two ways: ratings/rankings bonuses and deficit recoupment.

Ratings and rankings bonuses are additional payments from the network to the studio (often, but not always, on a per-episode basis) that are triggered by a series achieving certain average viewership benchmarks, as measured and published by the Nielsen Company (whose publications remain the standard in

31 Of course, this pre-negotiated contractual default does not prevent a network from negotiating with its studio partner for some relief from the expensive escalation to “cost of production” as a condition of the network’s ordering a fifth season of a given series. From the studio’s perspective, the ordering and production of a fifth season may also be vital to accessing lucrative syndication and other downstream distribution opportunities; consequently, networks have significant leverage to force studios to compromise on their contractual license fees in order to secure a doubtful fifth season order. See Chapter 3, Section C.i.a (pg. 129).

the television industry).³² Such bonuses may be triggered by a series achieving minimum ratings figures, minimum rankings relative to other primetime television series, or both. They are often tiered, with bonuses that escalate as successively higher ratings or rankings thresholds are achieved. These bonuses may be payable starting in the fifth season of a series, or, in some cases, a studio may be able to negotiate for ratings/rankings bonuses that are accessible starting in the second or third season of a series. In addition, if a series hits specified ratings/rankings thresholds, the network may agree to automatic enhancements in the license fees payable for repeat broadcasts.³³ Like many other elements of broadcast license deals, however, these rankings and ratings bonus systems have evolved little over the last several years, remaining as precedential relics in license templates even as audience fragmentation and overall declines in linear TV viewership have made it increasingly impossible to achieve them.

“Deficit recoupment” refers to the network’s reimbursement to the studio, typically in the fifth (or fifth and sixth) season(s) of a series, of the studio’s production deficits from the first four production seasons of the show. This mechanism simulates a common demand of studios when negotiating a license renewal/extension for a highly successful series entering its fifth season under a traditional 4/4.5-year term deal. Like ratings and rankings bonuses, deficit recoupment may be conditioned, in whole or in part, on the show achieving specified Nielsen ratings or rankings. Because a network cannot directly control the deficits a studio chooses to undertake during the first four production seasons, deficit reimbursement may also be subject to negotiated episodic caps. Deficit recoupment is, in practice, also largely a relic; even when still provided for in legacy license agreements with outside studios, networks frequently have sufficient leverage to force studios to waive these terms to secure a pick-up for an additional season.

Unlike many other traditional components of television license agreements, however, these success bonuses have not been adapted into streaming license templates. The implicit bargain of cost-plus license deals is that the studio trades away virtually all of its financial upside in exchange for eliminating virtually all of its financial risk. An explosively successful streaming original produced by an outside studio can enrich its studio in the form of spinoffs (e.g., Amazon’s *Bosch* and *The Boys* franchises, produced and owned by Fabrik Entertainment

32 Nielsen publishes multiple ratings metrics, and the advent of digital video recorder (“DVR”) technology has forced Nielsen to evolve how it measures ratings. The “Live” rating measures how many viewers watched a TV show as it aired in real time. “Live + Same Day” (or “Live + SD”) adds to that count the viewers who watched recordings of the show by 3 a.m. the day after the initial broadcast. “Live + 3” and “Live + 7” ratings include viewers that watched the recorded show within the three days and seven days, respectively, following the initial broadcast of the show. Any time ratings are used as benchmarks or triggers, the deal must be clear as to which rating controls—Live, Live + SD, Live + 3, or Live + 7. Live + SD and Live + 3—are most commonly used.

33 See Section A.vi.a.

and Sony Pictures Television, respectively), and platforms may occasionally entertain renegotiations for increased premiums in later seasons of particularly successful third party-produced originals. But streamers have largely taken the position that their cost-plus license fees—which are often negotiated at or near the outset of development, before the creative package is fully assembled or the true quality and potential of the project is known—entitle them to capture all of the surplus value from a hit series, and there is no prevailing custom of license fee renegotiations with studios to reward them for great success (as there is, for example, for actors who are able to dramatically increase their episodic fees, or for creators who earn lucrative long-term overall deals).

To date, streamers have also rejected efforts from entrepreneurial studios to negotiate for new, achievable streaming equivalents to traditional rankings and ratings bonuses for their license fees. These exist in various forms for talent in “dollars-for-points”-type backend systems.³⁴ The streamers’ resistance to extending these concepts to license agreements with outside studios has reflected the logic described here, as well as their desire to avoid opening the door to any kind of meaningful data sharing requirements with their studio partners.

This looks like it could be poised to change. The new agreements struck with the WGA and SAG-AFTRA after their 2023 strikes created first-of-their-kind bonuses for top-performing series and confidential disclosure requirements for high-level data (with allowances for public reporting of aggregated measures). In December 2023, Netflix announced a major shift in its approach to data transparency by publicly releasing a new biannual report sharing the same type and detail of data now confidentially owed to the unions by all streamers.³⁵ Meanwhile, the rise of advertising will make performance metrics an increasingly important and routine part of pricing and dealmaking around streaming more generally. A variety of market pressures and trends point toward more success-based license pricing in the years ahead.

v *Minimum Orders*

The network’s right, pursuant to the license agreement, to order production of a season of a series is always subject to a minimum episodic order.³⁶

34 See Chapter 9, Section C.iii (pg. 380).

35 See Chapter 2, Section B.iv (pg. 84).

36 Such minimums are important to the studio because the number of episodes produced can substantially impact the economics of a series. As discussed in Section A.iv.b, the per-episode cost of a series goes down as the episodic order goes up, because certain fixed production costs can be amortized over a greater number of episodes. In addition, license fees are typically negotiated on a per-episode basis, so more episodes produced necessarily equates to more aggregate revenue. Consequently, although the studio in a traditional deficit-based deal carries a higher aggregate deficit on a larger order, the episodic deficit is lower and easier to overcome. However, even with these

For broadcast network shows, the longstanding convention is as follows: (1) for the first season, thirteen episodes (inclusive of the pilot), with an option to order a “back nine” of episodes if the show has a fall (rather than mid-season) start; (2) for the second season, twenty-two episodes if the first season had a fall start, or thirteen episodes (with another “back nine” option) if the first season had a mid-season start; and (3) for the third and subsequent seasons, twenty-two episodes.

As of this writing, by far the most common minimum order in streaming and pay TV—certainly for one-hour programs and increasingly for half-hours—is eight episodes per season. This standard sits at the end of a decade-long decline, most recently from ten episodes per season (a standard in streaming that persisted for a few years), before that from twelve episodes (an early streaming norm carried over from cable), before that from thirteen episodes (an early cable norm carried over from the aforementioned traditional network minimum), before that from twenty-two episodes (long considered a “full season” in broadcast), and before that from twenty-six episodes (a decades-old, now-arcaic notion of a full season).³⁷ For limited series that are built for a particular length, the “minimum” order likely reflects the specifics of the creative plan (although networks still sometimes try to negotiate for some buffer in the guarantee to leave room for plans to change).³⁸

minimum order requirements, networks often reserve the right to reduce their order, subject to paying certain shut-down/diminished amortization costs. In such cases, the studio would remain obligated to produce and deliver the reduced number of episodes (although the shortened order may void the network’s contractual options to order further seasons).

37 Streamers have favored ever-shorter seasons thanks to data demonstrating the efficiency (for subscriber attraction and retention) of producing more series with fewer episodes rather than fewer series with more episodes. Years before those data insights, however, cable networks and the early streamers had begun the shift toward shorter production seasons for a variety of reasons, including the preferences of certain writer/creators who favored shorter and tighter serialized story arcs; the preferences of high-level actors who preferred shorter time commitments for production; the willingness of digital platforms to accept second-run licenses for series with shorter episodic runs than would be acceptable to traditional syndication licensees; the desire to avoid talent burnout from grueling television production schedules; and the opportunity to program schedules with a greater variety of short-run series (rather than a smaller number of longer-run series). That said, advertisers favor the consistency and reliability of longer episodic runs; this pressure may nudge the streamers back toward ten- and even thirteen-episode orders for shows that are expected to be particularly popular with advertisers.

38 For whatever reason, license agreements always seem to be negotiated (and series seasons always seem to be conceptualized) in even numbers—principally, six, eight, or ten episodes. Contractual minimums and actual orders in odd numbers are both somewhat unusual. Frequently, when a show as delivered and exhibited runs for an odd number of episodes, it had actually been written and planned for one additional episode, but the studio, producers, and network elected to cut an episode during writing or production (or, in rare instances, post) to address story issues or absorb production overages.

vi Licensed Rights (Grant of Rights)

Any intellectual property license must define the scope of the rights being licensed, and network license agreements for television programs are no different: generally structured to grant networks only specific enumerated rights, with all rights not covered by the grant of rights reserved by the studio (although potentially encumbered by a holdback).³⁹

For much of television's history, the consistency of the industry's basic technological and structural foundations allowed for significant standardization in the negotiation of licensed rights, allowing project-by-project dealmaking to safely focus primarily on economic terms, secure in the assumption that rights terms would be negotiated only within well-understood bounds (if at all). These norms began a long process of evolution and adaptation as original content expanded first into basic cable, and eventually to other platforms with distinct business and technological models. For the most part licenses for linear television networks of various types were incrementally derived from (and remained recognizably related to) one another. But the arrival of streaming platforms in the marketplace forced a more basic restructuring of customary rights grants in license agreements for original content, which eventually effectively swallowed up and replaced more differentiated licensing models used by other types of non-broadcast platforms.

The demands of platforms generally define the scope of the rights being granted in any given license agreement. The opportunity space for material negotiation, beyond simply pricing, is around control of rights that are not necessary to facilitate a platform's existing or immediately planned business, but that are sought for the benefit of corporate affiliates or simply to speculatively preserve as many options as possible for future pivots in tactics or strategy. Early-stage platforms lure business partners by acquiring rights that are tailored narrowly to their immediate needs. Established platforms with market power hoard excess rights to starve out competitors while keeping their own options open.⁴⁰

In general, platforms and studios tend to rely heavily on their own precedents with one another, looking to expedite their business together by narrowing the negotiations from project to project and largely templating both deal structures and long-form agreements. Inevitably, however, year-to-year changes in a platform's budget or strategy bring about a fresh push-and-pull between studios and networks around their evolving priorities, anxieties, and opportunities.⁴¹

39 See Section A.viii.

40 The hope is that mature and sustainable platforms somehow strike a healthy balance between these poles.

41 The usual trajectory of which has been toward networks seeking ever more expansive grants of rights while looking to avoid any associated increase in the license fees they must pay for such rights.

a Broadcast/Linear Agreements: Linear Network Exhibition and Runs

Most obviously, any network must obtain the right to exhibit the series on its own network in every way that network is delivered to customers. For broadcast networks, this means the over-the-air broadcast signals of affiliate stations, authorized retransmissions by MVPDs (including vMVPDs), and more recently, simultaneous streaming and/or authenticated access via a branded app and/or through an affiliated flagship streaming platform. For cable networks, this primarily means MVPD carriage (including via vMVPDs, and with authenticated access via branded apps and/or affiliated streamers). As distribution technologies have evolved, however, the contractual definitions of “network exhibition” have grown to often cover any newly emerged technical delivery mechanisms on which a network/platform may rely, and in some cases, the right to exhibit episodes on affiliated platforms (for promotional purposes or otherwise).

Broadcast networks are traditionally limited to a finite number of “runs” (i.e., distinct, scheduled exhibitions) of the licensed episode of a series and must pay additional license fees (on the order of \$25,000–\$50,000 per run) for repeats beyond a negotiated threshold. Networks may base the number of permitted runs and threshold for triggering repeat fees on an episode-by-episode basis, or based on multiples of the total number of episodes ordered by the network in each season (with a sub-limit on repeats for any given episode). These limits usually amount to a cap of three to four runs per episode under the initial network license.⁴² In any event, at a minimum, the network is generally responsible for reimbursing the studio for any residuals obligations arising out of the network’s repeat exhibition of series episodes, and repeat fees to the studio generally escalate the more reruns the network takes.

b Broadcast/Linear Agreements: Companion Digital Rights

Linear network license agreements—particularly broadcast network license agreements—have always evolved seldom and slowly. Budgets, and therefore license fees, crawled up over time (though not necessarily at the same rate), but otherwise, networks and studios that regularly did business together were often content to largely duplicate their recently negotiated license agreements, plug in fresh numbers on a show-by-show basis, make a few incremental changes, and proceed. But in licensing for linear television, the immediate and enduring exception to that consistency and routine has been digital rights.⁴³

42 In once-standard/now-defunct basic cable license templates, the maximum number of runs was usually much higher (e.g., up to twelve runs), or even unlimited.

43 How this line read in the first edition: “The huge exception to this trend, however, has been with respect to digital rights, which arguably represent the fastest-changing—and most economically impactful—area of constant negotiation (and renegotiation) between studios and networks.” It reads so quaint in hindsight.

In this context, “digital rights” refers to the exploitation of a series that originates in broadcast/linear television via a variety of internet-based delivery methods—in the early days, the networks’ own websites (e.g., ABC.com), but quickly expanding to encompass branded apps (most notably for networks like HBO and FX), affiliated advertising-supported streaming platforms (mostly Hulu), and MVPD-operated on-demand platforms. Other than for the benefit of MVPDs and affiliates, these companion digital rights are usually granted on a non-sub-licensable basis (to preserve the market for the studio’s reserved streaming rights). For several years, studios sought to separate SVOD and AVOD rights and preserve them as independent licensing markets. Over time, however, the streamers’ growing preference for hybridized subscription and advertising-supported business models, as well as the affiliation of three out of four of the major broadcast networks with corporate flagship streaming services, effectively collapsed the boundaries between the SVOD and AVOD markets (though these changes left room for FAST services to assume the market niche previously occupied by AVOD).

In the early days of “companion digital rights,” the prevailing standard was the “rolling five,” in which linear network licensees could make the five most recent episodes of a series (plus or minus the series pilot) available to customers on an on-demand basis (to enable viewers who fell behind on a series to catch up on recent episodes). These limited “catch-up” streaming rights soon gave way to “stacking rights”—in-season streaming exhibition rights for every episode of an ongoing series season, which soon became an enforced requirement in linear license deals. As the broadcast networks’ parent companies embraced “walled garden” strategies for the Streaming Wars era, the networks secured virtually unfettered rights to exercise their in-season stacking rights among any of their many current or prospective affiliated platforms.⁴⁴

Enjoying superior negotiating leverage in a four-buyer market with huge barriers to entry, the networks were able to set the market for “stacking fees” on broadcast series to about \$100,000–\$250,000 per episode (across season-to-season escalations)—nowhere near making up for the studios’ loss of the once-promising “streaming one” window, in which hotly anticipated new shows, sight unseen, commanded \$1 million-per-episode license fees for out-of-season streaming rights, with availability for each season commencing thirty days before the next season’s premiere.⁴⁵ That said, with classic broadcast megahits

44 Premium cable networks such as HBO and Showtime were among the first to consistently license extensive digital rights alongside their network exhibition rights (sometimes for separately stated fees, sometimes with fees to be negotiated and/or subject to a “baseball arbitration”-style pricing mechanism), helping them lead the market toward digital distribution of deep and comprehensive on-demand content libraries with early streaming products like HBO Go and Showtime Anytime.

45 This market was largely destroyed not only by the platforms’ perception (or at least their argument) that in-season stacking badly diminished the value of out-of-season streaming rights, but also by the streamers’ growing preferences to spend their budgets on original rather than second-run

like *Friends* and *The Office* long dominating viewership in streaming, and (as of this writing) buyers reportedly looking for “nostalgic” and “classic-feeling” shows (especially following the breakout success of *The Night Agent* and unexpected renaissance of *Suits* on Netflix in 2023), studios have hope for a revival in the market for later-window and/or non-exclusive streaming rights in beloved pre-streaming series.⁴⁶

c *Licensed Rights for Streaming Originals*

The digital rights described in the foregoing section are known as “companion rights” because, despite the obvious contemporary importance of streaming exhibition for all original series, digital rights in linear license deals are still viewed as derived from, ancillary to, and to be used principally in service of the core “network exhibition rights” at the heart of the license agreement. Where the first-run network licensee for a series *is* a streaming service, however, the digital rights granted by the studio may instead be referred to as “standalone rights,” and they represent the core of the license deal around which its other terms (particularly the pricing for granted rights) are built.⁴⁷

As streamers sought to overcome their initial lack of track records as creatively or financially viable launchpads for original series, they lured outside studios into business with them in part by agreeing to very narrowly defined rights grants on newly commissioned series. Much as they had done with early licenses for second-run streaming of original series from linear television, studios were initially able to scope their rights grants for first-run exhibition of original series to cover only their licensees’ already established or demonstrably and imminently upcoming business and technological practices. At the same time, terms for new concepts like “SVOD” and “AVOD” were generally understood, defined, licensed, and exploited completely independently and distinctly from one another, rather than in hybridized models simultaneously generating revenue from both subscriptions and advertisers.

So, for example, a platform like Netflix that (at the time) was offered to customers only on a subscription-supported, ad-free basis might be granted only SVOD rights, with AVOD rights reserved in hopes of eventually licensing them to a platform like Hulu (initially an ad-supported and subscription-free platform), which in turn would not be given the opportunity to acquire SVOD

content, their growing preferences for wholly owned rather than licensed productions, and their shift even in non-broadcast linear television toward more expansive rights grants (based on standards from streaming).

46 See Chapter 3, Section C.i.a (pg. 129).

47 For such deals, traditional notions of “network exhibition” or finite “runs” and “repeats” are, by definition, not applicable, and license agreements presume (but do not require) full-time availability for every series episode of the series for the entirety of the platform’s negotiated exhibition term.

rights for itself.⁴⁸ Such narrow licensing not only maximized the rights reserved to the studio for distribution with third parties; in the fast-evolving streaming market, it also created several windfall monetization events for supplier studios who got “second bites at the apple” to extract additional fees from existing licensees (of both original and library content) in exchange for expanding narrowly-defined rights grants from legacy license agreements as needed to facilitate more recent diversification and hybridization in the streamers’ service offerings and monetization models—e.g., Hulu’s evolution from a pure AVOD service, to offering a mix of AVOD and SVOD products, to an exclusively SVOD service with a mix of ad-free and ad-supported tiers; or Netflix and Amazon’s eventual introduction of “tethered downloads” for streaming subscribers.⁴⁹ Studios also frequently limited streaming licensees to exploiting rights solely on owned or affiliated platforms with similar or closely related corporate branding (with limited allowances for specific known local branding or affiliate sun-licensing arrangements).⁵⁰

Negotiating leverage quickly shifted toward the streamers, however, and it did not take long for these carefully parsed rights provisions to begin collapsing into broader and undifferentiated grants, especially in deals for streaming originals.⁵¹ As the tech streamers came to view the SVOD and AVOD markets as being essentially unified and competitive, rather than independent and complementary, they first obtained more extensive holdbacks against SVOD/AVOD rights that were withheld from their own rights grants before eventually adding such rights to their own grants of rights outright. At the same time, streamers forced into costly renegotiations with existing licensors to acquire newly desired or identified rights immediately revised their license templates to prospectively capture such additional rights. Before long, the basic prevailing approach to defining digital rights grants in streaming licenses (especially for originals, but also for library linear series) had shifted from a licensor-friendly model that “started with zero” and granted only enumerated digital rights (with all other rights presumptively reserved) to a licensee-friendly model of effectively granting all digital rights on a blanket basis, subject only to specifically stated limitations and/or restrictions. These shifts generally entailed no material increases to the compensation offered to studios by the platforms for their ever-growing requirements with respect to grants of rights. Compared to earlier-generation licenses for streaming originals, contemporary deals are more

48 Then and now, FVOD exhibition has largely been seen as non-commercial in nature and potentially damaging to the downstream licensing value of shows for other types of streaming exhibition, and is usually restricted to promotional or stunt exhibition of a limited number of episodes.

49 See Chapter 2, Sections A.i–ii (pg. 57).

50 For instance, from 2011 to 2014, Amazon operated its streaming business in the United Kingdom and Germany through an acquired subsidiary called LOVEFiLM, before finally folding the service into its self-branded Amazon Instant Video service in February 2014.

51 See Chapter 3, Section C.ii (pg. 139).

likely to address SVOD, AVOD, and FVOD rights as a group (with only TVOD/EST singled out among streaming rights for special terms);⁵² to permit hybridization of traditionally independent streaming rights (e.g., lower-cost ad-supported subscription plans or subscription-authenticated tethered downloads); and to allow for some amount of sublicensing.⁵³

The seemingly inexorable trend toward expansion in granted rights has also increasingly swept linear rights into “streaming deals.” For years, streamers allowed studios to reserve rights that—though encumbered with holdbacks, first negotiation/first refusal rights, and occasional buy-out options—nominally preserved for the studio the value of its reserved linear rights (while giving the streamer the opportunity to pull out its checkbook to protect and extend its exclusivity in the future). More recently, tech and studio streamers alike have also sought to secure linear rights for the benefit of current or future affiliated linear platforms (as Amazon does for its MGM+ [formerly Epix] premium cable network, or Max does for its HBO and Turner-branded linear channels), or simply to library these rights for possible future sub-licensing/monetization in lower-priority portions of their worldwide territories (as seems likely to grow more common in the coming years). Over this same period, legacy conglomerates have also largely adapted their rights-hungriest streaming templates for use on shows that are intended initially or primarily for (non-broadcast) linear exhibition. Thus, just as digital rights slowly grew from an incidental to a central component of the granted rights in license agreements for linear shows, linear rights have similarly evolved from an incidental to a central component of the granted rights in license agreements for streaming originals.

For the most part, however, this expansive approach to rights acquisition remains primarily defensive in nature despite the increased diversification and hybridization of business models (both on individual platforms and within portfolios of various platforms owned and operated by the tech and media giants). Even the largest licensees cannot or do not, either concurrently or consecutively, exploit all or even most of the diverse rights they control for each

52 See Section A.viii.

53 Such sublicensing terms are usually very unpopular with supplier studios, especially larger studios that still have the personnel, infrastructure, and capabilities—but ever fewer available opportunities—to exploit such rights directly. Studios often view sublicensing by the network as an intrusion on the studio’s traditional position in the content value chain that can create confusion in the market for secondary/ancillary rights in a particular project (due to there being multiple licensors representing separate rights in a single territory). In addition, studios may perceive the network’s wish to monetize an original series off its original platform—while largely denying the studio its traditional customary right to do the same—as particularly odious, especially given the low-risk/low-upside logic of licenses for streaming originals. Some studios are therefore especially resistant to platform demands for sublicensable rights and may condition their agreement on mutual approval over proposed deals, a requirement that the platform engage the studio as its subdistributor (for a customary fee) if it ever seeks to monetize such rights, and/or sharing between platform and studio of revenue from the resulting deals.

series; and despite their increasingly global businesses, these companies' capabilities and strategies are not entirely uniform from territory to territory. Such granted rights are therefore largely acquired not necessarily to be exploited, but to leave the option for them to be exploited in the future, and to render such rights decisively unavailable to competitors. Figuring out a new approach to a more "old-school" balancing of granted and reserved rights in license agreements—one that reflects a more sophisticated understanding of the relative value, opportunity, and cost of various rights and exclusivity protections to both parties—seems critical to achieving the industry's goals for cost rationalization and sustainability in the post-"peak TV" era.

vii License Territory and Term

All intellectual property licenses must specifically identify the territories and time periods that are within the scope of the license; again, network license agreements are no exception.

For most U.S. broadcast (and traditionally, other linear) networks, the applicable territory is the United States and its territories and possessions.⁵⁴ Puerto Rico and Bermuda are often included as part of the United States, and Puerto Rican and Bermudan rights may be subdivided between English-language rights (which are often included as part of a U.S. license) and Spanish-language rights (which are often excluded from U.S. licenses or granted only on a non-exclusive basis, to allow the studio to also include these rights in pan-Latin American licenses).⁵⁵

For virtually all non-broadcast original series, however, the increasingly prevalent default has been for platforms to negotiate for rights in most or all of the world (in all languages, with equivalent licensed rights in every territory)—the end state of a decade-long evolution from licensing rights only for the U.S. and a few key major territories,⁵⁶ then to negotiating for options covering most major territories, then to negotiating for a mix of bought-out and optioned territories that collectively cover the entire world, to the now-typical

54 Every territory also typically includes its military bases, as well as airlines and cruise ships that fly the flag of that country.

55 The same basic territorial footprint and definition were used in basic cable as well as broadcast TV, although, before the pay TV business began its major secular decline and substantial replacement with streaming, some major cable networks (such as Viacom's Comedy Central and MTV and Discovery Communications' Discovery networks) were also already being made available in a limited number of territories outside of the United States. Such localized foreign versions of U.S. cable networks typically carried much of the same content as their American counterparts (though with original content often premiering weeks, months, or even years later than on the flagship U.S. channel). Even older and more traditional basic cable license agreements therefore could include options or buyouts of needed rights for select international territories, priced appropriately for each such additional territory, as required by the buyer network.

56 Deals that were, at the time, not cost-plus.

up-front buyouts of worldwide rights.⁵⁷ Although neither Apple nor any of the studio streamers can boast worldwide footprints that are as complete or fully integrated as those of Netflix and Amazon, they are all generally consistent in acquiring (or at least guaranteeing their access to) worldwide rights—even Peacock, which, as of this writing, is available only in the United States and its territories, but which (following Comcast’s \$39 billion acquisition of European pay TV giant Sky in 2018) offers Peacock originals on Sky-branded platforms where available.

In general, the only exception to this standard is when a streamer acquires a series that has already been commissioned by and/or produced for one or more non-U.S. networks before the streamer discovers it.⁵⁸ In these cases, streamers will typically narrowly carve out such unavailable rights from their own licenses (to the extent already committed to other licensees in existing closed deals), while usually obtaining the earliest available exhibition rights in encumbered territories, and otherwise retaining their typically expansive acquisition of rights throughout the rest of the world.⁵⁹

In theory, there is no reason why studios and platforms could not negotiate for different rights grants and reservations on a territory-by-territory, region-by-region, or simply domestic-vs.-international basis. Such finer parsing could allow for more efficient dealmaking, at least incrementally reducing the amount spent by platforms for rights they do not necessarily need, while enhancing the studio’s financial prospects from its reserved rights in the deal.

Compared to the currently prevailing one-size-fits-all approach to worldwide rights management, such detailed negotiation would require more complex and individualized evaluations by streamers on their wants, needs, and goals for each distinctly negotiated territory or region, accepting some more modest/realistic expectations for their international growth and expansion prospects, and for the platforms to tolerate at least inconsistent exclusivity—if not inconsistent availability—for titles across the various territories they serve. For supplier studios, it would also demand more complicated and uncertain financial modeling

57 Streamers may exercise international rights directly under their own brands (as Netflix and Amazon generally do), via standalone platforms (wholly owned or operated as joint ventures) that are separately branded or co-branded with the company’s main service marks (such as “Disney+ Hotstar” in India), or under locally-programmed specially branded tiles on global flagship services (such as the Star and Star+ tiles available within Disney+ in many parts of the world).

58 These are sometimes referred to as “world ex. _____” deals, referring to the licensed territory being the world, excluding specific unavailable (in whole or in part) territories. Notable examples include Netflix’s *Black Mirror*, originally commissioned by Channel 4 in the U.K., and Amazon’s *Fleabag*, originally commissioned by the BBC. (These could be described as “World ex. U.K.” deals.) Oftentimes, however, streamers look for opportunities to expand their rights in future seasons—for example, Netflix took over first-run exhibition rights in the U.K. for *Black Mirror* starting with the show’s third season in 2016.

59 Such arrangements are a sub-species of international co-commissions, discussed more generally in Section C.

and projection, to intelligently ascribe value to these additional reserved rights (and therefore intelligently assess how much up-front license revenue it makes sense for the studio to give up to re-secure such rights). The types of rights that the streamers are most immediately ready to part with—perhaps Eastern European linear television rights to a sitcom—are likely too insubstantial to yield meaningful license fee concessions from studios in exchange for retaining them. Change here is therefore likely to be slow-to-nonexistent until streamers can identify more significant packages of rights, perhaps in combination with less restrictive holdbacks on existing reserved rights, that they are willing to give back to the studios to secure financial relief in these deals.⁶⁰

The most obvious inefficiency in most streaming deals, as they are made today, concerns Chinese distribution and exhibition rights. China was, for a time, viewed as one of the industry's highest-potential opportunity spaces due to its huge untapped audiences, rising disposable income in the general population, and fast-growing economic market for content creation and distribution. But political and regulatory hurdles have consistently stymied the ambitions of American-owned streamers to operate their own services in China. Efforts by various platforms to manage these challenges by going into business in China via joint venture arrangements with local partners have failed to gain traction, and at this point, there is little reason to expect (or even realistically hope) that the streamers will ever be in a position to operate as customer-facing platforms within the country. Many of the same issues that have hindered the platforms' efforts around China impact outside studios as well, with fewer U.S.-produced projects being authorized for local distribution by the Chinese government each year (for both theatrical and streaming exhibition) and, for the projects that do make it through, shrinking license fees available from platforms that increasingly prefer to invest in lower-cost, broader-audience local original content. That said, now that it seems clear that the Chinese content market can really only be effectively accessed by U.S. companies via distribution licenses, and not direct local operations, the exclusive licensing of Chinese distribution rights to "worldwide" platforms (which are, without fail, at best really "worldwide ex. China" platforms) seems like a clear example of value destruction in the dominant licensing model, and an area ripe for improvement in future dealmaking.

Finally, license agreements provide for time limits on how long network licensees may exhibit series episodes. For broadcast networks, the exhibition term is typically coextensive with the series term: as soon as the network allows

60 There are therefore many practical impediments to such finely parsed global dealmaking becoming the new norm, which would be much more complex and time-consuming to navigate, especially if negotiated project-by-project rather than implemented as new service-wide licensing policies. In any event, however, as with granted and reserved rights more generally, more tailored dealmaking around global rights deals seems like one more tool that studios and networks can experiment with to rationalize the costs of the streaming business, while making better and more balanced allocations of risk and reward between studio and network partners on original series.

its option to order a new season to expire unexercised, it no longer has the right to broadcast old episodes of the series (although any negotiated holdbacks on outside exploitation⁶¹ remain in full effect). For cable and digital platforms, the most typical exhibition term is “run-of-show plus ten years,” meaning that the network’s exhibition term continues until ten years after the date of its initial exhibition of the last original episode produced.⁶² Because this time period generally applies to all seasons produced (to ensure coextensive availability of all series seasons), older seasons are functionally subject to a longer exhibition term than newer seasons. The ten-year period following the initial exhibition of the final series episode may be exclusive in streaming for its full duration, or only for the first half of such ten-year period (give-or-take), and non-exclusive (i.e., available for concurrent licensing non-exclusive licensing to third-party streamers) thereafter.

viii Reserved Rights and Holdbacks (Network Exclusivity)

In general, a studio reserves for itself all rights it has not granted to its network licensee. These reserved rights become the basis of the studio’s efforts to realize a profit by maximizing revenue-generating opportunities across media, territory, and time. However, the original network licensee has a significant interest in protecting its investment in a series (which investment amounts, at the least, to a substantial percentage of the show’s cost of production) by ensuring that, at least for some time, the network is the exclusive home of the content that its viewers want to consume. Consequently, every network license agreement includes a set of holdbacks, which restrict the timing on which a studio may exercise its reserved rights in a series.

The overall trend of license agreements over the last ten years—in general, but especially outside of broadcast television—has been for studios to reserve fewer and fewer rights, with greater and greater encumbrances, to the point that many studios essentially value their “off-network” rights in a streaming deal at or near zero, looking at any revenue they may eventually be able to extract from such rights as an unanticipated windfall. Even the most rights-intensive license agreements still provide for *some* reservations and holdbacks, however, and network exclusivity is another area of negotiation that looks ripe for re-evaluation as platforms (especially studio streamers) continue their searches for more sustainable business models.⁶³

61 See Section A.viii.

62 In this context, “run-of-show” may also be stated as “run of the series” or “ROS.” The term “run-of-show” may also be used as slang in physical production, especially for feature films, to refer to the full scheduled period of principal photography for a film or series season.

63 See Chapter 2, Section B.vi (pg. 89).

A studio may typically engage in non-primetime “off-network” or “syndication” licensing of an original series on a once-a-week basis commencing three years after the debut of the series, and on a more-than-once-a-week basis (also known as “stripping”) commencing four years after the debut of the series. These holdback windows (especially in streaming, with its non-annualized releasing pattern for subsequent seasons) may also be negotiated based on the passage of time calculated from the release of a third or fourth season, rather than the first. For series that run for only one or two seasons, such rights may instead become available twelve to eighteen months after the initial exhibition of the final series episode (though historically there has not been much of a market for syndicating series with so few episodes).

This holdback, or something close to it, is the prevailing standard for streaming and other non-broadcast originals as well, although the “permitted platforms” for syndication may be defined to exclude (or require a longer holdback for) platforms of the same type as the original network. For example, following the expiration of these holdbacks, broadcast network shows can generally be freely syndicated to cable network or broadcast station licensees, while cable originals can only be syndicated on broadcast stations (with licenses to competing cable networks fully held back during the term of the agreement, usually until the network allows its option to order new seasons to expire unexercised). Even streaming and pay TV platforms—for which extensive exclusivity against other streaming exhibition is addressed as part of the platform’s license term⁶⁴—usually use the same basic holdback timing/structures, but may occasionally negotiate for specific limitations on syndication to particularly competitive or disfavored third-party platforms.

When streaming first emerged as a new exhibition window for linear series, off-network second-run exploitation of a conventional television series via SVOD or other digital platforms was initially made subject to the same holdback window as traditionally applied to off-network linear television/syndication licensing. Before long, however, experience demonstrated that the availability of recent seasons of ongoing television series on streaming services was complementary, rather than cannibalistic, to the home network where new episodes debuted, and therefore a rare win/win/win/win for studios, networks, streamers, and audiences alike.⁶⁵ Network license agreements thus soon evolved to make second-window streaming subject to a separately defined holdback from traditional linear syndication, usually allowing for each season to debut in streaming roughly thirty days before the subsequent season’s scheduled premiere on the primary network (with an outside date, around nine to twelve months, for the final season produced). Because over the same time period, such linear networks also generally began to claim “stacking rights” to stream in-season episodes on their own (or affiliated) digital platforms, studios

64 See Section A.vii.

65 See Chapter 3, Section C.i.a (pg. 129).

and networks also sometimes had to negotiate detailed terms to more finely manage the availability and exclusivity of such episodes across multiple platforms, and/or to give network-affiliated streaming services first opportunities to acquire out-of-season streaming rights.⁶⁶

Home video availability of a television series serves a similar “catch-up” function for viewers (and, in any event, is not practical for a studio to pursue, on a season-by-season basis, until each season has been exhibited in full by its premiere network). Consequently, many networks (particularly cable networks) also permit studios to exploit home video rights (which include contemporary technologies such as DVD and Blu-ray), on a season-by-season basis, after nine to twelve months from each season finale, or (to facilitate viewer catch-ups) as soon as one to three months before the debut of the following season. However, broadcast networks sometimes prefer to fully prohibit the studio from pursuing home video distribution of a series until after the network has ceased to order new seasons.

Distribution of individual series episodes via electronic sell-through (“EST”)—the closest digital counterpart to traditional home video distribution—may be subject to the same holdbacks as physical home media. Unlike physical media, however, series can feasibly be offered via EST on an episode-by-episode (rather than season-by-season) basis, and some license agreements permit studio exploitation of EST rights as soon as a few hours after the initial network premiere of each episode. Compared to linear networks, streaming platforms tend to seek additional encumbrances on EST rights—the details have evolved (and will continue to evolve) over time, but Netflix has historically limited “season pass” EST distribution (i.e., sales of complete seasons in EST at a discounted all-in price compared to the total episodic cost), Amazon (which has long offered TVOD transactions on its Instant Video platform) has historically allowed EST sales on third-party platforms for each season after a one-year holdback, and Apple (which operates the world’s largest TVOD marketplace) generally prohibits EST transactions on non-Apple platforms altogether. All of the major platforms also limit or prohibit “free” distribution of episodes via EST. In large part owing to longstanding industry custom and practice, TVOD rights are still broadly considered outside of the “customary” scope of rights granted to a commissioning network and, compared to other forms of streaming, are much more easily measurable and accountable. Consequently, direct exploitation of EST rights by a streamer with an affiliated TVOD service is generally subject to negotiated revenue sharing provisions, designed to compensate the studio comparably to what it would receive for EST sales under conventional standalone licenses to such platforms.⁶⁷

⁶⁶ See Section A.vi.b.

⁶⁷ Over the course of negotiating a long-form license agreement, the parties need to work out responsibility for residuals obligations arising out of such TVOD/EST sales. Terms for revenue sharing and residuals responsibility for EST/TVOD transactions on a streamer’s affiliated platform are thus sometimes negotiated in direct relation to one another.

Studios are generally free to exhibit any episode of a television series in any territory not licensed to the initial network, at any time, subject only to the commissioning platform's right to make the initial worldwide premiere of each episode, on an episode-by-episode basis.⁶⁸

"Ancillary rights" (such as licensing and merchandising, soundtrack, and publishing rights) can also generally be exploited by the studio freely, without holdback or reservation (at least after a series' initial premiere), so long as ancillary products do not "spoil" the substance of unreleased episodes. To the extent that a streaming platform operates related businesses in music (as is the case for Amazon and Apple), merchandising (Amazon), podcasts (Apple and Max), or video games (Netflix), the platform may also negotiate for more detailed terms guaranteeing its opportunity to offer access to such products and services on its own platforms (exclusively, non-exclusively, or one and then the other), and/or limiting the studio's opportunity to make such products and services available via specified major competitors.⁶⁹

Much of the negotiation around the availability of "ancillary rights" tends to be about "derivative rights" (i.e., the right to produce or authorize the production of spinoff or sequel television series, theatrical motion pictures, stage plays, or other new productions), which are often frozen during the series term of the license agreement. In other words, as long as the network licensee continues ordering new seasons of the series, the studio may not exploit such derivative rights without the network's approval (which, in the case of a derivative television series, would generally be granted by the network only if it were also the network licensee for the new series).⁷⁰

68 Management of such premiere rights can get complicated in "co-commission" situations, in which two or more unrelated platforms in separate territories each commit significant license fees to a project prior to (or early in) its production. See Section C.

69 Studio business affairs executives on projects based on underlying intellectual property must take care to review the terms of the applicable option/purchase agreement to confirm that the studio actually controls and can grant the rights demanded by the network (and that the rightsholder has not reserved them), and/or that the studio has the power to agree to the network's required holdbacks (as the studio can only impose a holdback on the rightsholder's exercise of their reserved rights to the extent actually provided for in the option/purchase agreement for the property). Frequently, there is at least some mismatch between the network's expectations on rights and holdbacks (which the studio has the sole power to accept on wholly original projects) and the corresponding terms applicable to such rights in the option/purchase agreement. This is especially common for liberally negotiated and drafted option/purchase agreements that are entered into by independent producers and later "laid off" onto studios. When the limitations on a studio's rights and controls under the option/purchase agreement preclude it from agreeing to the platform's requirements, platforms usually agree to pare back their requirements to the maximum that the studio is able to agree to under its existing deal. In rare cases, however, the platform may condition its willingness to proceed with the project on the studio going back to the rightsholder to renegotiate the terms of the option/purchase agreement to the extent necessary to meet the platform's minimum requirements with respect to granted rights and holdbacks on reserved rights.

70 Such rights may also remain encumbered post-term, as explained in Section A.x.

ix *Revenue Backstops*

Although relatively uncommon in today's marketplace, revenue backstops are an old tool long used by negotiators to close license agreements under circumstances that might otherwise be considered too risky or speculative for a studio to be willing to accept.

The basic starting point for negotiating virtually any new license agreement is the scope of rights demanded by the licensee network, a position that networks have historically crafted to reflect their immediate and anticipated needs based on the practical and technological realities of their businesses.⁷¹ Counterintuitively, however, rather than being based primarily on the parties' valuations of the rights being *granted* by the studio, initial license fees for original series have historically often been driven primarily by the parties' valuations of the rights being *retained* by the studio, relative to the anticipated cost of the show.⁷² The underlying analysis implicitly driving these conversations is the studio's assessment of its relative levels of risk and reward under the deal.

Risk is easy enough to measure roughly: it is basically equal to the studio's deficit (i.e., the calculated difference between the show's cost and the initial network license fee), with some further allowance for unplanned and unavoidable production overages. Measuring expected reward requires a more complex analysis, however, taking into account the extent of the rights reserved by the studio (and corresponding holdbacks and restrictions on the studio's exercise of such rights); the current or anticipated existence of meaningful markets for such rights; the likelihood that the studio will be able to meaningfully monetize its reserved rights at all; and if so, the range of financial outcomes it might expect from such "off-network" distribution. In turn, these assessments have historically been driven by a combination of factors, including the size of the series budget, viewership of the series on its initial platform, critical acclaim and awards, the extent of marketing activity around the show, the resulting audience awareness and general social prominence of the series, and the recognizability of the series and its stars to viewers in other markets.

Depending on when a negotiation is taking place, these measures may be extremely speculative at the time a studio is modeling a show's prospects and conducting its license negotiation. For shows intended for unproven platforms,

71 Studios certainly can and do negotiate about the extent of granted and reserved rights, especially when working out novel templates with new partners. For the most part, however, the parties to a license negotiation work from and around the starting point of the network's demands, which have typically been grounded in hard-to-debate practical necessity.

72 Certainly, studios have long sought to build on precedents in the marketplace—both their own and those of their competitors—and capitalize on occasional competitive situations to extract larger fees and significant non-financial concessions from their network partners. Outside of such competitive situations, however, networks tend to hold the leverage, and negotiated license fees often reflect less "how much the network is willing to pay" and more "how little the studio is willing to accept."

there is a vacuum of historical data that renders these measures virtually unknowable, increasing the perceived risk to the studio of making a deal that contemplates even a modest deficit. Compounding that uncertainty and risk for the studio is the fact that, as a practical matter, the various factors outlined here are often largely subsumed into a single proxy metric, especially for negotiations that take place before a show actually debuts—the prominence and prestige of the show’s debut network (which are somewhere between unknown and nonexistent for unestablished new platforms).⁷³

Creative dealmakers have sometimes navigated this uncertainty by negotiating for a “revenue backstop,” in which a network guarantees for its supplier studio a minimum amount of total revenue to be generated by specified reserved rights within a defined time period. In such deals, the network agrees to reimburse the studio for any shortfall between its actual distribution revenues for particular rights and/or territories on the one hand, and the revenues the studio would have expected to achieve for a comparable show from a more established network on the other.⁷⁴ This functionally shifts the financial risk of the uncertainty around the new network from being borne solely by the studio to being shared between studio and network. The benchmark for the “expected revenue” figure from which the backstop is derived would be highly negotiated between the parties, considering both relevant market comps and the immediate needs of the studio, based on its financial analysis, as it tries to construct a model that can support greenlighting its new project.

x Subsequent Seasons and Derivative Productions

Studios looking to maximize a project’s long-term prospects take care to protect their ability to seek out a new network licensee for future seasons, once the initial licensee decides to stop ordering the series.⁷⁵ Similarly, a studio may

73 Of course, such uncertainty does not mean that there is no upside in working with such networks—to the contrary, entrepreneurial independent studios have long thrived in part by taking risks on upstart networks in unproven new media, establishing valuable new relationships and profiting hugely as some of those one-time upstarts, from basic cable to subscription streaming, have grown into powerful incumbents. Nevertheless, conservative analysts may value the “off-network” rights for a show that is intended for a little-known new platform at or near zero, at least until the new platform firmly establishes itself within the industry and/or a clear market is established for rights in shows that originated on that platform.

74 The same tool can also be used where a network seeks to negotiate for (relative to some appropriate reference standard) unusually extensive granted rights, unusually broad or prolonged exclusivity, or unusually substantial holdbacks or other restrictions on studio-reserved rights, such that the expected value to the studio of such rights is depressed relative to their expected value from comparable shows/deals not subject to such unc customary terms.

75 Studios have been able to extend the life cycles of numerous prominent series by finding them new homes after they were canceled by their original networks. For instance, Sony Pictures

realize major additional value from a successful series by producing spinoffs, or even converting a series into a franchise with multiple iterations (such as NBC's *Law & Order* and *Chicago* franchises from Dick Wolf, or CBS's *CSI* and *NCIS* franchises). On the other hand, a network wants to take care to preserve its ability to retain control of future seasons of a successful series, even after the initial term of the license agreement has expired, and to establish itself as the natural home for any derivative productions of a successful series, even if that original series is no longer on the air.

Typically, these competing interests have been resolved through a patchwork of holdbacks and post-term first negotiation and first refusal (or, occasionally, last refusal) rights. Commissioning networks typically retain fully exclusive control over proposed spinoffs and derivatives for the run of the series plus a tail (which may be as short as six months and as long as perpetual, but usually amounts to between one and three years, with the tail often growing up to a cap according to how many series seasons are produced).⁷⁶ These procedural safeguards offer a network a meaningful advantage over competitors when it comes to obtaining rights in subsequent seasons or derivative productions of a successful series, while at the same time protecting the studio's ability to monetize and maximize valuable rights if a show's original home network is uninterested in proceeding (or if the parties are unable to negotiate a deal).

Special considerations may also apply for original series that are "moving" to a new premiere platform for new seasons. Streamers who introduce lesser-watched third-party originals to wider audiences and then take over production of future seasons (as Netflix has with *Arrested Development*, *You*, *Cobra Kai*, *Black Mirror*, and others) may insist on obtaining at least non-exclusive exhibition rights for existing episodes.⁷⁷ Platforms may also condition their agreement to commission new seasons on "jumping ahead" of the project's original

Television was able to extend the lives of series such as *Community* (canceled after five seasons on NBC; renewed for a sixth season by Yahoo!) and *Damages* (canceled after three seasons on FX; renewed for fourth and fifth seasons by DirecTV). Touchstone Television did the same for *Scrubs* (canceled after seven seasons on NBC; renewed for eighth and ninth seasons by ABC), while Warner Bros. Television did so for *Southland* (canceled after one season by NBC; renewed for four additional seasons by TNT).

⁷⁶ These negotiations can get complex when a new series is based on an existing film or television series—especially for ongoing or actively-in-development franchises—with differentiation in the applicable holdbacks and FN/FR terms for projects depending on their mediums (e.g., film vs. series, animation vs. live action) and creative content (e.g., incorporating original elements of the newly commissioned series vs. based exclusively on preexisting or otherwise separate studio-owned productions and underlying intellectual property). In addition, platforms commissioning series based on library properties may seek exhibition rights for the underlying titles (or options or first negotiation/first refusal rights to allow the platform to secure such rights in the future if they are currently unavailable due to existing commitments).

⁷⁷ Some studios try to plan ahead for such scenarios by negotiating for contractual options to eliminate the network's exclusivity on existing episodes in favor of a new commissioning licensee for

commissioning network with respect to rights and protections for future derivatives (either of which demands may require the studio to renegotiate elements of its existing agreement with the show's original network before it can agree to such terms).⁷⁸

xi Network Approvals

Networks enjoy broad (and broadly stated) creative approval rights in connection with every series they commission. Such approval rights extend not only to the creative content of the show (including filming locations, production drafts of episodic scripts, and final cuts of produced episodes), but also to hiring (and firing) of key personnel engaged in connection with the series (including executive producers, directors, writers, series regulars, and major recurring guest actors).⁷⁹ In addition, networks generally maintain exclusive final authority over the granting of credits for series that appear on their services.

The final creative content of a series is a result of an ongoing process of push and pull among talent and producers, studio executives, and network executives. As between the talent/producers and the studio, in the event of a disagreement, the former must adhere to the directions of the latter. But as between the studio and the network, the parties must generally reach mutual understanding (or at least accommodation) with respect to all key creative matters, with neither side having the right to unilaterally designate or force creative choices against the other side's will—although in many cases, creative decisions may be forced (or creative disagreements effectively resolved) by the demands of budget, schedule, or other production exigencies.

Standard network approval rights also extend to production budgets and schedules. Final mutually approved budgets are usually clearly memorialized by the parties shortly before the commencement of principal photography (often as the last outstanding formal condition to the network's firm order of the season).⁸⁰

future seasons, often in exchange for a negotiated discount or partial reimbursement of the original license fees for those rights.

78 On the other hand, platforms that are particularly sensitive to seeing future seasons of their original series on certain platforms—e.g., a Netflix original series moving to Amazon, or a Showtime original series moving to HBO—may negotiate in their initial license agreements for restrictions or approvals over proposed “re-sales” to specified major competitors.

79 Management of such creative approvals can get complicated in “co-commission” situations, in which two or more unrelated platforms in separate territories each commit significant license fees to a project prior to (or early in) its production. See Section C.

80 Prior to settling on a full mutually approved production budget, studios and platforms frequently agree on one or more limited “pre-prep budgets” or “cash flow” schedules, representing amounts approved for spending (and therefore financially backed) by the network while the parties continue

Networks have historically exercised such budget/schedule approvals fairly loosely and liberally on deficated projects, and only to the extent necessary to satisfy themselves that a production is sufficiently responsibly planned (such that the studio will be able to complete and deliver it), and that the show's production values will meet the expectations of the network and its audience. Beyond that, the studio (which bears principal financial and practical responsibility for the production) has substantial discretion over how much it spends (over a reasonable negotiated minimum), and how it chooses to spend it (so long as the network's creative rights are respected).

In cost-plus streaming, however, platforms—financially responsible for all budgeted production expenses (and then some)—have generally exercised their budget and schedule approval rights more rigorously and aggressively, down to the line-item level, than broadcast networks and other counterparts in deficit-based shows. Even where budgets/license fees are nominally capped and studios are contractually liable for unapproved production overages, streamers—skeptical of and sensitized to the studios' collective cost/risk-aversion, sometimes tenuous financial conditions, and tendency to reflexively pass all of their costs along to the platforms without taking any evident personal responsibility for them—largely expect to bear most if not all unexpected additional expenses that may arise over the course of production and delivery. Consequently, production executives for streaming platforms are often intimately involved with all aspects of budgeting, scheduling, and production planning, and require studio production executives to be extremely transparent and collaborative both in setting an ingoing production plan, and in adapting and executing on it in the face of the day-to-day challenges of physical production.⁸¹

xii Network Promotional Rights

One of the network's fundamental roles in the television industry is to market its shows (and itself as a content destination) to the viewing public.⁸² To enable this function, the studio typically accords its network licensee broad rights to promote the availability of a series on the network's service, and, in connection with such promotion, to create (at the network's own expense) marketing materials (such as commercials, trailers, and print advertisements) that are technically built from and derivative of the underlying elements of the series. Networks customarily consult with studio and talent partners with respect to major

to work through major casting requirements, full budget/schedule approval, or any other outstanding conditions on the full season order.

81 This is, of course, on top of the platform's ultimate creative approval rights over the series and all of its major creative elements.

82 See Chapter 1, Section B.iii (pg. 27).

materials (e.g., “key art”) and high-level campaign design, but generally retain final approval over all marketing matters, as well as general day-to-day control over execution of a project’s campaign. Studios usually spend little or none of their own money on such marketing campaigns, although larger and better capitalized studios may choose to contribute to marketing expenses, especially for awards campaigns, to get reticent platforms on board with the studio’s favored marketing and publicity ideas, as a means of asserting more overall control over marketing efforts, or where (as is often the case with streaming platforms) a studio is unsatisfied with the network’s level of investment in “franchise marketing” (i.e., show-specific advertising) rather than “platform marketing” (i.e., advertising for the service more broadly, which may feature several individual titles but focus clearly on the overall platform).

The network license agreement generally requires that the studio take reasonable steps, in its agreements with actors, writers, and other key service providers, to obtain the right to use such individuals’ names and likenesses in the promotion of the series, and to require them to participate in publicity activities, as required by the network. Studios therefore routinely obtain network approval of the publicity clauses used in the acting forms for each production (including applicable requirements around professional availability for promotional services), and of any material changes to those clauses made during actual negotiation of the agreements (beyond any “gives” that are pre-approved within the studio’s discretion).⁸³

Networks often directly finance, outside of the budget and license fees for the series, the creation of key marketing materials (such as series posters/key art and electronic press kits). In turn, studios often agree to cost-sharing arrangements with the networks, by which the studios reimburse the networks for a portion of these expenses in exchange for the right to use (and to authorize the studio’s other international and downstream licensees to use) such network-financed/created marketing materials. Networks also frequently coordinate directly with a show’s creative and production team to arrange for photo/gallery shoots, interviews, or other production activity around electronic press kits (“EPKs”) and behind-the-scenes (“BTS”) materials (which may be used directly in marketing or as “value added” special features in home media releases or online).

83 See Chapter 8, Section A.xiii (pg. 319). A studio may revise its forms to meet the platform’s requirements for each series, or use platform-specific schedules or riders to implement its requirements without altering the studio’s basic underlying forms. The same approvals and adjustments also generally apply with respect to options and exclusivity clauses in the studio’s forms for talent agreements.

xiii Product Integrations

Networks generally retain approval over all product integrations on their shows, including cashless “tradeout” deals.⁸⁴ In scripted programming, the studio generally receives and retains any fees paid by advertisers for product integrations (as well as the cost savings associated with tradeout deals), although the network and studio may alternatively agree to split such fees.⁸⁵ Studios frequently negotiate to reserve the right to independently solicit potential integration partners, and may be entitled to off-the-top “sales fees” (essentially equivalent to finder’s fees), usually between 10% and 15%, on revenue from partners they bring in. However, networks usually demand control over the negotiation of product integration deals and typically require that an advertiser buy some amount of advertising time from the network in exchange for the network granting its approval of a proposed integration. This advertising revenue is retained solely by the network, and in many instances, the network may be solely responsible for negotiating and allocating the total compensation paid by the advertiser between the “media buy” (which is retained by the network) and the “integration fee” (which is shared with or retained by the studio).

xiv Contingent Compensation

Assuming there is no co-production relationship between a network’s affiliated studio and the lead production studio for a series,⁸⁶ the position of the network is that of licensee, and the studio remains the sole owner of the series (and therefore primary beneficiary of the upside in the show’s success). Nevertheless, networks⁸⁷ may seek compensation for providing the initial platform and promotional effort that launch a series to success—usually in the form of a share of contingent compensation, roughly 2.5%–5% of MAGR (with the usual outliers), defined similarly to “points” accorded to talent participants.⁸⁸

84 See Chapter 1, Section B.vi.b (pg. 40).

85 This is in contrast to the world of unscripted television, in which networks sometimes retain all, and typically no less than half, of product integration fees (in addition to retaining 100% of any associated advertiser media buys). In addition, for first-run syndicated programming—for which there is no commissioning network—the studio retains 100% of product integration fees and may also extract similar commitments for associated media buys, from the studio’s retained “barter” share of advertising inventory.

86 See Section B.

87 Especially, in their time, cable networks.

88 Studios may require that such MAGR participations granted to networks fit within their typical caps (usually 35%) on total third-party participations, or that the networks’ participations be deducted “off-the-top” in calculating talent participations. See Chapter 9, Section B. v.ii (pg. 371).

xv Quick Reference Guide**TABLE 11.2** Network and Streaming License Agreements

<i>Deal Term</i>	<i>Main Issues/Ranges</i>	<i>Other Issues</i>
1. Development Contributions and Production Commitments	• Series sold or “set up with” network for development, pilot commitment, or series commitment • Network covers 50%–100% of development costs (potentially subject to cap) • Platform may have option to order standalone pilot before first season	• Broadcast development “coverage” often artificially capped but may be backed with “penalty” if pilot and/or series is not ordered • Pilots standard in broadcast; to date rare in streaming, but making a comeback? • “Production commitments” are pay-or-play and may be satisfied financially
2. Pilot and Series Options	• In broadcast, usually “two bites” for each of pilot/series • In streaming/pay TV, set in months from negotiated triggers (e.g., final delivery of pilot script or other written material, completion of mini-room, pilot delivery) • Option period for initial orders is typically 3–6 months from trigger(s)	• Broadcast pilots usually ordered by February 28, fall start series by May 31, and mid-season start series by December 15 of each year • Broadcast series season options usually exercisable by May 31 annually • Subsequent season options tied to network-approved cast options, or 6–9 months after delivery and/or exhibition of final episode of prior season
3. Series Term	• In broadcast, default is “extended term” (7/7.5 years) • In streaming/pay TV, usually “perpetual” term (unlimited successive, dependent options)	• Traditional “standard term” in broadcast is 4/4.5 years • Extended/perpetual term licenses may include additional built-in escalations
4. Deficit vs. Cost-Plus Models	• Traditional model: deficit financing (initial license fee less than cost of production) • Modern model: cost-plus (initial license fee greater than cost of production)	• “Deficit” = in traditional model, at-risk difference between license fee and cost • “Premium” = in cost-plus model, license fee in excess of cost of production
5. Budgets	• See Table 11.1	

(Continued)

TABLE 11.2 (Continued)

<i>Deal Term</i>	<i>Main Issues/Ranges</i>	<i>Other Issues</i>
6. Initial License Fees	• Premium or total license fee may be fixed number or percentage of budget • Percentage-based cost-plus premiums usually capped (may or may not be tied to expected budget) • Y1 premiums (1-hours): 20%–40% of budget/\$1M–\$3M per episode • Y1 premiums (½-hours): 5%–25%/\$100K–\$1.5M per episode	• Percentage-based license fees usually calculated on net (not gross) budget • Ingoing target budget ranges or presumptive caps for percentage-based license fees (especially if cost-plus) • Broadcast 1-hour pilot: \$3.5M–\$5M • Broadcast 1-hour series: \$1.5M–\$2M per episode • Broadcast ½-hour pilot: \$1M–\$2M • Broadcast ½-hour series: \$750K–\$1.35M per episode
7. Payment Schedule	• In cost/cost-plus deals, approved budget payable on episodic/seasonal milestones over the span of production (paid in full by or shortly after full season delivery) • Premiums amortized over cost-of-production payments and/or paid on delivery (and/or monthly or yearly installments thereafter)	• In broadcast, payable episodically in thirds (some combination of commencement of pre-production, commencement or completion of principal, and delivery)
8. Breakage	• Series regular budgets sometimes subject to pre-negotiated breakage formula • Ad hoc requests common • Network/platform usually covers 50%–100%	• Splits with studios more common in deficit models • Common for high-level guest casting, major stunt sequences, and event episodes
9. Later Season License Fees	• Annual increases may be fixed percentage, tied to actual budget increases, or tied to actuals with caps (e.g., 5% annually) • Renewals may be contingent on flat or reduced budgets	• Studios may negotiate “extraordinary bumps,” especially for Y2 and/or Y3 • May partially defer premiums to future seasons (if ordered)

(Continued)

TABLE 11.2 (Continued)

<i>Deal Term</i>	<i>Main Issues/Ranges</i>	<i>Other Issues</i>
10. Success Bonuses	• In broadcast, ratings and rankings bonuses, and deficit recoupment • Generally no studio success bonuses in streaming (but potential for future change)	• Broadcast bonuses largely no longer practically achievable
11. Minimum Orders	• In streaming/pay TV, usually 8 episodes per season • In broadcast, standard of 13 episodes (including pilot) in Y1 with optional “back 9,” 22 episodes (if fall start) or 13 episodes + back 9 (if mid-season) in Y2, and 22 episodes in Y3+	• “Full” season order decreased from 26 to 22 to 13 to 12 to 10 to 8 episodes • May be set based on specific creative plan (with or without buffer)
12. Broadcast/Linear Agreements: Linear Network Exhibition and Runs	• License for linear network exhibition, however delivered (over-the-air, via MVPDs, vMVPDS, branded apps, MVPD VOD, etc.) • Buys out finite runs per episode (usually 3–4 runs per episode over the term), with set fees (\$25K–\$50K for additional runs)	• Initial commissioning network reimburses studio for residuals arising out of its own exploitation
13. Broadcast/Linear Agreements: Companion Digital Rights	• Licenses now include as standard in-season “stacking rights” (i.e., simultaneous streaming availability of all episodes of the current broadcast season so far) • Pre-negotiated episodic “stacking fees” (\$100K–\$250K per episode, escalating season-to-season) less valuable to studios than once-thriving (now-diminished) “streaming one” window	• Old standard was “rolling 5”—catch-up streaming rights for up to 5 recent eps (+/– pilot) at a time • Companion rights traditionally limited to co-branded digital platforms with equivalent ad-support structures, but now usually exploitable freely among affiliated digital platforms of all types or business models

(Continued)

TABLE 11.2 (Continued)

<i>Deal Term</i>	<i>Main Issues/Ranges</i>	<i>Other Issues</i>
14. Licensed Rights for Streaming Originals	• SVOD, AVOD, and FVOD generally licensed as a group and may be freely mixed by the platform • Granted rights may be sublicensable, potentially subject to holdbacks, mutual approval, engagement of studio as subdistributor, and/or revenue sharing • Deals for streaming originals may also grant linear rights, or may reserve them subject to holdbacks, FN/FRs, and/or buyout rights in favor of first-run streamer	• May refer to “standalone” digital rights (as opposed to “companion” digital rights granted with linear rights) • Early deals segregated sub-categories of digital rights and tailored grants to licensees’ actual current and planned business practices; over time, deals increasingly broad in scope of granted rights, permitted business models, and authorized channels of exploitation • Evolving market conditions may change platform preferences for defensive licensing
15. License Territory and Term	• Broadcast/linear territory: U.S. and its territories and possessions; English-language (and non-exclusive Spanish-language?) rights in Puerto Rico and Bermuda • Broadcast/linear term: through end of final broadcast season • Streaming territory: worldwide (all languages) • Streaming term: run-of-show plus ten years (may be exclusive for full term, or divided between exclusive and non-exclusive terms)	• Currently equivalent rights in all territories (but may evolve) • Rights in China? • Post-ROS streaming term may be divided between exclusive and non-exclusive terms
16. Reserved Rights and Holdbacks (Network Exclusivity)	• Off-net syndication (cable or broadcast station) roughly after Y3 or Y4 (or 12–18 months after finale for shows canceled after 1 or 2 seasons)	• May negotiate longer holdback for “stripping” vs. once-a-week syndication, and/or further restrictions on syndication licenses to specified competitors

(Continued)

TABLE 11.2 (Continued)

<i>Deal Term</i>	<i>Main Issues/Ranges</i>	<i>Other Issues</i>
	• Out-of-season streaming for each season of linear originals opens roughly 30 days before next season’s premiere (or after 9–12 months for final season) • Physical home media held back season-by-season for 9–12 months from season finale (or 1–3 months before next season’s premiere) • EST may be held back seasonally (like home video), or available episodically on a next-day basis • Rights outside licensed territory unencumbered (subject to commissioner’s worldwide premiere rights for each episode) • Derivatives generally frozen during season term (i.e., before cancellation)	• For linear originals, may need to reconcile streaming exclusivity and availability dates for out-of-season vs. in-season stacked episodes • Additional revenue sharing, exclusivity, and residuals issues for EST rights on streaming originals • Additional access and exclusivity terms for ancillary rights where related to streaming platform’s affiliated businesses (e.g., music, merch, podcasts, video games, etc.) • Post-term restrictions on derivative/subsequent production rights negotiated separately
17. Revenue Backstops	• Used to bridge gaps when the value of studio-reserved rights is especially speculative (e.g., on shows intended for brand-new platforms) or diminished (e.g., due to unusually extensive network requirements around granted and/or reserved rights) • Network agrees to reimburse to studio any shortfall between negotiated benchmark and actual revenue from specified rights over specified time	• Financial risk based on series deficit plus potential production overages • Off-net revenue potential based on series budget, viewership on initial platform, critical acclaim and awards, extent of marketing and public awareness, recognizability to other audiences, and prominence and prestige of debut platform • Backstop benchmarks reflect both general market values and immediate practical needs of studio

(Continued)

TABLE 11.2 (Continued)

<i>Deal Term</i>	<i>Main Issues/Ranges</i>	<i>Other Issues</i>
18. Subsequent Seasons and Derivative Productions	• Negotiated holdbacks and FN/FR rights for derivatives, whose term may be tied to the number of seasons produced • Often separate and less restrictive rules for new seasons of continuing series vs. for new derivatives • Deals to “move” a show to a new platform between seasons may require some renegotiation with original network	• More complex negotiation of derivative rights for projects based on existing films or TV series, especially ongoing franchises • May differentiate among derivatives by medium or creative content • Studios may negotiate for rights clawbacks to facilitate “re-sales” of new seasons to third-party networks; platforms may limit re-sales to major competitors
19. Network Approvals	• Network approval over all key creative (including script drafts, cuts, locations, cast, and key crew) • Network budget/schedule approvals exercised lightly on deficit shows and rigorously on cost-plus ones	• Network approval over grants of screen credit
20. Network Promotional Rights	• Network obtains broad rights to engage in marketing and promotion and create related materials • Network publicity requirements for series regulars incorporated into studio’s form agreements • Costs usually paid mostly or entirely by network	• Studios often have the right to use network-created marketing materials (for reserved rights) if they contribute to/partially reimburse the costs • Network coordinates with show for gallery shoots, EPKs, BTS, etc.
21. Product Integrations	• Integrations and tradeouts subject to network approval • Integration fees retained by studio or split with network • Possible off-the-top sales fees (10%–15%) for securing brand partners	• Network may want to manage solicitation and/or control negotiation • Network may require ad buy from integration partner and/or allocate media buys vs. integration fees
22. Contingent Compensation	• May give network 2.5%–5% MAGR (if no co-pro)	• Studios may require network participations to fit within 35% pot or come off-the-top of talent participants

B Studio Co-Production Agreements

A co-production is an arrangement between two or more studios to jointly produce, own, and distribute a television series.

In the U.S. television market, co-productions generally arise in three scenarios: (1) when two different studios control separate elements (in the form of underlying rights, or writers, directors, or other talent who are subject to exclusive overall agreements) that they wish to join together to create a series; (2) for international co-commissions with multiple parties highly invested in a series from an early stage;⁸⁹ and (3) most commonly, when a studio seeks to license a series to a network with an affiliated studio arm.⁹⁰ Most networks treat a “forced co-production” with their sister studio as a non-negotiable requirement when buying a project from an outside studio, dropped only (if ever) in competitive bidding situations.⁹¹ Although a co-production is not legally a partnership, the two parties to a co-production agreement are commonly referred to as “co-production partners.”

By their nature, compared to going it alone, co-production arrangements mitigate a studio’s risk while capping its upside. From the network’s perspective, co-productions are usually a no-brainer, especially when the network’s expected license fees already cover most (or all) of a show’s cost of production. For example, a “pure-play” network might pay 80% of a series’ production cost to acquire its finite rights as a licensee (with no direct studio/owner-type stake in the project’s long-term success); but, by taking a 50% co-production position, they can then acquire 50% of the long-term upside in the series by paying (and risking) only an additional 10% of the budget (i.e., 50% of the 20% deficit). For the same reason, however, such forced co-productions are very unpopular with seller studios, for whom the reduced risk from

89 See Section C.

90 Such a co-production arrangement would be only apparent to viewers, if at all, by the company logos that appear at the end of the credits for each series episode. Co-productions may exist between unaffiliated and otherwise competitive entities (e.g., CBS Television Studios’ co-production position in the long-running ABC Signature-produced CBS procedural drama *Criminal Minds*), between affiliated studios from a single corporate family (e.g., FX Productions’ co-production position on the 20th Television-produced FX anthology series *American Crime Story*), or between unaffiliated companies with ongoing common interests (such as Warner Bros. Television and CBS Television Studios, which partnered to produce numerous series for the then-CBS/WB-co-owned CW network).

91 As the number of buyers has withered in recent years (as cable networks have largely given up commissioning original content directly, and the market has functionally consolidated into the four broadcast networks and eight premium streamers [with smaller SVOD and FAST services operating at the margins]), the legacy companies have begun to exercise their leverage even more forcefully with even bona fide studios that are small and lack market power. With such weaker studios, the networks often go beyond a “forced co-production,” instead demanding that the studio give up its “studio position” altogether, and instead assign over all rights in the project and accept a deal as a non-writing executive producer. Although the terms offered in such “studio buyouts” are often more favorable than those generally accorded to non-writing executive producers, they are still usually significantly less favorable than if the seller was able to retain its true studio position, even in a co-production. Vulnerable small studios that are hungry to sell projects usually need to have multiple buyers competing for a project to be able to resist such demands.

splitting an already-modest deficit is almost never worth the loss of the upside that must, in success, be shared with the new partner.⁹² Such forced co-productions are perceived as especially odious where a platform initially agrees to develop a project with an outside studio on a pure license basis, but subsequently insists on entering into a co-production as a condition of ordering a pilot or series.⁹³

i Co-Production Splits

The applicable split in any given co-production relationship may vary, but 50/50 deals are by far the most common. That single ratio then usually governs virtually all aspects of the parties' rights and entitlements on the project—e.g., each 50/50 co-producer cash-flows 50% of development and production expenses as spent, bears 50% of the risk (deficit), owns 50% of the copyright, enjoys 50% of the upside from the production, and has equal power (relative to one another, but still subordinate to the network in various respects)⁹⁴ with respect to creative and business approvals and controls.⁹⁵

Splits in two-way co-productions on an other-than-50/50 basis, or differentiated splits across categories of rights or obligations, are unusual and probably a product of some very specific underlying circumstances (e.g., “unequal” control/contribution of critical underlying rights). Three-way co-productions (sometimes slangily called “tri-pros”) may arise when a buyer platform demands a forced co-production on a project that is already a co-production between two seller studios. The default position of the buyer in such a situation is that it obtains (via its sister studio) its usual 50% co-production position, while the two seller studios are forced to divide the remaining 50% amongst themselves. That said, studios (especially lead studios)⁹⁶ are seldom willing to

92 That said, such forced co-productions may be viewed by seller studios as somewhat protective, because the length of time a series remains on the air directly correlates to how much money it makes or loses for its studio, and networks (especially in broadcast) are consistently more likely to renew series that they own in whole or in part over even higher-rated series in which they have no ownership interest.

93 The effect of such hardball tactics is to offload all of the risk of development and/or pilot production (to the extent not covered by network development contributions, license fees, or penalties) on the supplier studio, while the platform renegotiates the parties' deal at a moment of maximum leverage to reap 50% of the upside via its affiliated studio (once the network has essentially already decided that it wants to move forward with the series). At the very least, such late-stage forced co-productions typically require the new partner studio to retroactively reimburse the outside studio for its proportionate share of any outstanding deficits from prior development or pilot production, and the outside studio may be able to negotiate some other financial or non-financial concessions in exchange for having (against its will) allowed the network to dramatically reduce and defer its risk as a co-producer in this fashion.

94 See Section A.xi.

95 Because of the obvious conflict of interest involved, the network-affiliated studio in a forced co-production has no approval rights with respect to the initial license agreement with its sister network, which is typically negotiated independently by the unaffiliated seller studio.

96 See Section B.ii.

accept minority positions on their own projects, and the final agreed co-production split in such a scenario is usually in even thirds, or sometimes 50/25/25 (with the lead studio retaining the larger share).⁹⁷

In any event, however, two-party 50/50 co-productions are by far most common, and going forward, this section will assume this arrangement when describing the negotiated terms for such deals.

ii Lead Studio

The “lead studio” in a co-production is responsible for managing physical production of the series, generally doing so much as it would if it were the sole studio, but along the way, obtaining the approval of its co-production partner of all budgets (and enhancements thereto) and key creative decisions (such as the casting of actors and hiring of writers and directors).⁹⁸

Bona fide studios with the resources necessary to serve as lead studio virtually always strongly favor doing so, for reasons that are at once economic (lead studios receive a somewhat larger share of revenue to compensate them for their work and overage risk),⁹⁹ creative (lead studios exercise greater day-to-day influence over a series), relational (the lead studio’s executives are generally much more deeply engaged with the show’s key creative team), and existential (studios that do not actively manage their own productions may have difficulty justifying their ongoing existence as discrete entities in the cutthroat corporate environments of large conglomerates with multiple production entities).

Where two studios enter into a co-production agreement after one of them has independently developed the project or otherwise engaged all of the key talent, the studio that commenced the development process generally gets to be the lead studio.¹⁰⁰ Where two studios enter into a co-production arrangement at the very outset of the development process, the choice of lead studio may be hotly negotiated, with the role generally going to the larger studio with

97 When a third co-producing studio enters the co-production at a later time, the three studio entities may collectively negotiate a new co-production agreement to govern the new relationship; or, more often, the existing co-production partners jointly negotiate a separate deal with their new partner, whose terms may or may not be equivalent to those governing the relationship between the existing partners, with financial obligations to the newly-added third studio treated as an “off-the-top” as between the original co-production partners.

98 Major decisions, such as total budget, casting choices, and the hiring and firing of key above-the-line personnel, are often subject to mutual approval without any contractual tiebreaker mechanism, forcing the parties to work together to resolve any disagreements. The absence of tiebreakers would be highly unusual in other fields, including theatrical feature films, that are less dominated by repeated business between a small number of major players.

99 See Sections B.iv.e–f.

100 For this reason, platform-affiliated studios in forced co-productions almost never act as lead studios.

superior bargaining power (or, in the event of an effective tie in that regard, to whichever studio contributes more, or more important, rights or elements to the production).

iii Distribution Rights

The parties to a co-production agreement must allocate series distribution rights. These rights are allocated between/amongst the parties based on two customary premises—lead studios generally get preference over non-lead studios, and studios that have the personnel and expertise to directly exploit rights/territories get preference over those that don't (and would instead have to engage and pay a third-party sales agent/distributor).¹⁰¹

Most commonly, distribution rights are divided between the partners based on territory, with one partner controlling all distribution rights domestically (which may, for these purposes, be defined to include Canada), and the other partner controlling all distribution rights throughout the rest of the world. The parties may allocate distribution rights across territories more granularly if a partner has especially strong relationships and capabilities in any particular region(s).¹⁰²

Where co-production partners territorially divide distributions rights between them, the lead studio typically gets “first pick.” The longstanding conventional wisdom is that domestic rights are more valuable (and therefore preferable to control) for half-hours/comedies, while international rights are more valuable/preferable for one-hour dramas. That said, U.S. networks have sometimes shown a preference for controlling domestic distribution rights even on dramas (so that the network-affiliated studio can manage its exploitation of such rights with an eye toward the interests and preferences of its sister network). At the same time, some studios prefer to control international rights even for half-hour programs, based on the greater encumbrances on domestic rights (as customarily required by U.S. networks), the broader long-term degradation of the syndication and pay TV businesses in the United States, and the blurring of traditional creative distinctions between “comedies” and “dramas.”

If a co-producing studio has no meaningful in-house distribution capacity whatsoever, it customarily yields control of all distribution rights to a partner

101 In some cases, a co-production partner may negotiate for a contractual first opportunity to be engaged as subdistributor for specified rights that are within its capabilities to exploit, should its partner elect to engage a subdistributor for such rights that are initially within its control.

102 Ancillary rights such as soundtrack, music publishing, and merchandising, and more specialized distribution rights like physical home media, may be controlled by one of the co-production partners worldwide, or split between them according to their general territorial controls (with the determination again generally reflecting a realistic evaluation of the partners' respective capabilities).

with such capabilities, even if the former is the lead studio and would therefore otherwise be customarily favored to control desirable distribution rights. If studios are competing within their negotiation for control of desired rights, one of the co-production partners might seek to secure those rights by guaranteeing the other a minimum amount of revenue to the co-production from those rights (this minimum may escalate depending on the number of seasons produced). In the somewhat rare case that neither party to a co-production has substantial direct distribution capabilities, the parties generally retain mutual approval over the choice and terms of engagement of third-party distributors and deduct all associated fees and expenses off-the-top as between the partners.¹⁰³

The parties to a co-production frequently negotiate separately around rights for derivative or subsequent productions.¹⁰⁴ The outcomes of these negotiations are informed by the preexisting ownership of any underlying literary rights, whether the series is based on a library film or television series (and whether the franchise is currently ongoing, in active development, or moribund), and the extent of development or other economic activity preceding a new studio's arrival as co-production partner. For totally original shows, the co-producers may agree to altogether freeze the right to produce spinoff television series, theatrical feature films, or other separate productions based on initial series, requiring the consent of both parties to proceed. More often, the deal permits one or both of the co-production partners—usually the lead studio—to unilaterally force the development and production of a derivative project, with the other party having an option to participate as a co-producer, either on the same terms applicable to the original co-production or on new terms to be negotiated in good faith. When a project is based on one studio's separately-owned library property—especially a previously produced film or television series, and *especially* a currently-active film or TV franchise—that studio will typically grant its network and co-production partners much more limited rights with respect to subsequent productions than it would for a wholly original series. Studios in such positions may also differentiate between productions that are derivative of the new proposed series (i.e., using the same actors, or based on unique characters, storylines, or other elements of the new production), versus those that are derivative only of the preexisting underlying property (i.e., without using unique copyrightable elements from the new series).

103 See Section B.iv.c.

104 In forced co-productions, the parties often must negotiate derivative/subsequent production rights independently for the network licensee and its affiliated co-producing studio. As a co-owner of the series, a co-producing studio generally enjoys more robust rights and protections with respect to subsequent and derivative productions than does a mere licensee. As a result, the terms applicable to the licensee network and its affiliated studio may differ significantly, especially to the extent the entities are organized and operated more independently from one another (e.g., ABC Signature relative to the ABC broadcast network, as compared to Amazon Studios relative to Amazon Prime Video).

In any event, if one of the co-production parties elects not to (or is not entitled to) proceed as a co-production partner in any new derivative production, it typically receives some passive participation in that derivative.

iv Revenue Waterfall

The waterfall of revenues between co-production partners resembles that enshrined in a profit participation definition. In practice, however, the revenue participation enjoyed by a co-production partner is simpler and cleaner than that applied to a profit participant, capping or altogether eliminating many of the analogous deductions and exclusions that characterize talent backend definitions.¹⁰⁵ In the simplest terms, it can be articulated as follows:

Gross Receipts
– Distribution Fees
– Distribution Expenses
– Cost of Production
– Unapproved Overages
– Lead Studio Overhead
– Third-Party Participations

= Studio Net Proceeds

What follows is a deeper examination of each of the elements of this co-production waterfall.

a Gross Receipts

As in a talent backend definition, “gross receipts” refers to all revenue received by (or credited to) a studio from its exploitation of a television series and all rights therein, from all sources. Unlike a talent backend definition, however, in a co-production agreement, “all” really means “all.” Even if distribution rights are divided between the co-production partners, all revenues usually flow through a single joint waterfall. There are no artificially depressed imputed license fees.

105 See Chapter 9 (pg. 351). Most significantly, studios do not charge interest against co-producing studios, although this default presumes that the non-lead studio co-cash flows production and occupies a net cash position roughly equivalent to that of the lead studio. In rare cases, a non-lead co-producing studio may negotiate with its partner to be relieved from its presumed duty to co-cash flow production expenses, usually in exchange for paying interest to the lead studio on such waived or deferred cash-flow contributions (calculated according to the timing of the lead studio’s recoupment of expenses from initial network license fees and other revenue, relative to a mutually agreed reference cash-flow schedule that might have otherwise governed the non-lead studio’s contributions).

Home video revenues are accounted for at 100% of revenues received, rather than on a royalty basis (and any applicable distribution costs for such home video exploitation are deducted, at actual cost, as distribution expenses).

To the extent that any revenues are excluded from “gross receipts” for purposes of the co-production waterfall, they are usually still accounted for in other ways. For instance, revenues from product placements/integrations, tax incentives, and copyright enforcement recoveries may be applied directly against the deficit (if there is one) without either side deducting distribution fees or applying these amounts against distribution expenses, or otherwise distributed to the co-production partners outside of the waterfall according to their respective shares. Revenues from derivative productions may be excluded from gross receipts, but the parties will have otherwise negotiated controls, co-production rights, or passive participations applicable to such productions. Although issues may still arise when a co-production partner that controls certain distribution rights enters into licensing transactions with its affiliated entities or foregoes licensing opportunities in order to protect the interests of its sister network, for the most part, the accounting for gross receipts between co-production partners is clean.

b Distribution Fees

As it does when accounting to profit participants, the studio that controls distribution rights deducts a distribution fee, off-the-top, from all revenues generated from the exploitation of rights under its control. If distribution rights are divided between co-production partners, each partner retains distribution fees from the revenues it generates from its own rights. The distribution fee applicable to each side is usually the same, although (as in talent backends) different distribution fees may sometimes apply for different categories of rights. Between co-production partners, distribution fees range between 5% and 20%, with 10% being typical.¹⁰⁶ As in talent backend definitions, there is typically no distribution fee charged on the initial network license; but, unlike in talent backend definitions, this exclusion generally applies to 100% of revenue from initial multi-territory licenses (rather than the studio charging a fee on a portion of such license fees allocated to international rights).

¹⁰⁶ Because the allocation of distribution rights generally favors partners with direct distribution capabilities, the use of a subdistributor by any partner to exploit its controlled rights is relatively uncommon. When either party does use a subdistributor, its charged distribution fees in the waterfall are inclusive of the subdistributors’ fees (i.e., borne solely by the studio that engaged the subdistributor from its own distribution fee), while the subdistributors’ expenses are deducted off-the-top as distribution expenses.

c Distribution Expenses

Deductions for distribution expenses operate more or less identically under a co-production agreement as under a profit participation definition. If distribution rights are divided between the co-production partners, each partner recoups its distribution expenses from the revenues it generates from its own exploitation of rights (including guild-mandated residuals) and remits (or otherwise accounts for) the balance to flow through the rest of the waterfall on a fully cross-collateralized basis. Co-production partners may negotiate more successfully than talent for caps on the other studio's distribution expenses; if such caps are agreed, they are typically set to 5%–10% of the studio's gross receipts, excluding from such cap residuals and music clearance costs. Where rights are exploited via a mutually approved third-party distributor (e.g., because neither co-production partner can do so effectively), the applicable fees and expenses paid to/retained by the third-party distributor are deducted off-the-top as distribution expenses.

d Production Cost/Deficit Recoupment

After deducting their respective distribution fees and expenses from the revenue they each collect (and accounting to one another for remaining revenue on a cross-collateralized basis), the co-production partners recoup their respective contributions to the actual production cost of the series (up to a mutually approved ingoing production budget, plus any further mutually approved overages or enhancements).

The lead studio serves as “paymaster,” paying all production expenses as incurred/due, collecting license fees from the initial network as paid, and accounting to its co-production partner on an ongoing basis. Non-lead co-producing studios are expected to co-cash flow production expenses based on either a pre-determined cash flow schedule or regular (e.g., biweekly or monthly) accounting and billing by the lead studio. Such accountings and cash-flow contributions generally reflect the lead studio's then-current net cash position, taking into account license fee payments it receives from the network over the course of production (based on milestones negotiated in the license agreement).¹⁰⁷

On cost-plus series, this recoupment step is typically satisfied in full based on the initial license fees received from the commissioning platform (although it can take some time, depending on the extent of production overages, burn rate of production, and payment schedule for license fee installments).¹⁰⁸

107 See Section A.iv.d.

108 All costs of clearance and delivery, as required by the commissioning network, are generally accounted for in the series production budget (and funded by the platform accordingly). As a result, except for residuals, there are typically few if any distribution expenses incurred in connection with servicing the initial network licensee's requirements. As no distribution fees are charged on any

For broadcast series and other deficit-based models, the co-production partners expect to each bear a remaining deficit after all production costs and initial network license fees are fully accounted for, which they will continue to recoup from further distribution revenues on a pro rata, *pari passu* basis.¹⁰⁹

e Unapproved Overages

Whether a show is produced on a deficit-based or cost-plus basis, the co-production partners' recoupment of "production costs" is capped at an amount equal to the ingoing mutually approved production budget, plus all subsequently mutually approved overages and enhancements.¹¹⁰ Consequently, to the extent the lead studio (which has day-to-day responsibility for managing production) overspent and incurred unapproved overages (i.e., costs in excess of the approved budget), it does not recover such expenses as part of the production cost/deficit recoupment phase of the waterfall. Instead, only after each side has fully recouped its respective share of the official "production cost" (limited as just described), the lead studio may next recover the unapproved overages it initially bore during production of the series, usually up to a cap of 2%–3% of the approved budget.¹¹¹ To the extent that the lead studio faces a runaway production and incurs overages in excess of this cap, it will be forced to bear such expenses solely out of its own share of "profits" from the bottom of the waterfall.

f Lead Studio Overhead

After the lead studio recoups its unapproved overages (if any) from the waterfall, it is entitled to retain 100% of revenues, as an a "overhead" charge, up to a specified

portion of such initial network license fees, they are effectively passed through (without deduction) and applied directly against production costs on an ongoing basis.

109 "*Pro rata*" means that each partner receives a share of incoming distribution revenue that is proportionate to its co-production interest, which also dictates the share of such expenses initially cash-flowed by that party. "*Pari passu*" means that such proportionate recoupments happen side-by-side/at the same time (e.g., every \$1 divided 50 cents to one party and 50 cents to the other), rather than in sequence (with one partner recouping some or all of its expenses before its partner recoups any or all of its own). Co-production partners may sometimes negotiate for extraordinary costs fronted exclusively (or disproportionately) by one party or the other to be recouped in a separate "corridor" before such pro rata, *pari passu* cost recoupment begins—functionally adding an additional negotiated step in the waterfall.

110 Thus, for the non-lead studio on a broadcast or other deficiated production, its series deficit is capped at an amount equal to the initial network license fees, minus the total mutually approved production budget (including all later mutually approved overages and enhancements).

111 Anytime any deal term is defined as a percentage of budget or cost (which, it should be noted, are not the same thing), the parties must specify whether this percentage is calculated based on the budget/cost net of applicable tax incentives (a lower number) or the gross budget/cost without accounting for such incentives (a higher number). For many percentage-based terms, there is a single standard that governs almost universally. This one could go either way. That said, absent other prevailing customs, most negotiators tend to default to net rather than gross numbers for most percentage-based terms.

dollar amount, percentage of the budget, or percentage of the budget capped at a specified dollar amount. This overhead charge represents the lead studio's compensation for its investment of corporate resources in managing the production, as well as its assumption of the risk of production overages (which, as just described, it could only recoup from revenues in a later order of priority and subject to cap).

The lead studio's overhead charge is generally 5% or 7.5% of the ingoing mutually approved (usually net) budget. Overhead caps, where applicable, range from \$75,000 per episode (for lower-budget comedies) to \$500,000 per episode (among aggressive independent studios), with most falling between \$100,000 and \$250,000 per episode for the first season. The overhead cap for future seasons may be recalculated as a percentage of each season's budget (which may grow significantly in success), or, more often, is subject to flat (usually 5%) cumulative annual increases.¹¹²

g Third-Party Participations

Finally, revenues from the series go to paying mutually approved third-party participants.¹¹³ Effectively, the fact of the co-production does not impact the calculation or accounting of participations to talent, who will see the same backend payments they would have seen had there been no co-production. The backend definition used by the lead studio, which engages all of the talent and rightsholders, controls for the third-party participations on the series. In effect, the co-production partners bear the cost of these participations in proportion to their respective co-production shares (so, most likely, 50/50).

h Studio Net Proceeds

Finally, whatever remains of gross receipts after all of the foregoing deductions constitutes the "studio net proceeds" of the series, and these are again divided between the co-production partners in proportion to their respective co-production shares (so, most likely, 50/50).

112 These caps distinguish overhead charges in co-production waterfalls from those in talent back-ends, where overhead is generally charged as a percentage of gross budget without a cap. In addition, in a co-production definition, the studio deducts its overhead charge *after* the co-production partners have recovered their contributions to the cost of production, while in a talent profit participation definition the overhead charge is deducted *before* the studio recovers its cost of production. (This extends the period on which the studio calculates interest on unrecouped production costs, which it does when accounting to talent, but not to co-production partners.)

113 See Chapter 9 (pg. 351). Some studio forms provide for third-party participations to be paid/deducted at an earlier tier of the revenue waterfall, or make the waterfall broadly subject to third-party participations as and when due according to the underlying contracts. These distinctions are matters of style and do not practically impact the accounting.

v Quick Reference Guide

TABLE 11.3 Studio Co-Production Agreements

<i>Deal Term</i>	<i>Main Issues/Ranges</i>	<i>Other Issues</i>
1. Co-Production Splits	• Most often a 50/50 split between 2 studios • May negotiate tri-pro (equal thirds, or 50/25/25) for forced co-productions on already co-produced projects	• Single split ratio generally covers all rights and obligations; differentiated splits possible but unusual • Non-50/50 2-party deals are unusual and fact-specific
2. Lead Studio	• Lead studio manages day-to-day physical production • Co-pro partners jointly exercise business and creative approvals and controls (subject to superior network rights) • Studios almost always prefer to be lead studio	• Studio that independently initiates project development (e.g., before forced co-pro) usually remains lead • Where co-pro studios jointly initiate development, lead goes to studio with most leverage (or which contributes most or most important rights or elements)
3. Distribution Rights	• Usually divided between co-pro partners (if each is capable of exploiting) • Typical split is domestic (+/- Canada) to one partner and international to the other • Special negotiations for derivatives/subsequent productions (including freezes, first opportunities, and passives)	• Ancillary rights may follow territories or be controlled by one partner worldwide • Preferences for lead studios and partners with best capabilities in each medium or territory • Control/rights for derivatives influenced by ownership of preexisting underlying properties
4. Revenue Waterfall (Generally)	• “Studio net proceeds” = gross receipts, after recouping or deducting distribution fees, distribution expenses, production cost/deficit, unapproved overages, lead studio overhead, and third-party participations	• Waterfall is similar to that in talent participations (MAGR), but with lower and/or fewer deductions at each step

(Continued)

TABLE 11.3 (Continued)

<i>Deal Term</i>	<i>Main Issues/Ranges</i>	<i>Other Issues</i>
5. Revenue Waterfall: Gross Receipts	- Accounted for all media at 100% of revenue received (e.g., no royalties on home video, as in talent backends) - Revenue from all rights generally aggregated in a single waterfall, even if partners divide control of territories and/or media	Revenue from product placements/integrations, tax incentives, copyright enforcement, etc. may be accounted for within or outside of waterfall
6. Revenue Waterfall: Distribution Fees	5%–20%, usually 10% - Equivalent fees to both sides when rights are split - No fee on initial license (including 100% of license fees in cost-plus deals)	- Inclusive of subdistributor fees, where applicable - May have distinct fees for different types of rights
7. Revenue Waterfall: Distribution Expenses	- Deducted by each party off-the-top from the revenue it collects from its rights - Revenue and expenses cross-collateralized across all rights controlled by each partner	May be capped for each partner at 5%–10% of that party's gross receipts (excluding residuals and music clearance costs)
8. Revenue Waterfall: Production Cost/ Deficit Recoupment	- Production expenses cash-flowed and recouped on a pro rata, pari passu basis - Lead studio serves as “paymaster,” accounting for out-of-pocket costs paid and license fee installments received on an ongoing basis	- May negotiate special recoupment corridor for costs borne exclusively or disproportionately by one partner - Pro rata, pari passu cost/deficit recoupment includes approved overages
9. Revenue Waterfall: Unapproved Overages	- Recoupable by lead studio only after partners mutually recoup approved costs - Capped at 2%–3% of budget (may be net or gross)	

(Continued)

TABLE 11.3 (Continued)

<i>Deal Term</i>	<i>Main Issues/Ranges</i>	<i>Other Issues</i>
10. Revenue Waterfall: Lead Studio Overhead	• 5%–7.5% of budget (usually net) • Where capped, \$75K–\$500K per episode, most often \$100K–\$250K per episode	
11. Revenue Waterfall: Third-Party Participations	• Third-party participations paid as and when due	• Existence of co-production does not impact accounting for talent participations

C International Co-Productions and Co-Commissions

Studios with significant operations and/or relationships outside the United States sometimes compete by developing premium projects for initial commission by international broadcasters and platforms (including, at times, the international offices of U.S.-based global streamers). Studios that can develop a compelling creative package and secure a significant financial commitment from one or more platforms outside the United States can sometimes “re-import” a project for sale to major domestic and global buyers (hopefully, but not necessarily, before moving forward with production for the first season). Where a project is produced based on concurrent pre-production commitments from separate exhibitors in multiple territories, it is often referred to as a “co-commission.” Because such deals often also provide for joint ownership of the project between domestic and international partners, they are also sometimes referred to as “international co-productions” (although, defining “co-production” strictly as requiring co-ownership, this is not always technically the case in such arrangements).

Some international co-production strategies are driven by tax incentive programs that are contingent upon stringent locality requirements with respect to either the content produced or the nationality of the producers involved. For example, Canada (and several provinces within Canada) offers tax incentives to American (and other non-Canadian) producers as an inducement for such producers to move production north of the border, while simultaneously offering an additional set of subsidies that can only be accessed by Canadian producers. France offers similar tax subsidies specifically for French producers. A co-production partnership with a local studio, which grants the local producer some or all of the legal copyright interest in the resulting production, may allow an American studio to access specific incentive programs which would

not be available to that studio if it independently produced its series within that country. Alternatively, a studio may nominally have the right to access a tax credit in a foreign country but be functionally precluded from monetizing such credit, perhaps because the credit is non-transferable and the studio does not have enough local tax liability to effectively realize the benefit. A co-production partnership with a local entity that can fully realize the benefit of the tax incentive (and calculate a revenue-splitting arrangement with the American partner accordingly) offers a workaround to this challenge.

Partnerships with local producers (with superior local relationships) can give American studios better access to markets outside the United States. Local licensees in foreign countries may be particularly inclined, for cultural or regulatory reasons, to acquire content that is produced, at least in part, by local studios. In addition, having two major licensees committed to a production from the outset increases the aggregate guaranteed license fees for the production, thereby decreasing the deficit (and therefore, the studio's risk). Alternatively, the guaranteed license fees from a foreign co-commissioner may allow the studio to decrease the license fee charged to the American network, thereby providing a bargain to the U.S. licensee that may induce it to commission a series it would not have been willing to commission at a higher price point. In theory, a studio with the right taste and connections could piece together projects with any number of co-commissioning platforms with non-overlapping territorial footprints, a strategy reminiscent of the international presale-driven model of the independent film business. This tantalizing potential has made international co-commissions a darling and perennial "next big thing" of entrepreneurial and globally minded producers.

In practice, however, this vision for a culturally and economically integrated and internationalized television business has never been realized consistently or at scale. Selling a project to one buyer is hard enough; there is no reason to believe that selling, in essence, a "premium product at a bargain price" to multiple culturally distinct buyers would be easier. Platforms around the world frequently have the same kinds of expansive expectations for deference and control for co-commissioned projects as they do for their own local series, making such projects especially challenging to manage.¹¹⁴ International co-commissions/co-productions require studios to anticipate, reconcile, and sometimes actively mediate conflicts between self-interested platforms with passionately held competing preferences, in multiple languages and time zones, covering a wide variety of creative, scheduling, publicity, and other practical matters, across development, production, marketing, and release of the series.¹¹⁵ They

114 U.S.-based platforms in particular are often resistant to compromising or sharing their customary power and leverage with global partners whose license fees, while potentially substantial in local terms, are usually still significantly lower than those paid by the U.S. platform.

115 For this reason, co-commissions among more than three global partners are rare.

are an interesting and worthwhile component of a diverse and thriving television marketplace, but they are not an easy way to make a living in this business.¹¹⁶

The structure and economics of international co-productions are generally similar to those of U.S. co-productions.¹¹⁷ The co-production partner based in the country where production takes place is usually, though not always, the lead studio (depending on the extent of its production capabilities). American studios producing abroad often run these projects through or in partnership with local production companies, with deals structured to optimize access to local tax and other incentive programs. Each partner typically controls distribution rights in its home territory, with control of distribution rights in other territories up for negotiation according to which partner can likely most effectively monetize such rights (sometimes with minimum guarantees on distribution revenue). Compared to domestic co-productions, however, international co-productions involve more uniquely calculated and negotiated splits among partners of economic rights and responsibilities. In addition, unlike standard U.S. co-productions, international co-productions are often made as “split territory” deals, in which the partners retain most or all of the revenue from their respective territories (rather than accounting for and sharing it with partners on a cross-collateralized basis).

116 Companies that have had some success in this space include Gaumont International Television (the French-owned studio behind *Hannibal*, an international co-commission of ProSieben in German-speaking Europe, Sky in the U.K. and Ireland, and NBC in the U.S., and *Narcos* and *Hemlock Grove* on Netflix), Fabrik Entertainment (the German-owned studio behind Amazon’s *Bosch* franchise, AMC and Netflix’s *The Killing*, and FX’s *The Comedians*), and Atlantique Productions (the French-owned studio behind *Borgia*, a French/German/Czech/Italian co-production/co-commission, and *The Transporter* TV series, a French-Canadian co-production co-commissioned for the U.K., Germany, France, Canada, and—after HBO dropped out and TNT stepped in—the United States).

117 See Section B.

12

UNSCRIPTED TELEVISION

The foregoing chapters all specifically explore the world of *scripted* television development, production, and licensing. Unscripted television presents a host of unique business and legal issues, which would take an entire separate book to describe in detail.¹ However, in the interest of providing a more comprehensive perspective on the television business in general, this chapter highlights a small sample of major dealmaking concepts applicable to unscripted television development, production, and licensing, and in particular, notes several major areas of departure from scripted television norms.

Long popular across broadcast, cable, and syndicated television, “unscripted television” (sometimes used interchangeably with “reality television”) broadly compasses several sub-genres, including “unstructured reality” or “docu-follow,”² “structured reality,”³ “reality competition,”⁴ “music competition,”⁵ game,⁶ historical anthology,⁷ star-driven food and travel,⁸ and other “alternative” forms of programming such as late-night talk shows,⁹

1 In fact, several such texts exist. Though it was released in 2016, the author recommends Paul Battista and Hayley Hughes’s *Reality Television Contracts: How to Negotiate the Best Deal* (2016).

2 For example, Discovery’s *Deadliest Catch* and Bravo’s *Real Housewives* franchise.

3 ABC’s *Shark Tank* and TLC’s *90-Day Fiancé*.

4 CBS’s *Survivor* and Bravo’s *Top Chef*.

5 NBC’s *The Voice* and ABC’s (previously Fox’s) *American Idol*.

6 The first-run syndication and ABC network versions of *Jeopardy!* and *Family Feud*.

7 VH-1’s *I Love the 80s* and Netflix’s *The Toys That Made Us*.

8 The Travel Channel’s *No Reservations* (with Anthony Bourdain) and CNN’s *Searching for Italy* (with Stanley Tucci).

9 NBC’s *The Tonight Show* and CBS’s *The Late Show*.

daytime talk shows,¹⁰ news comedy/commentary,¹¹ cooking shows,¹² and awards shows.¹³

As the streamers have expanded into unscripted programming, they have found success in nearly all of these sub-genres. They have also supported more premium and cinematic documentary mini-series¹⁴ and anthology series,¹⁵ as well as many feature-length documentaries with limited or no theatrical releases.¹⁶ Documentary series about true crime¹⁷ and sports¹⁸ have enjoyed especially significant and sustained popularity in streaming. Due to their high budgets (relative to other forms of unscripted programming) and short/irregular episodic runs, these “premium documentary” series have not historically had a significant place in linear television, but in streaming, they have proven capable of generating audiences comparable to those of the most successful scripted originals at a small fraction of the cost.¹⁹

This chapter offers a high-level introduction to unscripted television, focusing on four key deal types for the genre—professional talent agreements (e.g., for celebrity hosts or panelists), participant agreements for documentary and competition series, production services agreements (which, in unscripted television, largely supplant “license agreements” as they are described in Chapter 11), and co-development/collaboration agreements (which are especially common and particular to this corner of the industry). The business and production realities of unscripted television are discussed in much greater depth in other books dedicated to the subject, for which this chapter is not a substitute. That said, this chapter is intended to provide a sense of how unscripted television both echoes and challenges the norms and customs of scripted television, and a foundation onto which readers can layer additional information from other sources.

A Basics of Unscripted Television

Although unscripted television is thought of as a relatively recent phenomenon, in fact, television has prominently featured some version of “unscripted”

10 *The Oprah Winfrey Show* and *Ellen* (both first-run syndication).

11 Comedy Central’s *The Daily Show* and HBO’s *Last Week Tonight*.

12 Food Network’s *Cooking with Bobby Flay* and PBS’s *Mexico: One Plate at a Time*.

13 The annual broadcasts of the Academy Awards and Golden Globes ceremonies.

14 Netflix’s *Tiger King* and Amazon’s *Lorena*.

15 Netflix’s *Chef’s Table* and *Seven Days Out*.

16 Netflix’s *The Social Dilemma* and *13th*.

17 Netflix’s *Making a Murderer* and *The Tinder Swindler*.

18 Netflix’s *Drive to Survive* and *Quarterback*.

19 These premium documentary mini-series are arguably descended from Ken Burns’s documentaries on PBS, which are richly researched and written and also come in non-standard lengths (episodically and in total), but are comparatively inexpensively produced given their reliance on archival images and writings, distinctive “pan-and-scan” visual style, and general lack of newly filmed material (other than “talking head” interviews with historians and other experts).

programming for decades. Talk shows and game shows have been a staple of television since the inception of the medium, and iconic series such as *The Tonight Show* (talk) and *Jeopardy!* (game) have been in production continuously or semi-continuously since the 1950s and 1960s, respectively. MTV premiered *The Real World* (often credited with launching the modern “reality television” genre) in 1992, and its sister series, *Road Rules* (often cited as the original “reality competition” series), in 1995. The fledgling Fox network launched *America’s Most Wanted* in 1988, and the “docu-follow” template-setting *Cops* in 1989. The iconic *American Idol* is arguably a spiritual successor to Ted Mack’s *The Original Amateur Hour*, which debuted on the (now obscure) DuMont Television Network in 1948 and was broadcast at various times by NBC, ABC, and CBS until its eventual cancellation in 1970.

The modern era of unscripted television, however, began around 2001, when a long-anticipated WGA strike forced the major broadcast networks to find ways to keep the airwaves rich with content without relying on the unionized force of professional television writers.²⁰ With the writers’ strike looming, CBS launched *Survivor* and *Big Brother* in 2000 and *The Amazing Race* in 2001. Fox premiered *American Idol* in 2002, and ABC launched *The Bachelor* the same year.²¹ Unscripted television has continued to enjoy bursts of volume and popularity whenever strikes interrupt scripted series production (e.g., the WGA strikes of 2008 and 2023).

Although each of the sub-genres described here has distinct characteristics, as a general matter, unscripted programs differ from scripted series in a few essential systematic ways; these differences help explain both the initial appeal of unscripted programming circa 2001, and the significant proliferation of such programming since then.

First, unscripted programming is, on average, consistently less expensive to produce than scripted programming. A half-hour basic cable unscripted series can cost as little as \$125,000 per half-hour episode to produce, and even a premium broadcast network primetime competition series typically costs only approximately \$1–\$2 million per one-hour episode to produce (although, for the highest-profile series with celebrity talent attached, such as music competition series *American Idol* and *The Voice*, talent costs can drive these budgets higher). Because these series can draw ratings that are competitive with far costlier scripted television programs—and in fact, for many years, *Survivor* and *American Idol* were among the most-watched shows on television in all

20 Some observers similarly credit the 1988 WGA strike for giving rise to *Cops* and *America’s Most Wanted*.

21 Notably, of these five flagship franchises, all but one (*The Amazing Race*) was adapted from a preexisting European format. All five of these series remain on the air to this day. (Although Fox cancelled *American Idol* after fifteen seasons in 2015, ABC soon commissioned a revival, premiering in 2018.)

genres—reality programming can offer networks an extremely economical programming option.

Second, unscripted television production relies less heavily on the major entertainment unions than scripted television production. Virtually all major scripted television programs produced in the United States are subject to agreements with most or all of the five principal guilds that represent professionals in entertainment production: SAG-AFTRA (representing on-camera talent), WGA (representing writers), DGA (representing directors), IATSE (the International Alliance of Theatrical Stage Employees, representing most “below-the-line” crew), and the Teamsters (representing drivers, casting directors, location scouts, and other select crew positions). These unions carry with them various minimum pay requirements, work rules, and (for the above-the-line unions) residuals obligations that provide crucial protections for union-covered personnel, but necessarily make shows costlier and more difficult to produce, and less profitable to exploit. Unscripted programs can be far choosier than scripted programs with respect to what union obligations they must take on. Although much so-called “unscripted” or “reality” programming features significant construction of storylines by producers and editors, very few are so “written,” in a technical sense, as to require the engagement of WGA-represented writers.²² Unscripted programs that feature only non-acting documentary subjects or competitors, without a prominent on-camera host or judge, can be produced without the involvement of SAG-AFTRA; and even for those shows that must be subject to SAG-AFTRA contracts in order to access union-covered hosting/judging talent, the protections of SAG-AFTRA usually apply only to the professional performers and not to the non-professional subjects or competitors. Finally, although high-budget game shows and studio-based competition shows such as *Family Feud* or *The Voice* that are produced in glossy studio environments (sometimes colloquially referred to as “shiny floor shows”) are typically produced pursuant to DGA and IATSE contracts (and using DGA and IATSE member crew), lower-budget documentary series and programs that rely heavily on filming “in the field” (i.e., on location and not in a studio environment) often rely on lower-paid non-union personnel.²³

Third, global viewership dynamics for unscripted programming differ from those of scripted programming in ways that directly affect the basic business assumptions around these shows. While the monetization of scripted content is generally based on the maximization of value (and repeated resale of a single

22 Many reality television producers have complained about their lack of recognition (and union protections) as “writers” of such series, and the WGA has made efforts to expand its jurisdiction to cover such programs (though without success to date).

23 Or, in some cases, union members who are willing to work on a non-union basis.

product) across media, territory, and time,²⁴ unscripted content is not necessarily well-aligned with this market strategy. The relative narrative simplicity of some of these shows can make them less entertaining on repeat viewings, and true crime mysteries and competition series in particular can be less interesting once the murderer has been revealed or the outcome of the competition is already known. As a result, although unscripted series may command substantial ratings in their initial airings, they tend to have greater difficulty attracting the interest of syndicators and digital licensees for second runs, and the opportunities they do capture tend to be less lucrative. In addition, while unscripted formats may hold broad appeal internationally, the specific television series produced based on those formats usually do not. In other words, an Italian audience may be interested in seeing twenty-five attractive young Italian women competing for the affections of an eligible Italian bachelor (i.e., the basic set-up of *The Bachelor*), but they will generally be less apt to watch a group of Americans competing in the same setting. Similarly, while a British audience may be fascinated to watch their British peers answer trivia questions posed by a British host for the opportunity to win one million British pounds (i.e., the basic set-up of *Who Wants to Be a Millionaire*, a format from the United Kingdom), that same drama is somehow less compelling when it involves American contestants, answering American culturally specific questions delivered by an American host, for the opportunity to win one million American dollars. At the same time, the lower costs of production, distinct and replicable formats, and reduced reliance on entertainment professionals (particularly writers and actors) typically associated with these shows makes them much easier for foreign producers to recreate locally, reducing the demand abroad for the “original” American versions.²⁵ In the aggregate, then, unscripted programs are by far most valuable to the American networks that initially commission and exhibit them, and offer less downstream upside to producers.

Fourth, in light of the third factor, the basic prevailing business structure between producers and exhibitors of unscripted content in the United States is different from the scripted television norm. As described in Chapter 11, the studio behind a scripted television program typically licenses the series to the commissioning American network, granting finite rights for a finite term, and retains the balance of the available rights to resell in other media, territories, and time periods. In the traditional (pre-streaming) model, the studio initially bears a “deficit” (i.e., a difference between the initial production cost of the series and the license fee paid by the commissioning network), and then

24 See Chapter 3.

25 Moreover, many of the most-watched American reality and competition series are themselves based on preexisting formats from abroad, including ABC’s *Shark Tank* (from Japan’s *Dragon’s Den*), Fox/ABC’s *American Idol* (from the United Kingdom’s *Pop Idol*), and Fox’s *The Masked Singer* (from South Korea’s *King of Mask Singer*).

makes up that deficit and earns its profit by selling off the remaining available rights. On the other hand, even in linear television, an American network commissioning an unscripted program (of any type) typically pays 100% of the approved ingoing budget of the series. In other words, the producers of unscripted projects have long typically borne no deficits; in fact, they virtually always charge the network up-front fees as part of the approved series budget. But, after paying 100% of the costs of production (and essentially relieving the producers from any business risk), networks typically insist on owning 100% of the rights in these series. As a result, most agreements between unscripted producers and networks are not “licenses,” but rather, “production services agreements” under which the network acquires complete ownership of the series and all rights therein on a “work-for-hire” basis.²⁶ Any downstream exploitation of the series is then managed by the network itself, which balances its desire to recoup its investment in the series against the value the network gains from being the exclusive exhibitor of a series (at least within the United States).²⁷ Thus, the tendency for original series to remain exclusive to their original networks, which has been so novel and destabilizing for scripted series in streaming, has been routine in the unscripted business since long before the streaming era.

The foregoing factors combined to make unscripted shows an appealing alternative for the broadcast networks in the early 2000s and maintain the status of unscripted series as an important component of such networks’ programming portfolios to this day. Over the course of the 2000s and 2010s, these same factors made unscripted content a popular entry point for upstart cable networks looking to expand into original programming,²⁸ as well as a refuge for broadcast and cable networks struggling to compete directly with costlier scripted originals in streaming.

At the same time, these factors have made unscripted programming relatively unappealing and inefficient for major studios. Major studios are built

26 In addition, because they own the series and the production companies may be expendable, many networks insist on directly negotiating and entering into agreements with on-camera performers or other key talent, rather than allowing the production company to do so. In scripted television production, on the other hand, every talent deal is negotiated and entered into at the studio, rather than network, level (even if network policies, especially on exclusivity, significantly impact many of the terms negotiated by the studio).

27 The key issues presented by such deals are discussed in Section D.

28 In later years, networks such as E! and Bravo, which built their brands on unscripted programming (such as *Keeping Up with the Kardashians* on E! and *Top Chef* on Bravo), made some efforts to expand into scripted programming (such as E!’s *The Royals* and Bravo’s *Girlfriends’ Guide to Divorce*). Lifetime’s flagship scripted series, *UnREAL*, was itself a dramatized look behind the scenes of a fictional unscripted dating series. Such efforts generated mixed results, both critically and commercially, and these networks have all largely abandoned their ambitions around scripted programming, while their parent companies have directed most of their resources for scripted programming to their flagship “general entertainment” streaming services. See Chapter 2 (pg. 53).

to maximize the value from exploiting retained downstream rights, and their business models have historically required that the studios occasionally find extremely lucrative hits to cover their high overhead costs and subsidize a higher volume of money-losing failed projects.²⁹ In addition, major studios' agreements with the entertainment unions frequently limit their ability to produce shows on a non-union basis. As a result, while the scripted television business is dominated by a relatively small number of large studios (many of which are directly affiliated with networks/streamers and/or part of major media conglomerates), unscripted programming is primarily the domain of smaller independent producers.

B Professional Talent Agreements

Broadly speaking, there are three classes of on-camera performers on unscripted series: non-celebrity, non-professional entertainers who are consistently featured in a “documentary”-type program (e.g., *Deadliest Catch* or A&E's *Duck Dynasty*); non-celebrity, non-professional entertainers who compete on a game show or competition program (e.g., *The Voice* or *The Amazing Race*); and professional performers who appear as hosts, judges, or other types of presenters across all forms of unscripted programs. This section discusses major issues around deals for the third category of on-camera talent, i.e., professional performers.³⁰

The agreements governing the services of hosts, judges, and other professional performers on unscripted programs are generally similar to those for scripted series regulars.³¹ However, there are a few key distinctions unique to unscripted production that warrant discussion here.

i Fees

Historically, episodic fees for professional performers serving as hosts, judges, or other on-screen capacities on unscripted productions have been substantially lower than episodic acting fees for scripted series regulars.³² Although talent fees are frequently the single largest expense for an unscripted series, the generally “low budget” nature of unscripted production has largely limited the amounts paid to on-camera talent. In other words, while a scripted television series is often apt to seek out and pay whatever the market demands for

29 See Chapter 3, Section C.i (pg. 129).

30 The major issues for non-celebrity participants in documentary and competition programs are discussed in Section C.

31 See Chapter 8, Section A (pg. 301).

32 The minimum compensation rates for hosts, panelists, and other SAG-AFTRA talent on unscripted productions are governed by the Network Code, rather than the TV/Theatrical Contract (which covers scripted production).

the highest-stature talent it can attract, an unscripted television series is more likely to content itself with the best talent it can afford based on the budget. As a result, episodic hosting fees for professional performers on unscripted series are frequently in the \$10,000–\$50,000 per episode range (compared to the typical range of \$25,000–\$150,000 per episode for scripted series regulars in linear television, to say nothing of the much larger fees that prevail in high-budget streaming).

However, just as recent years have seen scripted television producers paying significant premiums to attract high-stature theatrical talent, unscripted producers and networks are also increasingly courting (and paying a premium for) the highest-stature talent they can attract. For instance, in its early seasons, Fox's *American Idol* featured three then-relatively unknown judges: Paula Abdul (a musician and dancer who had not had a significant hit in roughly ten years), Randy Jackson (a little-known musician and producer), and Simon Cowell (an unknown-in-America music executive, entrepreneur, and budding English television personality). By comparison, ABC's 2018 revival featured a trio of superstar judges in pop icons Katy Perry and Lionel Richie and country music star Luke Bryan, a trio designed to compete with NBC's rotating cast of pop star "coaches" on *The Voice*.³³

Similarly, game shows have long been hosted primarily by relatively low-profile comedians and professional presenters, such as Alex Trebek (*Jeopardy!*), Pat Sajak (*Wheel of Fortune*), and Chuck Woolery (*Love Connection*), whose primary claims to fame and fortune were often their game show hosting gigs. But just in the 2016 and 2017 broadcast seasons, multiple new game shows formats were launched and classic game show formats revived with major established talent as hosts, including Academy Award winners Alec Baldwin (ABC's *Match Game*) and Jamie Foxx (Fox's *Beat Shazam*), legendary rapper Snoop Dogg (TNT's *The Joker's Wild*), and feature film comic star Mike Myers (ABC's *The Gong Show*, albeit in the guise of fictional British TV presenter Tommy Maitland). Since then, big stars—who are accustomed to big paydays in scripted content—have remained mainstays as hosts and panelists for game and competition shows, including Will Arnett (Fox's *Lego Masters*), Anthony Anderson (ABC's *To Tell the Truth*), and Ken Jeong (Fox's *The Masked Singer*). These major celebrities can command six-figure episodic hosting fees competitive with those paid to the highest-level scripted linear television stars (even though such game shows are typically produced at the rate of one to five episodes per day, as opposed to seven to nine days to produce a single episode of a scripted drama).

33 Which (alongside host Carson Daly) has included Christina Aguilera, Adam Levine, Blake Shelton, John Legend, CeeLo Green, Shakira, Usher, Gwen Stefani, Pharrell Williams, Miley Cyrus, Alicia Keys, Jennifer Hudson, Kelly Clarkson, and Nick Jonas (among others).

ii Exclusivity

Performers on unscripted programs are typically subject to less stringent exclusivity requirements than scripted series regulars. Most scripted series studios require series regulars to be substantially exclusive to their shows in television (subject to customary carveouts and further negotiated exceptions) and grant the studio “first priority” on the actor’s services at all times.³⁴ Historically, however, the lower episodic fees paid by unscripted producers has limited the extent of the exclusivity they can reasonably require. Although unscripted hosting and judging fees have grown in recent years, the established celebrities commanding such fees are more apt to view their participation in an unscripted series as a secondary commitment. Such celebrities would be reluctant to sign up for an unscripted television series that would compromise their ability to pursue their primary professional activities as actors, musicians, or otherwise.

As a result, on-camera talent agreements for unscripted series typically require exclusivity only in unscripted television programming. In-demand performers can negotiate for even more limited exclusivity, such as exclusivity in a specific sub-genre, especially if they have already established themselves as ubiquitous media personalities. For example, the host of an unscripted music competition program may be prohibited from hosting another music competition series, but could be permitted to host a talk show, game show, or even another non-music competition series. The host would also likely be free, in any event, to appear as an actor in any scripted program.

Such agreements for professional entertainers on unscripted productions also typically involve more complex negotiation regarding contractual priority on the performers’ time, scheduling of production periods, and other terms related to the performer’s ability to concurrently pursue other projects that would affect their availability to render services for the unscripted series.

iii Options

Like scripted series regular agreements, unscripted performer agreements must set out a certain number of options for the performer’s services, and time periods during which those options must be exercised. Whereas the majority of scripted series regular agreements are for six years, the terms of unscripted series deals are often more freely negotiated, with shorter-term deals (four years, or even fewer) being more common.

In addition, unscripted series deals typically must differentiate more finely between and among “years,” “seasons,” and “cycles.” Given the highly

34 See Chapter 8, Section A.xiii (pg. 319).

standardized broadcast calendar of linear television, the terms “season” and “year” have historically been used interchangeably for scripted series. That has remained true in streaming, where scripted series have largely settled into a less-than-one-season-per-year cadence. Unscripted series, however, typically take less time (as well as less money) to produce, and their formats make them more amenable to mass production (as opposed to scripted series, which may not have an unlimited supply of good writers’ ideas to draw upon). As a result, even in linear television, successful unscripted series are typically produced in “cycles” that may or may not correspond to the regular broadcast calendar, and shows such as CBS’s *Survivor* and *The Amazing Race* are typically exhibited at the rate of two cycles per year.

In light of this production pattern, agreements for on-camera talent on unscripted series must be clear with respect to whether they contemplate “years” or “cycles,” whether the producer may require the talent to render services on multiple production cycles in any given year, and whether there are any limits with respect to how many episodes the talent can be required to work on before triggering a fee increase or exhausting a single “option” under the deal.

iv Product Integrations

Because product integrations are more common in unscripted productions (and, in some cases, essential to their financial viability),³⁵ it is often necessary to engage in more specific negotiation with professional performers around such practices. Hosts and judges of unscripted programs may routinely be called upon to describe, interact with, and speak positively about the products and services of brand partners. Some performers consider such services to be uncomfortably close to a personal endorsement. Other performers may not be uncomfortable with the practice, but feel that their personal endorsement, whether direct or implied, carries enough value that it should be separately compensated. Performers with their own lucrative sponsorship and endorsement contracts may also be concerned with potential conflicts with their personal branding activity. Consequently, deals with professional performers on unscripted programs typically explicitly set out the performer’s obligation to cooperate with and participate in product integrations as part of their series’ services, and the parties tend to negotiate in greater detail regarding potential limitations on such services, and the efforts to be made on both sides to reconcile these services with the artist’s personal sponsorship/endorsement activity.

35 See Chapter 1, Section B.vi.b (pg. 40).

v Quick Reference Guide

TABLE 12.1 Professional Talent Agreements for Unscripted Productions

<i>Deal Term</i>	<i>Main Issues/Ranges</i>	<i>Other Issues</i>
1. Fees	• Usually \$10K–\$50K per episode • May be higher (e.g., six figures) for marquee stars on shiny floor shows	• Generally lower than equivalent fees in scripted production
2. Exclusivity	• Usually limited to exclusivity in unscripted programming • May further limit exclusivity to specific sub-genres, especially for established media personalities	• Usually lower level of “priority” on talent’s services than corresponding scripted deals (may require more specific negotiation and scheduling)
3. Options	• May be as many as six years, but, compared to scripted programming, more common to require fewer • Must distinguish among “years,” “seasons,” and “cycles”	• Some unscripted series may produce multiple cycles in a single calendar or broadcast year • May set threshold for maximum total episodes per year, cycle, or season before option is exhausted and/or fees increase
4. Product Integrations	• Compared to scripted, more explicit requirements for participation in active integrations	• May require reconciliation with artist’s personal sponsorship and endorsement activity

C Participant Agreements for Documentary and Competition Series

Agreements governing the services and appearances of non-celebrity participants in documentary and competition series are usually sparsely negotiated. Professional hosts and judges typically have sophisticated agents, managers, and lawyers negotiating their deals; non-professional participants usually do not. Particularly well-known or talented hosts and judges may be highly coveted by producers and networks; “docu-follow” subjects are typically one of many being considered by a network as the subject of a proposed television series, while game show and competition series participants are usually selected from among many thousands of applicants seeking the opportunity to appear. As a result, many such deals are altogether “contracts of adhesion,” meaning that the

producer will present a potential participant with an agreement and refuse to negotiate most or all of its terms. If the individual is interested in proceeding, they sign; if they are unwilling to sign, the producer or network moves on to someone else who is willing to accept the terms on the table. Even established personalities from unscripted franchises, who often take on more sophisticated representation over time, seldom get the same latitude to negotiate the terms of their agreements that is accorded to principal performers on scripted shows. Even if the terms of such agreements are not subject to significant negotiation, however, it is useful to review some of their key components.

i Fees

The economic terms for non-professional entertainers participating in unscripted television programs are wildly different from those applicable to professional host/judge types.

For a new non-competition documentary series that follows non-celebrity individuals in their personal or professional lives (as is common on basic cable), the principal subjects of the series can expect to earn as little as \$500 per episode, and certainly no more than \$10,000 per episode, in their first contracts. Many episodic fees fall in the \$1,000–\$2,500 per episode range. The subjects of these series are typically not professional entertainers and do not expect to earn their primary livings from their series appearance fees. The primary motivation for such individuals to participate in an unscripted television series is usually non-economic—e.g., to seek personal fame, to gain access to other entertainment industry opportunities, and/or to take advantage of the “free advertising” provided by an unscripted television program to promote and advance their non-entertainment business interests. The economic terms of their appearance deals tend to reflect this reality. That said, non-celebrities who are catapulted to fame by an extremely successful television series (such as the Robertson family of *Duck Dynasty* or the Thompson/Shannon family of TLC’s *Here Comes Honey Boo Boo*) frequently negotiate for substantially greater fees to keep a show in production after their original contracts expire (or if afforded an earlier opportunity to renegotiate their deals).

On game shows and competition shows, the competitors typically appear for no fee whatsoever; their sole compensation is the opportunity to win whatever prize is at stake in the series (as well as the exposure and thrill of appearing on television).³⁶ This is true even for arcing competition series that follow a narrowing group of competitors over an entire season, such as *Survivor* or *Top Chef*, that may require participants to live in show-provided housing and work

36 The primary exception here is for competition series with a performance element, such as *American Idol* and *The Voice*. Singing and performing music on television is a class of services that is subject to SAG-AFTRA’s jurisdiction; as a result, many of these series formally treat the competitors as professional performers and pay them scale minimum episodic fees for each appearance over the course of a series.

on the series on a substantially full-time basis for weeks or even months at a time. For such individuals, the applicable agreement will disclose (and require the participant to acknowledge and accept) all of the competition rules, prize details, judging criteria (if any), and eligibility requirements.³⁷ In addition, for music competition series that are produced under SAG-AFTRA contracts (to allow access to celebrity hosts and panelists), competitors may be considered “union-covered” performers and paid applicable scale episodic minimums.³⁸

ii Releases

The essential component of most appearance agreements for unscripted productions is a series of broad and expansive releases. Participants in unscripted television programs typically waive any and every claim they might otherwise be able to bring against the producer or network in connection with their appearance.

Because such programs are often edited to generate storylines with “heroes” and “villains,” many participants in unscripted series may find their depiction to be unflattering, or even personally or professionally damaging. In addition, reality program participants may at times be unaware that they are being recorded, or may be recorded in personally compromised circumstances, such as while heavily inebriated. Producers and networks therefore obtain extensive waivers of any potential claims that may arise out of such depictions, including defamation, public disclosure of private facts, or violations of rights of privacy and publicity.³⁹ Appearance agreements typically involve extensive disclaimers about the production’s right to record the participant at virtually any time and to

37 For instance, many game show participant agreements provide that a winning contestant’s prize is paid only if and when the applicable episode is actually exhibited, and may not be payable at all if the episode never airs. In addition, participants in various game and competition series must submit to background checks and submit extensive information about themselves to the production as part of the casting process, and may be deemed to forfeit their prizes if they are found to have lied. In general, to avoid any actual or apparent conflicts of interest, participants in game and competition series cannot have any significant personal or professional relationships with the entities or individuals involved in the production or exhibition of the series.

38 In scripted and unscripted television alike, studios use “Taft-Hartley waivers” to engage non-union performers to render union-covered services on union signatory projects. Named after the Taft-Hartley Act (one of the major U.S. federal statutes on unions and labor law), these waivers allow a “union shop” (which is otherwise committed to exclusively hire union workers for positions within a signatory union’s jurisdiction) to hire some non-union personnel so long as they are paid and otherwise accorded the same protections as union-covered talent on the same program. For traditional acting roles, non-union actors who are hired multiple times under Taft-Hartley waivers eventually achieve “must join” status, meaning that the actor is not eligible for further Taft-Hartley waivers and must join (or become a financial core member of) SAG-AFTRA to be engaged for future SAG-AFTRA-covered roles. Many young actors are exceptionally eager to “get their union cards” to begin competing for roles in more substantial productions. On the other hand, because SAG-AFTRA prohibits members from performing in non-union productions (even internationally), some young actors prefer to postpone joining the union until they are confident in their ability to consistently generate union-covered work.

39 See Chapter 4, Section C (pg. 164).

depict them in virtually any way; where a reality show involves putting participants in a home owned or rented by the production (e.g., *Big Brother*, *The Real World*, *The Bachelor*), the participants' agreements typically permit the producers to film the participants in secret anywhere on the premises. Reality producers have long been criticized for helping to manufacture on-screen "drama" by encouraging participants to heavily consume alcohol, often generously providing them with drinks during production—a practice that Bravo owner NBCUniversal recently defended as protected by the First Amendment in response to a lawsuit brought by former *Real Housewife* of New York Leah McSweeney. "Documentary" series agreements usually include broad permission for the production to access and film the participants in their homes and places of business. Participants may be asked to sign agreements by which they waive any claims for fraud or misrepresentation, should they later learn that the producers lied to them in any way, including about the very nature of the show in which they are participating.⁴⁰ Participants in competition shows with physical elements waive any claims for injury arising out of their participation in the series.

In short, the responsible producer of an unscripted television series considers the nature of the project, imagines every conceivable legal claim that a disgruntled participant, subject, or competitor could bring, and then requires that individual to waive any and all such claims as a condition of their participation in the series.

iii Exclusivity

For documentary series and arcing competition series, producers and networks will typically seek extremely broad exclusivity from non-professional series subjects and competitors, perhaps encompassing full exclusivity in all of television, and such individuals seldom have the bargaining power to resist such demands. Where exclusivity is negotiated, the range of negotiation options is generally consistent with those set forth for professional hosts and judges.⁴¹

The particulars of exclusivity may vary dramatically depending on the nature of the series, and of the participant. For instance, a real estate agent whose real estate business is the subject of a documentary series may be comfortable agreeing to exclusivity in all of television, while a professional stand-up comedian and aspiring comic actor/writer participating in a comedy competition series such as NBC's *Last Comic Standing* would be unwise to accept such terms. However, there is virtually always some measure of exclusivity demanded of such

40 The law in many states is highly skeptical (as are many judges) of preemptive releases of claims for future "intentional torts"—intentional acts that knowingly or purposefully cause harm to others, a category that includes fraud, defamation, and intentional infliction of emotional distress. Consequently, particularly when a participant's agreement to a release is obtained "fraudulently" (e.g., by lying to them about the nature of the program, when they would not have agreed to the release if they had known the truth about it), such releases do not always hold up when challenged in court.

41 See Section B.ii.

individuals. Even one-time competitors on game shows are typically required to agree not to appear on any other television programs, including any other game shows, for twelve to eighteen months following their appearance on a particular program.

iv Options

For “documentary”-type unscripted programs that contemplate following one or more individuals over an extended period of time (and across multiple seasons), the participant’s agreement will include option terms comparable in form and substance to those applicable to the professional performers on unscripted series.⁴²

Participants in competition series may also be required to agree to options beyond the scope of the television show itself. The modern form of these terms was pioneered by *American Idol*, which generated a universe of long-tail financial opportunities beyond the actual show by requiring contestants to submit to options—exercisable even if the contestant was not eventually crowned champion—to be professionally managed by Simon Cowell’s talent management company, to sign to the show’s partner record label as a recording artist, and/or to perform (for modest pre-set and non-negotiable fees) in live events featuring contestants from the show (including on tour).⁴³

v Reverse Royalties

Many individuals choose to participate in unscripted television programs not because of the immediate appearance fees (which are typically low), but for the exposure that these shows can provide.⁴⁴ At the same time, a popular sub-genre of documentary shows (often exhibited on the Bravo and E! networks) follows the personal and professional dramas surrounding real-life businesses and the entrepreneurs behind them, including real estate agencies (*Million Dollar Listing*), fashion companies (*The Rachel Zoe Project*), restaurants (*Vanderpump Rules*), fitness studios (*Hollywood Cycle*), and bars (*What Happens at the Abbey*). Networks and production companies are well aware of the value of the “free publicity” provided to the businesses featured in these programs and sometimes negotiate for a “reverse royalty,” i.e., an amount owed by the subject of the series (either as an individual or a company) to the network or production company in exchange for the promotional value provided by the series. This payment may be calculated as a percentage of the company’s or individual’s

42 See Section B.iii.

43 Requirements like these can also create eligibility issues in casting, with musicians who already have recording, management, and/or publishing contracts that would conflict with these options frequently being barred from competition if they cannot extract themselves from their existing commitments.

44 See Section B.i.

revenue, a percentage of revenue earned in excess of a historical pre-series baseline, or even a share of equity in the subject’s venture.

vi Confidentiality and Publicity

Because the entertainment value of unscripted programs, especially arcing competition series, often relies heavily upon a sense of suspense and uncertainty about the outcomes, participants in such programs are generally subject to strict confidentiality requirements, prohibiting them from disclosing any information about the substance or outcomes of their appearances prior to the exhibition of the applicable episodes. These non-disclosure clauses may even prohibit a participant from disclosing the mere fact of their appearance or participation until it has been publicized by the network. To prevent participants from breaching these confidentiality requirements, participant agreements often provide for liquidated damages (i.e., contractually defined damages) of hundreds of thousands or even millions of dollars in the event of any unauthorized disclosures.

Participant agreements typically expressly affirm the production company and network’s sole control over all publicity in connection with a series. Consistent with the confidentiality provisions of these agreements, participants are generally prohibited from engaging in any series publicity without the coordination and/or consent of the production company and network. At the same time, participants usually agree to cooperate with and participate in producer/network-coordinated publicity activities, such as interviews and talk show appearances arranged by the producer or network in support of the series.

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TABLE 12.2 Participant Agreements for Documentary and Competition Series

<i>Deal Term</i>	<i>Main Issues/Ranges</i>	<i>Other Issues</i>
1. Fees	• For non-competition documentary series, \$500–\$10K per episode (often \$1K–\$2.5K in Y1) • For most game and competition series, competitors receive no fee (other than applicable prizes) • Competitors on music competition series may be paid scale minimum competition (pursuant to Network Code)	• Stars of major hit docu-follow series may renegotiate for much higher fees in future seasons/contracts • Shows obtain Taft-Hartley waivers to feature non-union performers doing union-covered work on SAG-AFTRA projects

(Continued)

TABLE 12.2 (Continued)

<i>Deal Term</i>	<i>Main Issues/Ranges</i>	<i>Other Issues</i>
2. Releases	• Broad releases of all potential claims from show's depiction of participants (comparable to but broader than life rights) • Further format-specific releases (e.g., to be filmed at all times when in show-provided housing, for injuries from competitions with physical elements, etc.)	• Subjects of "docu-follow" programs grant production access to homes and offices • Waivers of claims for intentional torts (including fraud, defamation, and intentional infliction of emotional distress) may not hold up if challenged in court
3. Exclusivity	• Broad and often non-negotiable exclusivity, potentially extended to all of television • In some cases, may be limited to unscripted programming and/or specific genres (as for hosts)	• Game show contestants may be prohibited from appearing on other game shows for 12–18 months
4. Options	• Stars of "docu-follow" programming subject to options comparable to those for professional performers	• Options may extend beyond the series itself (e.g., recording and management contracts and/or touring services for contestants in music competition) and may affect contestant eligibility
5. Reverse Royalties	• Network may require a share of revenue from, and/or equity stake in, outside business activities receiving "free publicity" from show	• May be calculated as a percentage of the company's or individual's revenue, a percentage of revenue earned in excess of a historical pre-series baseline
6. Confidentiality and Publicity	• Strict confidentiality requirements to avoid spoilers • Breaches of confidentiality may be subject to six- or seven-figure liquidated damages clauses	• Network controls and has approval over all series publicity • Network may require stars and contestants to participate in network-arranged publicity activities (e.g., interviews)

D Production Company Agreements

The dominant form of relationship between unscripted content producers and networks is not a license agreement, but a production services agreement.⁴⁵ In such arrangements, the network pays the production company 100% of the cost of production of the series (including a negotiated fee for the producer) and obtains 100% of the ownership of the series on a “work-for-hire” basis. Even starting from this presumption, however, there are several key terms open to negotiation between the network and production company.

i Production Company Fees

The production company must negotiate with the network to determine the value of its budgeted production fee. In most cases, these fees are contracted and calculated as a percentage of the series’s ingoing approved budget. In negotiating these fees, there are five primary issues to account for:

The first issue is the applicable percentage of the budget. The prevailing industry standard, applicable in a substantial majority of cases, is 10%. However, in competitive situations, or where the production company is offering a substantial package of producing elements (e.g., significant celebrity attachments as producers) with whom it must share the production fee, the fee may be negotiated to a higher percentage, such as 12.5% or even 15% in rare cases.

The second issue is the definition of “budget” for purposes of calculating the production fee, particularly the applicable exclusions from the calculation base. In other words, the parties may negotiate for a “10% production fee,” but the question remains, “10% of *what*?” The network is incentivized to negotiate for the greatest number of exclusions; the production company seeks as few as possible. In nearly all cases, the defined “budget” for this purpose excludes the production company’s own fee (i.e., to avoid compounding), any applicable agency package fee,⁴⁶ subsequently agreed network breakage amounts, overages, and prizing. Underlying rights/format fees,⁴⁷ if applicable, are also typically excluded. If the network agrees to treat any producers as “line-items” (described further shortly), the network may nevertheless seek to exclude such producers’ fees from the “budget” for purposes of calculating the production

45 Occasionally, especially powerful unscripted producers—particularly those who are affiliated with a major television studio that primarily produces scripted content on a license basis—may be able to negotiate for a co-production arrangement with the network (providing for shared ownership of the series and shared control of distribution rights), or even, in rarer cases, a license relationship (albeit one that will vest the network with greater exhibition and/or distribution rights than it might typically expect to receive in a license agreement for a deficit-financed scripted series). Such arrangements are rare and are not addressed here.

46 Because the WGA generally lacks jurisdiction over unscripted productions, the prohibition on agency packages it obtained in 2019 largely does not apply to unscripted shows.

47 See Section D.ii.

fee. Many networks also insist on excluding legal and insurance charges, particularly when the production legal services for the series will be rendered by an outside lawyer or law firm (rather than by an in-house employee of the studio) and/or when the applicable fees are also calculated on a percentage-of-budget basis. Some networks insist on excluding principal on-camera talent fees, especially in cases where the network directly negotiates and controls the relationship with such talent.

The third issue is applicable floors and ceilings. On lower-budget productions, producers may want to make the percentage-of-budget calculation subject to a dollar-amount floor, in order to avoid accepting a production fee that is too low to appropriately compensate them for the effort, overhead, and overage risk required to produce the series.⁴⁸ On higher-budget productions, networks may want to limit the extent to which the production fee can continue to grow in proportion to the budget and apply a hard-dollar cap. In either event, the applicable floors and/or ceilings are typically negotiated on a case-by-case basis, bearing in mind the parties' reasonable projections and assumptions about where the final ingoing budget of the first season of the series will likely land.

The fourth issue is the extent to which the production company must bear fees payable to certain service providers out of its negotiated production fee. Production companies frequently partner with individual producers on a project-by-project basis. Sometimes, these individual producers come up with the underlying idea around which a series is built. In other cases, they may provide unique access to talent or subjects, or otherwise provide expertise and connections that are vital to the success of the series concept. Production companies may also seek to partner with high-profile celebrities whose name recognition can help generate network and/or public interest in the series or attract the participation of other celebrities, even if the celebrity executive producer himself never actually performs on camera. Networks usually require that such producers (who render services on a non-exclusive and effectively part-time basis) be paid out of the production company's fee, so that the network does not bear any further cost for their fees. Anticipating this requirement, many production companies negotiate their agreements with such third-party producers based on a negotiated percentage split of the applicable production fee received from the network, which the production company is incentivized to maximize.⁴⁹

However, the production company may seek to negotiate for the right to separately account for fees to such producers outside of the production fee and within the network-approved (and funded) budget of the series. This is referred to as "line-iteming," and producers whose fees are accounted for in this fashion are said to be treated "on a line-item basis." For example, the fees payable to showrunners and other physical producers who render services on a

48 See Section D.iv.

49 See Section E.ii.

substantially exclusive and full-time basis are generally and uncontroversially accounted for as line items. Although networks strongly resist treating any non-exclusive, part-time creative producers in this fashion, they may agree to do so for uniquely prolific and successful producers (such as Mark Burnett) or for celebrity executive producers (especially for those who are also appearing as hosts, judges, or other on-camera talent).

Finally, the production company and network must negotiate the applicable increases for the production company's budgeted fee. It is not uncommon for the budget of a successful unscripted series to escalate somewhat dramatically in later seasons, as the success of the series drives the network to invest in enhancing it further. The production company would prefer to see its fee recalculated season-by-season (or, better yet, cycle-by-cycle) based on the new budgets, to take advantage of these ballooning production costs.⁵⁰ Such rapid increases may also cause the fee calculation to run up against any negotiated fee caps. On the other hand, the network may require that the fee increase by fixed percentage amounts from the first cycle's calculated fee (with 4%–5% being typical, as in many other dealmaking contexts), allowing the company some appreciation in its compensation, but not necessarily in proportion to the growth in the series's budget.

ii Format and Other Rights Fees

For the most part, on original unscripted series, no separate compensation is paid in connection with the underlying “intellectual property” of the series (i.e., the series format).⁵¹ In effect, the negotiated production company fee serves as compensation for both the underlying idea for the series and the services rendered by the production company in producing it. However, there are two main cases where a separate intellectual property fee may be payable as part of the budget: where the series is based on, or substantially incorporates into its title or format, some preexisting piece of intellectual property (e.g., Fox's *Beat Shazam* or CBS's *Candy Crush*); or where the series is based on a preexisting television format that has been imported from abroad or revived from a prior

50 On the other hand, this does entail the production company taking some risk that the series budget actually goes down in subsequent seasons or cycles, and the company's fee therefore falls with it. Although this is relatively uncommon, it can occur specifically in second cycles (when one-time set construction and other amortizable costs are not re-incurred), when per-cycle episodic orders are increased (which may result in a higher aggregate, but lower episodic, average budget and production fee), or on marginally successful series for which the production company seeks to induce a reluctant network to renew the series by working to reduce its cost.

51 If, as noted in Chapter 5, Section D (pg. 208), the extent of copyright/intellectual property protection for scripted series formats is up for debate, the protectability of unscripted formats is especially dubious. For some basics on copyright law that shed light on this issue, see Chapter 4, Section A (pg. 148). Again, the entertainment industry's general respect for formats and practice of engaging in format licensing are arguably more a function of custom and norms as they are a legal necessity.

domestic series (e.g., ABC's *The Weakest Link*, based on a British series of the same name; or TNT's *The Joker's Wild*, based on a classic U.S. game show from the 1970s and 1980s).

Where applicable, fees for preexisting intellectual property are also commonly negotiated on a percentage-of-budget basis. Preexisting television formats typically command format fees equal to 5% of the budget, while non-format intellectual property (such as trademarks and non-TV game formats) are usually compensated at between 2.5% and 5% of the budget, according to their prominence and value in the marketplace. If the preexisting format is owned by a third-party company, it is paid to that third party as a show expense; if the production company itself owns the preexisting format, it can charge and retain the format fee for itself. The same issues around relevant definition of "budget" and negotiation of dollar-value floors and ceilings described earlier with respect to production company fees are also applicable to the negotiation of format/rights fees.

iii Locks

Production company agreements are subject to the same types of negotiations around "locks" as non-writing executive producer agreements on scripted series.⁵² Production companies may be locked for only a single season, for two seasons, for the life of the series, or for some more uniquely negotiated period of time.⁵³ The extent of the lock granted depends on the stature and track record of the production company, including any prior relationship between the specific production company and network; whether the production company originally generated the idea for the series and brought it to the network, versus if the network sought out the production company and attached it to a preexisting idea; and whether the series is new, versus if the production company is engaged to take over production services on a preexisting series or format.

iv Overages and Underages

Generally, once the ingoing budget for the season is determined and approved by the network, the production company is responsible for any unapproved overages (i.e., production costs in excess of the approved budget), subject to a limited number of negotiated exceptions. These exceptions almost always include breakage amounts approved by the network in writing and costs that are reimbursed by insurance, and may also include overage costs that are caused by

⁵² See Chapter 6, Section D.iii (pg. 259).

⁵³ For example, the production company may receive only a two-year lock, with the network's option to engage it for a third season, and a life lock automatically triggered if the network exercises its third season option.

third-party breaches of contract not caused by or contributed to by the production company, or costs that are caused by events of force majeure (i.e., “acts of god” such as war, earthquakes and major weather events, union strikes, and other events beyond any party’s reasonable prediction or control).

However, the production company and network must also negotiate with respect to the treatment of underages (i.e., any negative difference between the amount allowed for in the ingoing budget and the actual amount spent by the production company on production costs). Networks frequently demand that all underages be retained by the network. In addition to saving the network money, this arrangement also disincentivizes the production company from “padding” its initial proposed budget or intentionally skimping on production values in hopes of generating underages that it will get to retain.

If the network has the right to retain underages, this right is enforced by the network’s right to audit the production company’s expenses (and so the approved budget is referred to as “auditable”). Although the network will generally fund the approved budget to the production company on a mutually agreed cash flow schedule that limits the production company’s need to go out-of-pocket to cover legitimate production expenses, some portion of the funding for the series (typically 5%, but potentially as much as 10%) is subject to an “audit holdback.” In other words, the network withholds this portion of the approved budget and releases it to the production company only after undertaking an audit of the company’s expenses, to verify that the full amounts claimed by the production company were actually spent in connection with the series. This holdback may itself be subject to automatic release if the network does not exercise its audit rights in a timely fashion, e.g., within sixty or ninety days following the delivery of the applicable cycle.

Production companies, of course, prefer to retain any underages (in which case the budget would be referred to as “flat” or “non-auditable”). They will argue that the network was prepared to spend the full budget amount all along and that the network’s retention of underages therefore amounts to an undue windfall, and that the opportunity to retain underages is fair compensation for the overage risk assumed by the production company. In addition, many production companies find production audits to be highly burdensome, time-consuming, and prone to maddening disputes with networks that seek to aggressively disallow costs that the company considers to be legitimate.

As a compromise, some production services agreements provide for the network and production company to share underages, potentially subject to a cap on the production company’s share of retained underages. Such agreements may also provide that series budgets are auditable (with the network retaining underages) for the first one, two, or three seasons of a series (when the process and true cost of producing the series are worked out through practical experience), and become flat/non-auditable thereafter (with flat annual increases). Retained underages can ultimately constitute an extremely important source

of further revenue for the production company, particularly in latter seasons of a series, by which time the production company has developed considerable expertise and efficiency in producing the show and can find opportunities to retain underages without compromising production value.

v Chargebacks

In addition to the previously discussed revenue sources (i.e., production fees and, where applicable, format/rights fees and retained underages), “chargebacks” constitute a critical source of revenue for many unscripted production companies.

In addition to employing personnel with the creative and production expertise to manage a series, many production companies own significant property and infrastructure resources that are critical to any production. These may include office space; studios and other production spaces; editing bays and other costly computer hardware and software; and cameras, lighting, and other physical production necessities. If not provided by the production company, these materials would need to be purchased or rented from third parties; instead, the production company may provide them from its own stock and charge market rates for their rentals within the budget of the series. Generally, such in-house chargebacks must be disclosed to the network (especially if the budget is auditable, in which case undisclosed chargebacks may be disallowed in a production audit and unreimbursed). Over time, these chargebacks eventually amortize the production company’s capital expenses of obtaining the resources and then provide a further source of profit.

Larger production companies may also keep editors, producers, lawyers, and other essential production personnel on staff as salaried employees, on exclusive hold as consultants, or under exclusive “overall”-type deals.⁵⁴ If the company dedicates such individuals’ time to a specific project on a substantially exclusive, full-time basis, it may also seek to charge the value of their services back to the network-funded budget at the market rates it would have otherwise paid for freelancers. In the most extreme cases, a fast-working on-staff editor or producer can generate more revenue for their employer than the cost of their own salary by working on and being “charged back” to multiple independent productions at the same time. Again, the production company generally must disclose such chargebacks to the network and obtain the network’s approval on an individual-by-individual basis, or risk the network’s disallowing of the costs in a subsequent production audit.⁵⁵

⁵⁴ See Chapter 10, Section A (pg. 392).

⁵⁵ On the other hand, production companies typically take the view that, if the work is getting done as and when it is supposed to, the network does not need to know if an individual is working on (and being charged to) multiple productions at the same time.

vi Product Integrations

Because product integrations are a particularly prominent feature of (and lucrative source of revenue from) unscripted programming, some networks are especially insistent about retaining 100% of revenue, both from traditional advertising sales and designated “integration fees,” in connection with these arrangements (excluding only the out-of-pocket costs of actually implementing such integrations, if any).⁵⁶ On the other hand, the prominence of integrations in unscripted programming makes them particularly valuable for unscripted producers to share in, and it is ultimately the duty of the production company to execute on the integration as organically as possible. Therefore, while advertising revenue is generally acknowledged by all parties as sacrosanctly the network’s to retain, savvy production companies negotiate hard for a share (typically 50%) of specified “product integration” fees. Production companies that participate actively in sourcing and courting integration opportunities with partner brands have a particularly strong claim to share in the resulting revenues. Alternatively, companies may negotiate for an off-the-top, percentage-based “sales fee” or “finder’s fee” on integration revenues they directly source. However, even where the network agrees to split integration revenues with the production company, the network may retain the right to recoup certain expenses off-the-top prior to splitting, particularly any breakage or other network-paid overages.

vii Backend

Because the network is typically the owner and distributor of most or all of the rights in an unscripted series, it occupies the position of a “studio” for purposes of calculating and accounting for contingent compensation to third parties, including the production company. For the most part, such backend is also characterized as “Modified Adjusted Gross Receipts” (“MAGR”), or the corresponding backend concept under a different name, and the basics of its definition and calculation largely follow those for scripted series.⁵⁷

Many networks have adopted the scripted television studio norm of 35% of MAGR being the maximum allowable “pool” or “pot” of contingent compensation for any given series. Production companies may expect to negotiate for between 15% and 35% of MAGR, which, like the contingent compensation for non-writing executive producers on scripted series, will likely vest in thirds over production of a pilot, first season, and second season of the series.⁵⁸ The

56 This differs from the norm in scripted television, where the studio frequently retains product integration revenue (but not ad sales revenue) for itself entirely, or agrees to split such fees with the network. See Chapter 11, Section A.xiii (pg. 443).

57 See Chapter 9 (pg. 351).

58 See Chapter 6, Section D.viii (pg. 261).

network will generally require the production company to bear any participations to its partners out of its negotiated contingent compensation. As a result, as with upfront fees, many production companies negotiate their agreements with third-party creative producers to pay them a percentage of whatever contingent compensation the production company actually receives (if any) from the network.⁵⁹

Because the network effectively occupies the role of both network and studio, when accounting to participants for contingent compensation, it must follow the practice of studios selling their shows to affiliated networks and impute a license fee for its own exhibition of the series.⁶⁰ Ideally (to the production company), this imputed license fee is equal to the ingoing approved budget of the series; but in practice, most networks impute a license fee between 70% and 90% of the production cost of the series, leaving a 10%–30% deficit that must be recouped from distribution revenues before any contingent compensation becomes payable. The MAGR definition would also specify the extent of network exhibition and/or distribution that is “bought out” entirely (i.e., not further accountable to the participant) by the imputed license fee. Frequently, the scope of the imputed license fee buy-out on an unscripted series is much broader than what might be applicable to a scripted series, perhaps covering not only the network’s direct linear exhibition of the series for an unlimited number of runs, but also all exhibition or distribution of the whole series on domestic digital platforms in perpetuity.

The production company may also attempt to negotiate for a reduced or eliminated overhead charge in the MAGR calculation, on the argument that it is the production company, and not the network, that is actually taxing its overhead and infrastructure in connection with the production of the series. Despite the logic of this argument, however, many networks retain the overhead charges typical of MAGR definitions.

As a result of the imputed deficit and MAGR-standard overhead and interest deductions, and the already limited second-run and international market value of unscripted series, it is very rare that profit participants in unscripted series see any value from their negotiated contingent compensation.

viii Reserved Rights

Although most deals presume the network’s complete ownership of a series and control of all distribution rights in connection therewith, the production company may be able to negotiate to reserve certain rights, particularly where it can demonstrate an actual history, or at least a proven ability, to effectively monetize and exploit such rights. Given the unfavorable customary

59 See Section D.i and Section E.ii.

60 See Chapter 11, Section A (pg. 406).

definitions of contingent compensation for unscripted series, such reservations of rights can prove critical to the production company's ability to extract true long-term value from its series. Except with respect to bona fide preexisting formats and other underlying intellectual property (for which rights are generally reserved as a matter of course), networks may condition a production company's reservation of rights on the production company agreeing to bear some portion of the series production costs (in other words, a deficit).

The most critical potential reserved right is the underlying format of the series, which may hold broad appeal internationally, even where any particular local production based on that format would not.⁶¹ Although not all forms of unscripted series are amenable to formatting and re-adaptation—a documentary series whose entertainment value is based on a specific celebrity personality cannot be adapted as readily as a traditional game show—the most successful unscripted formats may be adapted into local versions in literally dozens of territories. For example, local versions of *Big Brother* have been produced in over fifty different countries. Each local version generates format fees (and, potentially, contingent compensation) payable back to Endemol, the Dutch company that created and owns the *Big Brother* format.⁶²

To be clear, even if the production company successfully reserves format rights to a new original format, the network would likely claim a 50% economic interest (which would entitle it to receive 50% of format revenues generated by the production company, after the company deducts customary distribution fees and recoups its distribution expenses off-the-top).⁶³ Nevertheless, the production company's opportunity to retain those off-the-top distribution fees and the other 50% net share of format receipts could prove quite lucrative for years to come.⁶⁴ In addition, the production company's reservation of domestic (as well as international) format rights could enable it to revive the series format in

61 See Section A.

62 See Section D.ii.

63 Some deals provide for the network's share of format revenue to start lower, but to grow with each successive season of the original series ordered by the network.

64 If the production company is unable to reserve format rights altogether, as a fallback it may seek to negotiate for a "separate pot" format royalty from the network. In this structure, the network would own and control the format and its distribution (both domestically and internationally), but the production company would be entitled to share in format revenues after the network deducts only distribution fees and format-related distribution expenses, and not any U.S. series-specific production or distribution expenses. In other words, the production company would see backend value from the network's distribution of the underlying series format, even if the original American series had not "broken even" (i.e., recouped the imputed deficit, overhead, and interest deductions) pursuant to the otherwise prevailing MAGR definition.

a new domestic series after the original series is canceled (subject to negotiated holdbacks and revenue sharing with the original network, as described earlier). As the recent trend of game show revivals demonstrates, this right can also prove very valuable over time.

In rarer cases, a production company with established relationships in certain territories (commonly other English-speaking territories such as Australia and the United Kingdom) may negotiate to reserve distribution rights in those territories (with an obligation to account back to the network for a share of the resulting distribution revenues, as it would for reserved format rights). As a lesser accommodation, the network may nominally retain control of distribution rights worldwide (and therefore the right to channel all distribution revenues worldwide through its unfavorable generally applicable MAGR formula) but agree to engage the production company as its distributor in the production company's territories of expertise (thereby at least allowing the production company to collect off-the-top distribution fees).

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TABLE 12.3 Production Company Agreements for Unscripted Productions

<i>Deal Term</i>	<i>Main Issues/Ranges</i>	<i>Other Issues</i>
1. Production Company Fees	• Standard prodco fee is 10% of ingoing approved budget, but may be up to 15% (especially for large packages) • Defined exclusions from budget when calculating fee (e.g., prodco fee itself, underlying rights/format fees, agency package fees, breakages and overage, prizes) • Prodco fee may be subject to floors and/or ceilings • Prodco usually bears fees to other non-exclusive producers • Prodco fees for subsequent seasons may float with budget, increase based on flat percentages (4%–5%), or float subject to caps	• Defined exclusions from “budget” when calculating fee may also include legal and/or insurance charges, principal on-camera talent fees, and any other percentage-based fees) • Fees for showrunners and other full-time producers, producing fees to on-camera talent, and A++ producers may be “line itemed”

(Continued)

TABLE 12.3 (Continued)

<i>Deal Term</i>	<i>Main Issues/Ranges</i>	<i>Other Issues</i>
2. Format and Other Rights Fees	• Format fees may be payable for shows based on existing produced formats or other preexisting intellectual property • Typically 5% of budget for preexisting television formats, and 2.5%–5% of budget for other IP	• Generally no format fees for wholly original series • Calculation of format fees subject to same types of issues as for prodco fees (e.g., exclusions from budget, floors and ceilings, escalations in future seasons, etc.)
3. Locks	• Similar to locks for non-writing Eps on scripted series • Ranges from 1-year lock to life lock	• Relevant factors include prodco stature and track record, existing relationships with network, and source of underlying concept for series • Locks may automatically extend in future seasons (similar to “Warner locks”)
4. Overages and Underages	• Prodco generally responsible for overages, excluding network-approved breakage, costs covered by insurance, and costs from third-party breaches and/or force majeure events • Networks prefer to retain all production underages; prodcos prefer flat/non-auditable budgets (with prodco retaining underages)	• Underages may be split between prodco and network, potentially subject to cap • Where network retains underages, cash flow schedules are subject to holdbacks of 5%–10% pending network audit of production costs • Network may retain underages (auditable budgets) in early seasons and convert to flat/non-auditable budgets in later seasons)
5. Chargebacks	• Prodco may include budgeted charges for prodco-owned resources (e.g., office space, studio/production space, editing bays, camera and lighting equipment, etc.) and/or full-time prodco employees rendering production services (e.g., editors, producers, lawyers, etc.) at fair-market rates	• Chargebacks must be disclosed to and approved by network • Some resources and/or individuals may be charged back to multiple productions at the same time

(Continued)

TABLE 12.3 (Continued)

<i>Deal Term</i>	<i>Main Issues/Ranges</i>	<i>Other Issues</i>
6. Product Integrations	• Revenue from paid product integrations may be retained solely by network and split between network and prodco • Prodco may receive off-the-top finder's fee for sourcing integrations	• Networks universally retain all advertising revenue (including when part of a broader integration deal) • Network may recoup breakage or other defined costs from product integration revenue prior to sharing
7. Backend	• Total series participations typically limited to 35% of MAGR, with prodco receiving 15%–35% • Prodco may have to bear other participants from its share of backend (as with upfront fees) • Network must impute license fee for its own exhibition (usually 70%–90% of budget, may be up to 100%)	• Miscellaneous backend definition issues comparable to MAGR for scripted series (see Chapter 9) • May negotiate for reduced or eliminated overhead charges in MAGR definition • Imputed license fee often buys out wider scope of exploitation than corresponding ILFs in scripted MAGR definitions • Generally considered valueless for unscripted series
8. Reserved Rights	• Rights for bona fide preexisting formats and other underlying IP generally reserved as a matter of course • Format rights are widely considered the most valuable potential reserved right • Production company usually must account to network for a share of revenue from reserved rights	• May be conditioned on prodco bearing a deficit on series production costs • Production company's reservation of rights or engagement as subdistributor may require demonstrated history or capacity for distributing specific rights and/or in specific territories • In lieu of reserving format rights, production company may negotiate for separate pot participation in format revenue

E Producer Collaboration Agreements

One of the most common early-stage agreements in unscripted series development is a collaboration agreement among creative producers (or between creative producers and a production company), by which the parties partner to further develop and take a project to market. There are many reasons why parties may choose to partner at an early stage, based on what each brings to the table—an original idea, a desirable brand, critical relationships with talent or subjects, superior relationships with network buyers, the capacity to manage physical production/render production services, or other valuable expertise or resources.

These collaboration agreements are similar to “shopping agreements” entered into among producers, or between producers and rightsholders, on scripted projects. However, scripted shopping agreements generally avoid pre-negotiating any substantive terms (instead reserving such negotiations to take place directly between each party and an eventual buyer studio or network), whereas unscripted collaboration agreements frequently address major substantive deal terms as between the collaborating parties. That said, because these agreements contemplate customary anticipated terms from a buyer network, they still tend to be very simple and routine, and are frequently agreed in principle (and confirmed in writing) but not formally papered until an actual sale.⁶⁵ The following are a few of the issues commonly addressed in such collaboration agreements.

i Collaboration Term and Tail

A party that originates an idea or controls underlying intellectual property usually does not want to be permanently bound to a partner if they are unable to find success together in the market within a reasonable term. Consequently, like shopping agreements, collaboration agreements usually provide for a fixed term, often twelve months. This term is usually automatically extended if the parties are in bona fide negotiations with a network when the term is otherwise set to expire (perhaps subject to a cap, often three months).

Also like shopping agreements, collaboration agreements may provide for a “tail period” usually six to twelve months, during which a partner’s attachment

65 See Section D. The terms of a collaboration agreement are therefore functionally contingent on successfully negotiating contemplated terms with a buyer network. This is true whether or not the collaboration agreement explicitly makes any or all of its terms subject to network approval, given the superior leverage usually wielded by the buyers in these transactions. In most cases, the physical production services company will take the lead on negotiations with a buyer network, and the outcome of these negotiations is usually driven primarily by the production company’s stature and precedents (of which individual producers become the beneficiaries).

automatically revives if a project is sold to a buyer that the parties had jointly pitched during the collaboration term. In addition, these agreements usually provide that, after the collaboration term expires, the party that originated the idea is free to redevelop it alone or with new partners, but only based on the concept as it existed *prior* to the parties' collaboration. As with the "tail period" for previously pitched networks, collaboration agreements often provide for a party's attachment to automatically revive if the project is later sold to a network based on the jointly developed format or sales materials. That said, intellectual property protection for television formats is thin, especially in unscripted television, and the process of redevelopment may organically bring about similar elements to those that were jointly developed during the original collaboration.⁶⁶

ii *Fee/Backend Splits*

Collaboration agreements almost always set forth a percentage split of producing compensation in an eventual network-approved budget. Networks generally require that the production company for an unscripted project, together with all "creative producers" who are not working full-time on a series (e.g., as showrunner or line producer), share a single network-approved "pot" of compensation—usually 10%–15% of the ingoing approved budget (subject to customary negotiated exclusions).⁶⁷ This is the "fee" being split between producing parties, in any percentages they may negotiate, though such deals often tend toward simple and intuitive "equal partner" arrangements based on 50/50 splits.⁶⁸ Although parties could theoretically agree to different split percentages

66 See Chapter 4, Section D (pg. 172). Disputes can therefore arise when an unscripted project eventually sells to a network, and the collaborator who has been "left out" of the sale recognizes in the project specific elements that they believe they contributed (or which were jointly developed) during the collaboration term. The partner that came (and is leaving) with the underlying idea/concept may also retain the right to use its own further contributions during the joint development process, though this can lead to difficult and subjective debates about which partner contributed any given element to a development project. Particularly carefully drafted collaboration agreements may provide that a party's automatic reattachment to a project is specifically contingent on it being sold with "protectable" or "copyrightable" elements developed during the collaboration—a standard which, in practice, may often be functionally impossible to meet if fully litigated.

67 See Section D.i.

68 On its face, it may seem unusual for production companies—who will be directly managing all aspects of the day-to-day work of physical production, and which may have some overage liability—to agree to an equal split with non-exclusive creative producers who are contributing less labor and/or shouldering less risk. However, production companies—unlike their creative producer partners—are also functionally "compensated" in the form of chargebacks for production resources and personnel in the network-approved budget, and such chargebacks are typically excluded from any fee splits and retained solely by the production company. See Section D.v. The parties to a

for up-front vs. backend compensation, typically, the same percentages will apply to both. Assuming the buyer network controls all rights, backend received from the network is usually split cleanly, without the deduction of distribution fees, overhead, or other common elements of defined contingent compensation entitlements.⁶⁹

Well-negotiated collaboration agreements will often provide for the partners to jointly use reasonable efforts to maximize the amount of shareable network-approved producing compensation, such as by seeking a higher-end (greater than 10% of budget) production fee or attempting to line-item producers to the greatest extent possible (especially on-camera talent that are also attached and participate as producers). In addition, if one of the parties is contributing bona fide preexisting intellectual property beyond the idea for the series (such as a recognizable brand/trademark, relevant literary material, or a previously produced series format), the collaboration agreement will frequently provide for the parties to attempt to negotiate separate compensation from the network (in addition to and independent of the producing fee pot) for such licensed rights. Depending on the circumstances, such separately stated compensation may be reserved exclusively to the rights-holding partner, or aggregated with other compensation to be split between the partners.

The parties may also negotiate as to the treatment of later-added third parties that will also have to share in the same pool of compensation (including mutual approvals of future attachments and/or compensation terms for such later-attached parties). Typically, a party will bear compensation owed to its affiliates or principals out of its own share of the divided compensation, whereas mutually approved compensation to bona fide third parties is usually taken off-the-top as between the original partners in a series.

Finally, especially if there is concern about significant dilution among many participating stakeholders of finite available producing compensation, parties may negotiate with respect to “floors” of compensation applicable to specific partners (either in real dollar terms or as a percentage of the “budget” that is used to calculate the fee pot). Such floors are most often sought by physical production companies (which take on the burden and risk of managing physical production) and owners of bona fide preexisting intellectual property (which may or may not ultimately be recognized by the network for a separately stated fee).

collaboration agreement may specifically negotiate/acknowledge the particular services and fees that they contemplate being treated as budgeted line-items (e.g., contributions from individual staff/salaried producers, editors, researchers, etc.).

69 See Chapter 11 (pg. 406).

iii Reserved Rights

Because most unscripted projects are produced on a work-for-hire basis for the commissioning network, there are usually no reserved rights that need to be allocated or accounted for between the parties to a collaboration agreement. Nevertheless, the parties may take care to negotiate that, to the extent that they are able to reserve any rights (especially format rights) from the buyer network, they will co-own and split revenue from such reserved rights in the same proportion that is applicable to their other shared compensation (so, usually 50/50). If one party, directly or through its affiliates, has sufficient distribution capabilities to directly license or exploit such reserved rights, the collaboration agreement may acknowledge such party's (or its affiliate's) control of such rights on behalf of the partners, and provide for customary additional compensation for its work as a "sales agent" or "distributor" (e.g., off-the-top distribution fees, distribution expense recoupment, etc.). If neither party is capable of distributing directly, then the parties will usually agree to mutual approval over the selection and terms of engagement for third-party sales agents or distribution partners.

iv Other Commonly Negotiated Terms

In general, networks are agnostic regarding how producers on an unscripted project divide compensation and reserved rights among themselves—from the network's perspective, it is making a deal with the producers *collectively*, and what happens among the producers "behind the scenes" is not its concern. However, collaboration agreements may also address several additional anticipated terms that, in practice, the parties must jointly present to the buyer network at the time a project is sold, and that must be accepted or approved by the network to be meaningful. These include locks or attachments for future seasons or subsequent/derivative productions (for which the parties often agree they must be treated on an equivalent/favored nations basis), business and creative approvals (which are often mostly or entirely to be exercised jointly/mutually by the parties, and which are most meaningful until the project is actually sold, after which these rights become subject to the network's superior business and creative controls),⁷⁰ and individual and company credits (which are, as always, subject to network policies and approval).

70 Because they are in any event subject to the network's superior rights, these are often "true" mutual approvals with no tiebreaker, although physical production companies often reasonably insist on a tiebreaking rights for day-to-day production matters, especially to the extent they impact budget and/or schedule.

v Quick Reference Guide

TABLE 12.4 Producer Collaboration Agreements for Unscripted Productions

<i>Deal Term</i>	<i>Main Issues/Ranges</i>	<i>Other Issues</i>
1. Collaboration Term and Tail	• Fixed term to jointly develop and sell project to a network (often 12 months) • Party that originated concept usually free to proceed independently if it the project is not sold during the term, possibly subject to “tail period” (usually 6–12 months) in which attachment revives if project is sold to a buyer pitched during the term • Prodco fee may be subject to floors and/or ceilings • Prodco usually bears fees to other non-exclusive producers • Prodco fees for subsequent seasons may float with budget, increase based on flat percentages (4%–5%), or float subject to caps	• Term may be automatically extended if in bona fide negotiations with a buyer when it is otherwise set to expire (possibly subject to a cap) • Non-originating party’s attachment may automatically revive if project later sells based on jointly-developed format or sales materials (may require parsing out contributions)
2. Fee/Backend Splits	• Prenegotiated split between partners of network-approved fees (usually but not necessarily 50/50) • Separate fees for preexisting formats/IP may be retained solely by owner party or aggregated with prodco fees and shared • Backend from network usually split cleanly, without deduction of fees, expenses, overhead, etc.	• Usually (but not necessarily) same split for upfront and backend compensation • Chargebacks for physical production companies generally excluded from sharing • Parties generally bear amounts owed to their affiliates or principals from their share, with bona fide third parties taken off-the-top • Party’s share may be subject to floor (in hard dollar or percentage-of-budget terms), especially for physical prodcos and underlying IP owners

(Continued)

TABLE 12.4 (Continued)

<i>Deal Term</i>	<i>Main Issues/Ranges</i>	<i>Other Issues</i>
3. Reserved Rights	• Revenue from reserved rights usually shared proportionately to other splits • Partner with distribution capacity may be designated distributor for reserved rights, or parties may have mutual approval over third-party subdistributors	• Usually N/A because no rights are reserved in network deal • Locks may automatically extend in future seasons (similar to “Warner locks”)
4. Other Commonly Negotiated Terms	• May address locks and attachments to derivatives (based on network deal and usually MFN) • Business and creative approvals (usually joint, subject to superior network rights) • Individual and company credits (based on network deal and often MFN)	• Physical production company generally holds tiebreaker for mutual approvals on day-to-day production matters

13

ON NEGOTIATION

One of the essential goals of this book is to help prepare television professionals of all levels and types to be effective negotiators. And most people instinctively understand that highly effective negotiation requires a combination of both *talent* (or “innate” ability) and *skill* (or “learned” ability).

In the context of negotiation, then, “talent” may refer to one’s natural ability to persuade others, to “read” the intentions and truthfulness of others, to speak with clarity and specificity, to remain calm and comfortable in stressful or ambiguous situations, to be adaptive or “quick on one’s feet,” and/or to instinctively build trust and rapport with others, even in oppositional situations. “Skill,” on the other hand, may refer to one’s learned intellectual mastery of complex issues, knowledge of historical industry custom and practice, awareness of relevant precedents and analogs, and/or familiarity with negotiating “tactics” that can be helpful in achieving desired results.

In practice, the line between “talent” and “skill” is far fuzzier than that simple distinction between “innate” and “learned” ability would suggest. Great instincts can effectively compensate for (or even altogether mask) a lack of deep understanding, just as many so-called “innate” qualities like persuasiveness and likeability can be honed with study, introspection, and practice.¹ Most people

1 This is perhaps most widely understood in the context of sports, where fans of the National Basketball Association (“NBA”)’s Los Angeles Lakers may recognize it as the “Shaq vs. Kobe” distinction. Shaquille O’Neal exemplifies mastery grounded in talent—uniquely big, strong, and fast, known both for his ability to physically overwhelm opponents on the court, and his tendency to spend the NBA offseason partying before showing up at training camp with poor conditioning and “playing himself into game shape” over the course of the season. Kobe Bryant, on the other hand, embodied mastery grounded in skill—relentlessly intense and ruthlessly demanding, known for spending his

instinctively recognize that mastery in virtually any field usually involves at least some combination of discernible “talent” and “skill,” but that greatness can be achieved via a wide array of combinations of the two. As with many pursuits, perhaps not everyone can be a great negotiator, but most smart people can at least become a pretty darn good one.

Perhaps the most underappreciated missing link between talent and skill—the thing that arguably separates the good negotiators from the great, and allows for greatness to be built on virtually any given combination of talent and skill—is *philosophy*. That is what I try to provide here: a negotiating philosophy for the working professional, developed in the course of my work as a professional negotiator, offered principally for the benefit of those who are on the same career path.

Like the rest of the book, this philosophy reflects the perspective of not just any professional negotiator, but specifically a *studio business affairs executive*. I note this because, having spent part of my career as a talent representative as well, I recognize that it is a different job, with its own unique set of challenges, expectations, and responsibilities. Lawyers and agents have fiduciary duties of loyalty and zealous representation, which some could interpret as being at odds with the more collaborative philosophies espoused here.² Moreso than business affairs executives, agents and talent lawyers may be driven toward a more adversarial style by the expectations of colleagues and clients who place a particular premium on *toughness* and *aggressiveness* as values in and of themselves. Some clients like to think of their representatives, “He’s an asshole, but he’s my asshole,” and feel more comfortable being represented with a more pugnacious approach than I advocate for here. While throughout this chapter I use the word “client” interchangeably to refer to an artist represented by an entertainment attorney/agent or a company represented by a business affairs negotiator, I recognize that the relationship between an independent representative and an individual artist is fundamentally different than that between a salaried executive and their colleagues and/or corporate employer. And, like it or not, based on my experience on “both sides of the aisle” in entertainment industry negotiations, business affairs executives are simply held to a different set of rules of engagement than their counterparts on the other side—the kind of hyperzealous advocacy that might earn a high five from a grateful client can easily result in ruffled feathers and angry calls to colleagues or bosses for a studio negotiator. Nevertheless, I believe that these principles are fundamentally

offseasons (even as a superstar) in the gym maintaining his physical form and developing new “moves” to unleash during the coming season. They were both historical greats. But fans can only wonder—much like Bryant himself once did—what heights the already-dominant Shaq could have attained had he married his prodigious physical gifts with Bryant’s unparalleled work ethic.

2 I don’t personally agree with this interpretation of one’s fiduciary duties, but it’s a legitimate and sincerely held point of view.

sound and can be deployed ethically and effectively by negotiators on any side, under any expectations, and in any context (in the entertainment industry or beyond). Others may legitimately disagree, but they aren't writing this book.

In addition, while business affairs executives and talent representatives often proudly embrace their identities as “the negotiators,” they don't have a monopoly on negotiation, which is, at its heart, the art of *persuasion*. And persuasion is arguably at the core of virtually every interpersonal interaction—if not in all aspects of life and business, then certainly in the famously relationship-driven, unavoidably collaborative and interdependent world of the entertainment industry.

If you work in this business, in any discipline, at any substantial level, part of your job is negotiating, whether you explicitly recognize it as such or not. Each of the following adages can inform how you engage with colleagues, business partners, or anybody else you hope will do something you want them to do (and who, in turn, hopes that you will do something they want you to do). At their most ambitious, these adages don't just represent a helpful framework for doing your job well; they offer you a career path in which meaningful human relationships built on mutual trust and respect are both a cause and an effect of your success.

A Why Is This Chapter Different from All Other Chapters?

In general, *The Business of Television* strives for objectivity. Although it is, of course, grounded in the author's idiosyncratic professional interests and experiences, it seeks to offer information, not advice, and, except in rare and clearly labeled cases, to describe the world as it is and not as it “should” be.

This chapter is unique in that it is very much about *advice*. Like all advice, it is subjective and personal, which is why this chapter is the only one in the book to use the words “I” or “my,” or to address the reader directly as “you.” Like all advice, it necessarily reflects my personal biases and preferences. And, as with all advice, readers will no doubt find other purveyors of wisdom who would disagree wholeheartedly with any or all of it, starting with my earlier assertion that negotiating *philosophy* matters at all.³

Some might also argue that this chapter describes the world as it “should” be rather than as it is. I might agree with that statement, at least in part. A close friend (and creative executive) once said to me, “Our careers should all be a paradise! We get to tell stories and do cool shit for a living. This should be a

3 It also means that, even more than the rest of this book, this chapter is really intended as a resource for early-career professionals. So if you are an experienced working professional, I hope you find this helpful too, but please don't think that I am trying to dictate to you how you should be doing your job. Unless you actually work directly for me, in which case, yes, I am kind of trying to dictate to you how you should be doing your job.

Shangri-la. But a few people just have to go and ruin it for everybody.” And to some extent, the philosophy presented here represents an aspirational worldview in which we all finally get that Shangri-la.

But when I say this chapter is about advice, I of course intend that it be *good and helpful* advice—and, based on my own personal experience, that’s what I think I’m offering here, for people across the negotiating landscape. I don’t pretend that the beliefs presented are (or will ever be) universally held within the industry, or that there aren’t plenty of prominent negotiators who have succeeded with a very different approach (and perhaps a very different worldview). But I would argue, conservatively, that most of the best negotiators in the business have built their success on at least some of the values embodied in this philosophy.

B But First, an Academic Framework

The philosophy presented here is heavily influenced by contemporary academic literature about negotiation, particularly the concept of “interest-based negotiation,” a negotiating paradigm first developed and promoted by law school faculty members at the Harvard Negotiation Project.⁴ Scholars may use the term “interest-based negotiation” somewhat interchangeably with “principled negotiation” and/or “non-adversarial bargaining.” The founding text of interest-based negotiation is *Getting to Yes: Negotiating Agreement Without Giving In*, first published in 1981 by Harvard professors Roger Fisher and William Ury (with Professor Bruce Patton added as a co-author for more recent editions).⁵ *Getting to Yes* offers four guiding principles for negotiation—(1) separate the people from the problem; (2) focus on interests; (3) invent options for mutual gain; and (4) insist on using objective criteria. In so doing, it offers “interest-based negotiation” as a superior alternative to what might be considered the “traditional” negotiating paradigm, referred to as “positional bargaining” or “position-based negotiation.”

Positional bargaining conceptualizes negotiation as a fundamentally adversarial and zero-sum process. Discussion is focused narrowly on the issues presented, and every negotiation is approached as a one-off exercise in which there

4 The Harvard Negotiation Project was founded in 1979 with a mission “to improve the theory and practice of conflict resolution and negotiation by working on real world conflict intervention, theory building, education and training, and writing and disseminating new ideas.” For this reason, interest-based negotiation is also sometimes referred to as the “Harvard model of negotiation”—a moniker that I imagine is as off-putting to some as it is appealing to others.

5 Other key texts on interest-based negotiation include Douglas Stone, Bruce Patton, and Sheila Heen’s *Difficult Conversations: How to Discuss What Matters Most* (1999) and *Beyond Winning: Negotiating to Create Value in Deals and Disputes* (2000) by Robert H. Mnookin (since 1994, the Chair of Harvard Law School’s Program on Negotiation) with Scott R. Peppet and Andrew S. Tulumello.

is a fixed “pie” of value to be divided, with each negotiator trying to secure as much of that “pie” for their side as possible, at the direct expense of the party on the other side. In positional bargaining, negotiation is a form of warfare, meaning that somebody wins and somebody loses—and that, as the old saying goes, “all is fair in love and war.”

Interest-based negotiation presumes that the desired outcome of any deal is to leave both sides better off for having made it, and that—especially where both parties work interdependently and rely on one another to achieve common goals—a good negotiation considers and protects relationships as well as outcomes. In interest-based negotiation, a great negotiator isn’t someone who *claims* the most value; it is someone who *creates* the most value. Interest-based negotiation challenges both sides to consider not just what both sides say that they want, but crucially, to consider *why* they want it. It therefore emphasizes fairness, credibility, trust, and creativity.

Countless academic classes on negotiation present the same “day one” hypothetical to illustrate the difference between positional bargaining and interest-based negotiation. Imagine two friends who are arguing over the use of a single orange. Positional bargaining assumes there is one orange to go around, and the “winner” is the person who gets the most of it for themselves. Party A’s starting position is that Party A gets the whole orange; Party B’s starting position is that Party B gets the whole orange. All other things being equal, the most obvious and likely result is that the parties simply cut the orange in half.

Interest-based negotiation demands that both sides seek to understand *why* each party wants the orange, on the belief that such understanding will yield a more efficient and mutually satisfactory outcome. If the negotiators commit to this inquiry, they might learn that Party A wants to grate the skin of the orange for its zest, while Party B wants to squeeze the orange’s pulp for its juice. If the negotiators can look past the parties’ respective positions (“I get the orange”/“No, I get the orange”), and get to their underlying *interests* (“I want orange zest”/“I want orange juice”), then both sides can leave the negotiation happier *and* better off just by peeling the orange rather than chopping it in half.

Interest-based negotiation isn’t a perfect paradigm. Obviously, few real-world negotiating problems are quite so simple, or so elegantly resolved, as splitting an orange. Critics have derided the approach as idealistically taking the world as it “should be” rather than as it “actually is.”⁶ Some issues—most obviously, money—really are zero sum, at least when taken in isolation. And some negotiations are true one-offs, in which there is little or no value to either side in preserving a long-term relationship rather than ruthlessly maximizing immediate gains.

6 See me disclaiming this in advance earlier.

Though undeniably imperfect, interest-based negotiation has grown increasingly influential as a productive and refreshingly un-bleak alternative to the Kissingerian⁷ worldview embodied in traditional positional bargaining, and high-level business executives and government officials routinely receive trainings from Harvard's Program on Negotiation.

Hollywood—with its close-knit group of repeat players, both as principals and as representatives across a variety of business relationships, all mutually interdependent on one another to generate anything of substantial value—would seem to be an ideal context for interest-based negotiation to thrive. Unfortunately, this largely has not been the case.⁸ And admittedly, ruthless negotiators with unflinching willingness to unapologetically exercise their leverage can be particularly difficult to productively engage with this approach. Nevertheless, I stand by my earlier statement that many of the best negotiators in town (and certainly the ones that people generally enjoy dealing with) have thrived by—in their own ways and on their own terms—putting the following adages to work in their own careers.

C A Philosophy of Negotiation in Eight Adages

This chapter does not provide a comprehensive framework for negotiation as a discipline, nor a list of tactical “tips and tricks” for achieving good results. There are no “dos and don’ts” to be found here. Rather, what I offer is a values-based philosophy of negotiation, embodied in a list of eight personal adages that I have found helpful in developing my style and identity as a negotiator, and in advising other young professionals as they do the same. They can sometimes be a bit redundant with one another, and to some extent repackage the academic literature on negotiation in folksier language, but these are the answers I give when asked to opine on “what makes a good negotiator” or “what makes a good negotiation.” I hope they prove as useful to you as they have been for me.

i Negotiate, Don’t Haggle

If I still had an office with a whiteboard, that whiteboard would have permanently written across its top, in big block letters, “NEGOTIATE, DON’T HAGGLE.”

7 Just in case this is needed: this refers to Henry Kissinger. Look him up.

8 I can only speculate on the reasons why that might be—perhaps with some combination of Hollywood’s general disinterest in and disengagement from academia, longstanding norms and tropes about how the industry operates, the influence of a few beloved and/or feared old-school personalities, the reality of shark-infested professional waters, and a few current working professionals who grew up enjoying *Entourage* a little too much.

On its face, that might seem like a merely semantic distinction. But it is meant to capture a wide suite of mindsets and behaviors that distinguish many of the industry's most respected and effective negotiators, such as:

- Hagglers concern themselves exclusively with *what* the deal terms are; negotiators are concerned with *why* the deal terms are what they are.
- Hagglers gain ground in a negotiation through stubbornness, force, and sometimes sheer annoyance and exhaustion; negotiators gain ground in a negotiation through persuasion.
- Hagglers ground their positions solely in their personal instincts and desires; negotiators support their positions using objective criteria.
- Hagglers abstractly know what potential outcome or deal term is better for them; negotiators understand the real-world significance to both parties of such an outcome or deal term.
- Hagglers rely on “policy”; negotiators can articulate the reasons why a policy exists and must be respected.
- Hagglers consider only their own perspectives in a negotiation; negotiators endeavor to understand and account for the perspectives of the people on the other side.

So yes, “Negotiate, Don’t Haggle” is arguably just a folksier way of saying “engage in interest-based negotiation, not positional bargaining.” And to be clear, my premise is not that “negotiating” is a better approach to dealmaking than “haggling” simply because it’s more agreeable—it’s a better approach because in my experience, both in most individual transactions and certainly across many deals over a long career, it yields better results.⁹

Why, then, does “haggling” remain so prevalent? The short answer is simply that “negotiating” is a lot harder than “haggling,” and usually takes a lot of practice.

Many professionals develop into “hagglers” not necessarily because they’ve judged it to be a superior way to get results, but simply because they haven’t

9 Remember also that most negotiators work for and/or report to people who are not necessarily well-equipped to assess a deal strictly on the substance of its terms. (See also “Every Negotiation Has Three ‘Teams.’”) Rather, many folks who rely on representative dealmakers’ experience and assess negotiations principally on how they *feel*—whether the principals feel respected (or, alternatively, taken advantage of) by the process and outcome, whether they endured any frustrating delays and deadlocks in the negotiation process, whether a friend on either side has called them to complain about someone’s conduct, whether they feel the dealmaking process has done collateral damage to the underlying relationship, etc. Or, to put it more bluntly, most people have no clue whether a closed deal is actually any “good”—they just know if it was made quickly and without drama, and if they had to give up something painful in the process. It would, of course, be irresponsible to build one’s negotiating career solely on creating the feeling and appearance, as opposed to the reality, of quality underlying work. It would also be a mistake to ignore the reality that usually, part of what makes for a “great deal” is a great dealmaking experience.

gotten the level of training and education necessary to be capable of truly *negotiating*. Because the entertainment industry generally does not place a high premium on professional development, many negotiators learn their craft principally via observation rather than instruction. When presented with an unfamiliar type of deal, many early-career professionals are told to educate themselves by reviewing past deals, rather than being actively talked through them. The totally self-directed young professional may be able to identify all the major moving parts of any given deal type and to generally distinguish (from their own perspective) the “good” version of each term from the “bad” version, but without further instruction, may not understand what exactly makes the “good” version of each such term better than the “bad” one, or if and when it will actually matter in the real world.¹⁰

Negotiating at a high level requires a deep understanding of the meaning and significance of every point under discussion, the ability to identify issues that are not currently being discussed but could or should be addressed, a familiarity with industry custom and practice as they exist today and as they have evolved over time, an understanding of your client’s priorities and anxieties, and sincere curiosity about and empathy for the priorities and anxieties of the opposing side. And negotiators must be able to identify and make the arguments that will be most persuasive *to the people they are actually trying to persuade*, and not simply to themselves and their own clients.

That is why the more technical chapters of the book focus not only on identifying the major components of each deal type and the typical range of outcomes in their negotiation, but also on discussing the real-world implications of various deal terms, relevant historical context and business rationale, and the arguments that are frequently deployed by the negotiators on each side of the issue. The fundamental purpose of these chapters is to empower readers to develop themselves as negotiators, and not simply as hagglers, from the very beginning of their careers.

ii Every Negotiation Has Three “Teams”

People often talk about “negotiating teams.” At a studio, that might mean one or more business affairs executives, perhaps working in partnership with one or more creative, legal, and/or production executives. On the talent side, that might mean the consortium of agent, talent, and/or lawyer representing the individual.

¹⁰ For example, many junior agents, lawyers, and business affairs executives learn quickly that, in the context of a producing deal, a life lock is better than a 2-year lock, which is better than a 2-year Warner lock, which is better than a 1-year lock. Yet they may be totally unable to articulate the difference between a “2-year lock” and a “2-year Warner lock,” or what a “lock” actually means at all, or how and when these negotiated terms become relevant and are applied in actual practice. To refresh your recollection about the answers to these questions, see Chapter 6, Sections A.iv (pg. 220) and C.iii (pg. 243).

But the best negotiators not only recognize, but actively forge, a third team: the direct negotiators from each of the other two teams, joined together on Team “Let’s Get This Done.”

One of the many shared experiences of all professional representative negotiators is the reality of engaging with material that your clients and/or colleagues likely have a less sophisticated grasp on than you do. And to be clear, it is not the job of these clients and colleagues to know the ins and outs of these deals; it is your job to know, and to communicate effectively with those individuals. Nevertheless, that shared experience can serve as the foundation of real trust and camaraderie between negotiators, which can in turn be deployed for the benefit of both of their respective clients.¹¹ Of course, negotiators should always remember whose interests must remain paramount for them, and identifying too zealously with your counterpart can eventually blow back with angry (but sometimes justified) questions like “Whose side are you on, anyway?”

Nevertheless, negotiations that are conducted with some sense of mutual identification between the negotiators, mutual commitment to “be a dealmaker and not a dealbreaker,” and mutual willingness to *also* let the other side look good almost invariably yield mutually better results and happier principals.

iii Every Negotiation Is Three Negotiations

Savvy negotiators recognize that, when they are on the phone or trading emails with their counterparts in a deal, they are engaged in one of only three negotiations that are going on: the one taking place on those phone calls and in those emails, and the ones taking place in between—between each of the official “negotiators” and the client companies or individuals that they respectively represent.

When you are negotiating with somebody, you are not simply trying to persuade them; you are trying to both inspire and arm them to go back to the folks they represent and make your case for you. And there are many ways to go about that—by convincing your counterpart that your positions are objectively reasonable and can therefore be advocated for responsibly and safely; by giving them arguments and information that you would want them to repeat to the people they are advising; by making them feel like you are in this together as negotiators;¹² and by just making them like you enough to want to help you a bit (or at least enough not to take the opportunity to show off to their clients being a “tough negotiator” at your expense).

And to be clear, all of this works best if you sincerely believe it, as opposed to just performing it.

11 See “Every Negotiation Is Three Negotiations.”

12 See “Every Negotiation Has Three ‘Teams.’”

However you go about it, your most powerful ally in any negotiation is usually the person sitting across the table/email/telephone from you. Give them the will to help you, and the ammunition with which they can do so. Be open to supporting them in exactly the same way you hope they will support you. And if you can do so at little cost to yourself or your “side,” don’t be afraid to give them an opportunity to look good in front of their stakeholders—and you will often find that they are willing to return the favor.

iv Pay People in the Currency That Is Most Valuable to Them (and Least Valuable to You)

Negotiation is inevitably a process of compromise. Effective compromise requires a good understanding of what concessions are actually meaningful to the other side. And the most effective compromise requires knowing what the other side simply cannot do without.

Specific bargaining positions may or may not be truly *about* the thing they purport to be about. For example, sometimes a demand for more money, credit, or perks is actually a proxy for someone looking for a sense of respect and recognition in their deal terms—and sometimes it’s really just about the money, credit, or perks that are being demanded. Great negotiators have an innate ability to interpret other people’s words and actions and instinctively understand their underlying concerns, motivations, and intent.

This adage is perhaps simply the folksy version of *Getting to Yes*’s prescriptions to “focus on interests” and “invent options for mutual gain.” If you know what a counterparty really cares about, you can figure out a way to deliver it to them in a way that satisfies them the most while burdening you (with financial expense or otherwise) the least. It’s the orange rind-zest/pulp-juice hypothetical all over again.

Where circumstances allow it, however, the *greatest* negotiators pair that sharp instinct with another tactic, one that is available to anyone, regardless of their innate talent for reading others: they ask, and tell, their counterparts what they and their clients really care and worry about.¹³

To throw in a sub-adage here, “Everyone’s approach to business is a product of their own traumas.” (Once again, that goes for companies as well as individuals, and for representatives as well as principals.) Ideally, explaining the impact of those traumas on each side’s bargaining positions happens organically in the course of a negotiation. For example, a commonly heard bad argument from studio business affairs executives is “I can’t do it. It’s against our

13 To be truly effective, this requires successful application of many of the other adages listed here, as well as knowing which counterparts are worthy of the vulnerability and trust inherent in this kind of exchange. In particular, see “Play the Long Game,” “Every Negotiation Has Three ‘Teams,’” and “There’s No Such Thing as ‘Winning the Deal.’”

policy.” A good version of that argument would be, “I can’t do it. It’s against our policy because the last time we did that, this very bad thing happened that makes it very important that I not put the company in any position to relive that very bad experience.”¹⁴ Whether volunteered or solicited, this kind of honest exchange of information about each side’s priorities and anxieties can be the key to unlocking the most difficult and/or complex deals, allowing the negotiators to devise compromises that maximize each party’s sense of gain and minimize its sense of loss.

v Don’t Get Nasty; There Will Be Plenty of Time for That Later

This is a variation on one of my favorite all-purpose adages, borrowed from sports columnist Gregg Easterbrook, but applicable to virtually any setting in business or in life: “Don’t panic; there will be plenty of time for that later.”¹⁵ As adapted here, the statement’s two halves are each doing something distinct.

The first part, “Don’t Get Nasty,” means exactly what it says: don’t get nasty. As with the advice in this chapter generally, this is not a moral prescription, but a practical one: I just don’t think getting nasty works very well most of the time.

Some professionals favor a “shock and awe” approach to negotiation, characterized by shouts, curses, and threats; an avowed unwillingness to compromise on positions, even very early in a negotiation; the aggressive drawing of conceptual lines in the sand; and a generally “I’m not here to make friends” tone of communication. This style of negotiation can be personally overwhelming and devastatingly effective, especially when deployed against young, fearful, and inexperienced counterparts. Against confident and experienced negotiators, however, attempts at bullying or other especially adversarial approaches to negotiation often backfire.¹⁶ A highly vitriolic approach to negotiation tends to galvanize people in their positions, promoting resentful stubbornness that keeps the parties farther apart in a deal, rather than the spirit of compromise that is usually essential to reaching an understanding.

On the other hand, to recycle a few clichés here: you can disagree without being disagreeable, and you don’t have to be here to make friends to act friendly. This is not a paean to being a pushover, nor a call to prioritize harmony

14 See “Negotiate, Don’t Haggle.”

15 Easterbrook usually directs this advice at teams that are losing badly at halftime, as a reminder that they have every bit as much time to climb out of their scoring deficits as they spent falling into them. I mostly use it to advise colleagues to keep calm in the face of crisis or adversity, and to remind them that no one ever solved a major problem faster by freaking out about it. Fun bonus fact: polymath Gregg Easterbrook, known for years on ESPN.com as “Tuesday Morning Quarterback,” is primarily a scholar of economics and political science, and is the brother of famed Seventh Circuit jurist Judge Frank Easterbrook. Must be quite a table at Thanksgiving.

16 Again, see “Every Negotiation Has Three ‘Teams’” and “Every Negotiation is Three Negotiations.”

over good outcomes. Rather, in my experience, trying to open every negotiation with a tone and spirit of friendly collaboration, and to maintain that tone and spirit for as long as the course of the negotiation allows, tends to create and preserve productive momentum and inspire confidence in all principals and representatives that a deal can be reached, *especially* when the parties' starting positions are very far apart.¹⁷ That confidence alone is enough to make it more likely that a deal *will* be reached, or that it will be reached more quickly and satisfyingly than a negotiation that is adversarial from the outset.

As for the reassurance that "There Will Be Plenty of Time for That Later," the point is not that being nasty is OK *but only sometimes*. Rather, it is a reminder that, to paraphrase media commentator Marshall McLuhan, "The delivery is the message."¹⁸ Yes, tone and tenor are a matter of personal style; but they are also another channel of communication which, deployed properly, can help effectively convey the importance or urgency of one's own positions or provide critical feedback on the substance and delivery of the opposing side's positions. But communication is only effective if it is legible, which requires that it be clear, meaningful, and unambiguous.

Maintaining a generally calm, friendly, and personable affect can therefore make one a more effective advocate and communicator in the toughest and highest-stakes situations. A negotiator with a reputation for a constructive, solution-oriented approach to dealmaking is more likely to be believed when drawing a firm line on an issue that may be hard for the other side to accept. A negotiator with a reputation for a calm and friendly demeanor commands more respect and greater impact on the rare occasions when they do allow sharpness or emotion into their tone. And a negotiator who is willing to acknowledge (and even apologize) when they have crossed a line of basic courtesy or professionalism—as everyone does at one time or another in these stressful jobs—earns trust and grace that will pay dividends in future negotiations.

17 Few things can derail a negotiation more quickly than an extremely aggressive counter delivered extremely aggressively, which tends to send the message between principals, "This isn't a priority for me, so I only want to enter in this deal if the terms are ridiculously good for me, and I don't care if that means they are ridiculously bad for you." I sometimes call this the "eff you" counter. If that is indeed the message that you as a negotiator are trying to send on behalf of your client, then well done and message received. But usually that is not the case; a person or company can push hard for a "great" deal without being indifferent to the fact of making a deal or to the interests of the party on the other side. Some negotiators are known and admired specifically for their ability to deliver even the most aggressive position—one which could easily offend if delivered inartfully—with a smile and a laugh that gets their position across without diluting it but also without antagonizing the other side into digging in its heels or delivering its own "eff you, too" response.

18 The rare philosopher and public intellectual who achieved mainstream notoriety—including a cameo as himself in Woody Allen's *Annie Hall*, in which he appears out of nowhere to silence a pompous academic by telling him, "You know nothing of my work"—McLuhan is known as the "father of media studies" and is best remembered today for coining the phrase "The medium is the message."

On the other hand, those who are quick to aggression and vitriol have a “Boy Who Cried Wolf” problem: they don’t have a higher gear to communicate those things when they really matter. If everything is important, nothing is important; if everything gets you fired up, then being fired up doesn’t mean much of anything. The result of such tactics is often a quick devolution into positional bargaining that ultimately disserves everyone.

vi There’s No Such Thing as “Winning the Deal”

Perhaps the most pernicious myth about negotiations is that somebody must “win the deal” (and therefore, your job as a negotiator is to make sure that “somebody” is you). In this worldview, “winning” can be defined in any number of ways—by reference to a theoretical baseline outcome, according to each side’s satisfaction (or dissatisfaction) with the outcome, or perhaps simply by the juicy knowledge that you were totally prepared to give up more than you ultimately had to. But the whole concept reflects an essentially zero-sum view of business (and perhaps of the world more broadly)—for somebody to gain, someone else must lose.

In my experience, the most effective negotiators realize that there is no such thing as “winning a negotiation” or “winning the deal”—or at least, that it does not mean what people usually use it to mean. Deals happen because both sides believe they are better off making a deal than not making one. Frequently, those parties will have to negotiate and make a deal again in the future. Even if they don’t, in our industry, the negotiators who represent them will.

“Winning the negotiation” isn’t about somehow beating the other side—it’s about making a deal that’s good for both sides, not leaving anyone feeling burned, and being right about everyone being better off for having made it.

vii Play the Long Game

In Hollywood, there is virtually no such thing as a one-off interaction. A small number of companies dominate the overall volume of production, distribution, and exhibition. A small community of professionals, with long careers across multiple major employers, sits at the center of much of the industry’s activity. Any time two parties of any kind make a deal, there is a good chance that it won’t be the last time. And even if it is, whatever professional negotiators personally negotiated that deal, there is a good chance that they will cross paths again in the future (maybe in the same jobs, maybe in new ones). This has at least two key implications.

First, the most effective negotiators tend to be the ones with the best reputations. Some liars are better than others,¹⁹ but it does not take long for people

19 And pretty much everyone is an exaggerator at some time and in one way or another.

to figure out who can be relied on for honesty and who cannot, or who can be trusted to hear sensitive truths and who cannot. There are few things negotiators love to talk about over drinks more than the person they just caught in a lie—it is both a narcissistic act of self-congratulation and a public service of warning. Stick around long enough and negotiators you have never met will know (or think they know, or be able to find out) plenty about you before the first time you get on the phone with them. If they view you as unworthy of their trust before they've even spoken with you, that assumption will color every interaction they ever have with you, unless and until you can convince them that they had it wrong all along. On the other hand, a negotiator with a reputation for honesty and fairness enters every negotiation with an advantage, able to quickly build trust and rapport with their counterpart, and from there, to deliver great results while developing great relationships, which can deepen and multiply over a long career.

Second, take extra care when your actions—in ruthlessly exploiting a position of leverage, going “behind the back” of a direct negotiating counterpart, or otherwise—may cause your counterpart real personal or professional distress. To say nothing of the moral implications of intentionally (or at least knowingly) putting someone in a bad position,²⁰ it tends to have long-term consequences that outweigh the immediate gains. Whether or not you act with malice, people have long memories for those whose actions (in business or otherwise) have caused them personal or professional distress. Someone (whether principal or representative) who has been needlessly pulverized or otherwise embarrassed in a negotiation while in a position of weakness will have little hesitation in returning the favor when the tables are turned, as they so often are.²¹ And of course, one's willingness to put others in such positions becomes a significant part of that reputation I said was so important.

In the end, the professionals who deliver the best results—and who usually rise the highest in their fields—are those whose value comes not only from

20 Almost certainly a total career-obsessive who would be fairly devastated by any chastisement from a boss, colleague, or client, and who would experience substantial anxiety at the thought of any loss of professional status.

21 Some might argue that a negotiator has a duty to maximize their client's outcomes, which supersedes any notions of professional courtesy. Even if that is true, in my view, maximizing a client's outcomes *in the long run* does not mean maximizing their outcomes *at every opportunity presented*. Actions that create grudges or damage credibility—whether for the client, the representative, or both—have very real costs, and the gains and costs of engaging in unapologetically ruthless and/or dubiously ethical behavior are not distributed evenly, consistently, or even justly. The bad feelings you engender while overzealously advocating for one client might come to badly haunt you at the expense of a totally different client who received no benefit from the first transaction. For principals and representatives alike, I find that the surer path to a quick rise that isn't followed (even if belatedly) by an equally quick fall, is not crushing others just because you can. Or, to quote another close friend (and prominent business affairs leader): “If you don't make any friends on the way up, you sure as hell ain't gonna have any on the way down.”

their superior skill, knowledge, and experience, but from the superior ease with which they can conduct business with key people around town.²² It's never "just one negotiation." Your career is long (we hope). Play the long game.

viii The Best Way to Negotiate Is as Yourself

A common misperception among early-career professionals is that there is a single "right" or "best" way to negotiate, or a perfect model of negotiating excellence to emulate. Although I obviously advocate for certain shared values that I think promote a thriving and efficient marketplace for our deeply interconnected and interdependent industry, those values are compatible with any negotiator's personal style and strengths.

Early-career professionals should look for opportunities to observe and learn from negotiators who reflect a variety of styles and approaches. Listen in on calls with particular attention to the models of negotiation you see and hear around you, among colleagues as well as counterparts. In your early, low-stakes negotiations, try a few models on for size if they seem like they might be a good fit. Mix and match elements of them, playing to your strengths. You'll start by *performing the role* of professional negotiator, with a bunch of different acting coaches. Although you may start out mimicking these various coaches, over time, you'll learn to combine influences, prescriptive and proscriptive, from each of them into an integrated version of that role for yourself. Eventually, as your style naturally evolves and grows more comfortable and authentic to you—and probably without you noticing it at first—you won't be playing a role anymore.

That will be the right and best way for you to negotiate.

D Final Thoughts

If the advice contained in this chapter comes from one basic assumption about the world, it is that "we are each our own devil, and we make this world our hell."²³ The entertainment industry seems to attract (not to mention mint and reward) difficult and performative personalities, which can sometimes make basic decency feel strangely hard to come by. The negotiation philosophy set out here is one of basic thoughtfulness, forthrightness, creativity, and collaboration. It's a humanist approach to doing business. A lot of it is basic "Golden Rule" stuff. It calls for us to extend to others a presumption of good faith, while

²² I would propose that if you want to really test someone's bona fides in this regard, ask them if they've ever functionally "pre-negotiated" a deal in a single phone call, more or less scripting some "negotiation theater" over a few formal rounds of negotiation toward a result they've largely outlined from the outset.

²³ Oscar Wilde. (I know, I know.)

making it our job to continuously figure out who is and remains worthy of that trust. It is *never* going to be universally embraced by those who would deride it as naïve or idealistic.²⁴ Carefully and skeptically applied, however, it is still resistant to those cynics—though of course, not invulnerable to those with a bad attitude and a loose relationship with the truth who wield leverage unhesitatingly and without consideration of downstream impacts. It presupposes that doing business the “right” way, doing business the *effective* way, and doing business the pleasant way can all be the same thing. If lived successfully, I think it can make for a pretty satisfying career; and the more people who embrace it, the better it works for everyone. That may be an awfully aspirational line, but that doesn’t make it wrong.

It’s just like my friend said: “Our careers should all be a paradise! We get to tell stories and do cool shit for a living. This should be a Shangri-la.”²⁵

24 It is already—not unfairly, and even among sympathetic readers—generating rolled eyes right now.

25 Please remember this warm feeling when you start reading the considerably bleaker Conclusion section that immediately follows this chapter.

CONCLUSION

When FX Chairman and Chief Executive Officer John Landgraf gave his seminal “Peak TV” address in August 2015 in which he declared, “There is simply too much television,” he made two concrete predictions for what would follow.¹ His first prediction was that the number of scripted original television series on the air in 2015 would “easily blow through the 400 series mark.” Landgraf was quickly proven right, as the count for 2015 reached 422 original series (up from 389 the previous year). Landgraf’s less-remembered second prediction was that the “Peak” in “Peak TV” was already almost upon us. “My sense is that 2015 or 2016 will represent peak TV in America,” Landgraf said, “and that we’ll begin to see declines coming the year after that and beyond.” That prediction was less successful, as the industry’s output continued to rise, year after year, reaching a peak of 600 series in 2022.²

In all, it took nearly nine years, one pandemic, one giant financial market correction, and two crushing strikes after his inaugural “Peak TV” address for

1 This speech, delivered at FX’s semiannual presentation to the Television Critics Association, coined the phrase “Peak TV,” describing an industry era of prolific television programming, characterized by: (1) a high volume of series being produced and exhibited; (2) significant fragmentation of the television audience; (3) escalating production budgets and fees for the most valuable talent on the most premium productions; (4) the prevalence of low-cost programming alternatives from parties unwilling or unable to compete in the blockbuster arms race; and (5) significant disruption and innovation in business and exhibition models. The phrase quickly achieved ubiquity among both industry insiders and observers.

2 The Covid-19 pandemic caused a brief decline in 2020, which saw 493 original scripted series, down from 532 in 2019. Even in the face of the unprecedented disruption wrought by the pandemic, however, the drop was relatively minor, with the count of scripted series in 2020 being roughly equal to the 496 original series released in 2018.

Landgraf to finally be proven right, as FX’s annual count of original series for 2023³ clocked in at 516 original series—its first (non-pandemic) year-over-year decline since at least 2009.⁴ The self-effacing Landgraf—who had continued his Cassandra-like warnings of an impending and inevitable decline even as the industry reveled in its decade-plus growth spurt—joked that he was “finally correct,” proving that “even a broken watch is right twice a day.”

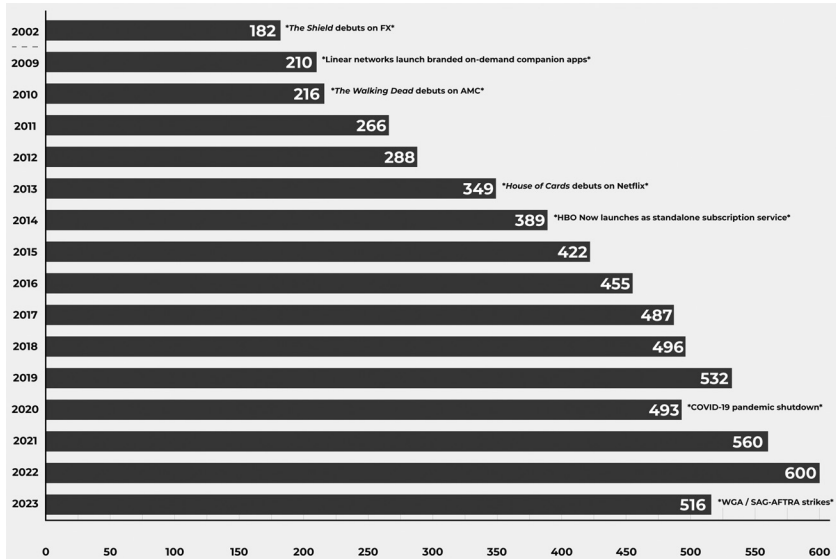


CHART 2 Volume of Original Scripted Television Series Production (2002, 2009–23)

Source: FX/Disney

A Past-Its-Peak TV

Landgraf’s basic premise—that there was not enough time and attention in the world to dedicate to so many shows, nor enough great ideas and talented creators to maintain quality at that volume—was always sound. But there were many reasons why the reckoning long predicted by the so-called “Mayor of Television”

3 These numbers are generated annually by FX’s research department and exclude foreign-language shows, kids titles, short-form content, and any form of unscripted, reality, or documentary series. It includes titles from all of the broadcast and cable networks and all eight of the premium SVOD services (Netflix, Amazon, Apple, Hulu, Disney+, Max, Paramount+, and Peacock), as well as those from smaller streaming platforms such as BET+, AMC+, Acorn TV, BritBox, and Shudder.

4 2009 is the first year for which FX has previously provided data on the count of U.S. scripted series—a now quaint-seeming 210 original series across all platforms.

took so long to materialize.⁵ The overall “Wall Street-ification” and “Silicon Valley-ification” of Hollywood, during an unusually sustained era of historically low interest rates, promoted a “grow now, worry about it later” mentality that was familiar to Wall Street bankers and Sand Hill Road venture capitalists, but alien to (and a poor fit for) the entertainment industry. The pandemic, while devastating to content production, was actually a boon to content distribution, as millions of people around the world were suddenly locked in their homes with few better ways to pass the time than exploring the limitless content options available to them, leading to sudden spikes in both viewership and subscriptions.⁶ For the legacy entertainment companies, a retreat would not only be an embarrassing concession that they had miscalculated by going (to various extents) “all-in” on streaming—it would also raise serious existential questions about these companies’ futures.

Behind closed doors and with a drink in hand, most executives likely would have admitted that they knew they were on an unsustainable path, and that the windfall provided by the pandemic was at best an advance on years of future growth, and at worst a prelude to a precipitous post-pandemic correction.⁷ But the economic incentives—in the form of growing corporate valuations (and with them, growing executive bonuses)—were there for them to carry on, even in the face of their doubts about the viability of their course. The arrival of competitors from the technology industry—with unfathomably deep pockets, no historical entertainment business lines to protect, and an at best ancillary place for content within their broader business empires⁸—demanded the legacy powers do *something* to compete. Most charitably, the underlying assumption was that, even if these executives couldn’t quite see it yet, there was a streaming “pot of gold” waiting at the end of the rainbow, if only they could outlast their competitors long enough to get there. Within the span of a few years, the giants of the entertainment industry jettisoned decades of functioning business models with no real plan for what would replace them. To date, their hopes to “figure it out eventually” have not been realized. There are no pots of gold at the end of the rainbow.

It is tempting to look at the events of 2023—the strikes, the market turbulence, the mass layoffs, the decline (at last!) in content output—and think, “At last, the correction has arrived, and now we can all move forward!”

5 These ideas are explored in greater detail in the Introduction (pg. 1).

6 In fact, I would argue that, but for the 2020 pandemic, the equally long-awaited and surprisingly delayed winnowing of premium subscription streaming services would have already begun as well.

7 Lucky for them, it seems to have mostly been the former.

8 Which, to be clear, does not mean that these content operations are entirely unaccountable within these large technology giants; only that their performance will inevitably be evaluated in their own ways. In a company like Amazon or Apple, there are any number of divisions eager to show that they could deploy \$1 billion in capital more effectively than those bozos in entertainment, which keeps the onus on these content operations to prove their value day by day. But those operations still enjoy the freedom (and the terror) that comes with knowing that, regardless of how well or how poorly they do, they will never be the foundation on which their companies ultimately rise or fall.

Unfortunately, the path down from the “Peak” of “Peak TV” is likely going to be more a tumble than a controlled slide, and the worst is yet to come.

The 14% decline in original scripted series airing in the United States in 2023 is only the beginning of a steeper decline, as the nature of the content production and distribution lifecycle means that these “new” 2023 shows had been in development, if not production, for many years. Many of them will not see second seasons. As these shows exit the years-long pipeline of project development and production, and content companies of all kinds begin to tighten their belts, there are many fewer shows flowing through the pipeline behind them. And as the count of competing streaming services enters its similarly inevitable (and surprisingly delayed) decline, there will be fewer platforms buying original content, with less competitive pressure to aggressively commission new shows. Industry insiders and observers debate the industry’s sustainable carrying capacity for original series, but just about everyone agrees that the “new normal” will be somewhere between 300 and 450 series per year.⁹

Now that the industry’s short-lived norm of universal permanent content availability has been broken, that smaller batch of original series each year will be supported by shrinking libraries of recent originals, as the growing cost of residuals¹⁰ drives the streamers to de-platform more and more series whose low viewership and/or negligible impact on subscriber acquisition and retention can no longer justify the expense of preserving the shows’ availability for streaming.

This trend toward cost-cutting will be felt not only in choices about library management and production volume, but in all aspects of the operation of the industry, from ongoing job losses (hopefully followed by more carefully managed regrowth),¹¹ to reduced production budgets for the shows that do get made (with a focus on quality that does not overly rely on expense and spectacle as a creative crutch), to more modest fees paid to top-end talent and creators (hopefully accompanied by greater rewards for bona fide success). For the most part, in the long term, these are welcome and necessary corrections. In the short term, however, the road to the “new normal” will be bumpy and painful.¹²

9 The author personally estimates that it is around 350 original series per year. In other words, just below the count of 389 in 2014, the figure that Landgraf reported in his first “Peak TV” address.

10 For which the talent community had a reasonable expectation, if not absolute need, of significant increases and some kind of return to “performance-based” compensation.

11 Particularly as companies maintain their obsessive search for “efficiencies” in the course of merger after merger. See Section B.

12 Figuring out the impact of artificial intelligence on the entertainment industry is well beyond the scope of this book to accomplish. But the author generally subscribes to the view that any perceived conflict between studios and talent with respect to artificial intelligence is a distraction, and that the real threat to the industry “is coming from outside the house”—in the form of technology companies like Microsoft, Google, and Nvidia, which have no connection to the history of the medium, no institutional relationships with the creative community, no union sympathies of any kind, no substantial economic stake in the traditional entertainment industry to protect, and no compunctions about dismantling the cultural scaffolding of American society.

B Peak TV Merger Scorecard and Future Consolidation

The years ahead also promise a continuation of the industry’s longstanding infatuation with corporate consolidation. This trend of mergers and acquisitions—driven by the largely uninterrogated assumption that the only way to withstand the technology industry’s arrival in entertainment would be to *get big, fast*—had begun in earnest long before the industry reached the peak of “Peak TV.” As a business strategy, corporate consolidation has proven remarkably resilient in the face of changing industry trends and market conditions, as well as its own dismal track record in recent years. There has been a lot of it in recent years, and there is more coming.

The first edition of *The Business of Television*, published in 2018,¹³ also talked about corporate consolidation as an industry trend that was already significant, and that was poised to remain a force in the years to come. Six years later, while describing the concept of corporate consolidation in exactly the same way, we can at least review the outcomes of all of the mergers discussed in the first edition’s Conclusion.¹⁴ How are these companies looking today?¹⁵

TABLE C.1 Peak TV Merger Scorecard

<i>Deal</i>	<i>Reported Deal Value</i>	<i>Announced</i>	<i>Closed</i> ¹⁶	<i>Outcomes (as of May 17, 2024)</i> ¹⁷
AT&T acquires DirecTV	\$49 billion (\$67 billion with debt)	May 2014	July 2015	• In 2021, AT&T spins off DirecTV into a separate company (co-owned with TPG Capital) valued at \$16.25 billion. • Subscribers decline from more than 20 million at closing to fewer than 12 million at end of 2023.

(Continued)

13 July 2018, specifically, although major changes to the manuscript were impossible after February 2018, and minor changes impossible after April 2018.

14 These include deals that had closed in the years immediately before the book’s publication, those that had been announced but had yet to close as of final manuscript submission, and those that were the subject of speculation for the immediate future.

15 Let’s call “today” May 17, 2024.

16 These deals are arranged in chronological order, by their closing dates.

17 All figures are “approximately,” as reported by credible news sources, and/or obtained from Statista.com, MacroTrends.net, and/or YCharts.com (to which the author gives his thanks for their usefulness as sources of historical data on stock prices, market capitalizations, subscriptions, and many other useful metrics).

TABLE C.1 (Continued)

<i>Deal</i>	<i>Reported Deal Value</i>	<i>Announced</i>	<i>Closed</i>	<i>Outcomes (as of May 17, 2024)</i>
				• DirecTV loses signature “Sunday Ticket” NFL package to YouTube TV, starting with 2023 season.
Charter Communications acquires Time Warner Cable + Bright House Networks (retaining Charter brand)	\$78.7 billion (TWC) + \$10.1 billion (BHN)	May 2015	May 2016	• Market capitalization is approximately \$40 billion. • Subscribers decline from 17.25 million at closing to just over 14 million at end of 2023. • Charter overtakes Comcast as largest U.S. MVPD (by subscriptions) at end of 2023.¹⁸
Lionsgate acquires Starz	\$4.4 billion	June 2016	December 2016	• By June 2022, Lionsgate concludes Starz is dragging down its market capitalization and begins seeking a buyer. • In December 2023, unable to find a buyer for Starz, Lionsgate spins off studio and library assets via Special Purpose Acquisition Company (“SPAC”) deal valuing the Starz-free company at \$4.6 billion. • In December 2023, Lionsgate acquires eOne from toymaker Hasbro (which had bought it for \$3.8 billion cash in 2019).¹⁹

(Continued)

18 Not bad for a consolation prize deal, in which Time Warner Cable (then the second largest MVPD in America) settled for merging with Charter (then third-largest, despite being the “acquirer”), after federal regulators scuttled an earlier proposed deal between Time Warner Cable and Comcast (the largest MVPD provider in America, then and until Charter overtook it at the end of 2023).

19 Hasbro at least got to keep *Peppa Pig* in the deal (having acquired the franchise with the rest of eOne).

TABLE C.1 (Continued)

<i>Deal</i>	<i>Reported Deal Value</i>	<i>Announced</i>	<i>Closed</i>	<i>Outcomes (as of May 17, 2024)</i>
AT&T acquires Time Warner (rebranded WarnerMedia, and then, post spin-off, to Warner Bros. Discovery)	\$85.4 billion	October 2016	June 2018	• AT&T successfully fights off DOJ antitrust lawsuit to block merger. • Less than three years after closing, AT&T spins off WarnerMedia into merger with Discovery for \$44 billion cash, plus assumption of some AT&T debt. • Post-spinoff Warner Bros. Discovery starts with market capitalization of \$60 billion and \$55 billion in debt (from both AT&T and Discovery). • Market capitalization of WBD is approximately \$20 billion, with approximately \$43 billion in debt. • Over 1,000 post-merger layoffs.
Comcast acquires controlling share (75%) of Sky	\$39 billion (implied)	September 2018	October 2018	• Comcast wins bidding war with Fox (which is in the process of being mostly acquired by Disney). • In October 2022, Comcast writes down value of Sky by \$8.6 billion and seeks buyers for parts or the whole. • 1,000 layoffs at Sky announced for 2024.
Disney acquires most Fox assets (excluding Fox broadcast network, news, and sports assets)	\$71.3 billion (plus \$13.8 billion of Fox debt)	December 2017	March 2019	• Acquisition price driven up from \$52.4 billion (when announced) due to competing Comcast bid in summer 2018.

(Continued)

TABLE C.1 (Continued)

<i>Deal</i>	<i>Reported Deal Value</i>	<i>Announced</i>	<i>Closed</i>	<i>Outcomes (as of May 17, 2024)</i>
				• Over \$11 billion in losses in streaming business since launch of Disney+. • In fiscal 4Q23 (calendar 3Q23), streaming losses narrow to \$387 million; Disney projects profits by end of 2024. • 7,000 post-merger layoffs. • Added debt load has hampered investment in growth and drawn the ire of activist investors.
CBS acquires Viacom ²⁰ (rebranded ViacomCBS, then again to Paramount Global)	\$15.4 billion	August 2019	December 2019	• Merger explorations begin in February 2018; in May, CBS board sues its own parent company (the Shari Redstone-controlled National Amusements, Inc. ["NAI"]) to block a potential deal. • Merger explorations resume after Les Moonves is fired in September 2018 in serious #MeToo scandal. • Post-merger Paramount Global adopts public-facing "arms-dealer" identity while also belatedly trying to support development of Paramount+. • Combined Paramount Global now has market capitalization of approximately \$8.3 billion, less

(Continued)

20 Although CBS had the larger ingoing market capitalization and was technically the acquirer, the combined company was largely under the control of the Viacom management team.

TABLE C.1 (Continued)

<i>Deal</i>	<i>Reported Deal Value</i>	<i>Announced</i>	<i>Closed</i>	<i>Outcomes (as of May 17, 2024)</i>
				than either CBS (\$19.7 billion) or Viacom (\$12.7 billion) at the time of the merger, with approximately \$15.8 billion of debt. • Estimated 1,000 post-merger layoffs. • Following the breakdown (in June 2024) of months-long negotiations around competing acquisition bids from David Ellison/Skydance and Sony/Apollo, controlling Redstone seeking new offers for NAI's controlling stake.²¹

(Continued)

21 This deal's long and winding road warrants a quick summary.

Skydance's main competitor for Paramount Global was Sony, backed by private equity firm Apollo Capital Management. Sony offered to \$26 billion to buy Paramount Global outright and take it private—a roughly \$2 billion premium on the company's then-current enterprise value (market capitalization plus debt). It was widely assumed that, had their bid succeeded, Sony and Apollo would fully merge and integrate Paramount Pictures and Columbia Pictures, sell Paramount's iconic studio lot to the highest bidder, and shut down or sell off several other struggling/degrading assets (including Paramount+ and the cable networks). At a minimum, FCC regulations would have required the Japanese-owned Sony to divest the CBS broadcast network and its owned-and-operated stations—presumably to Apollo, which would be expected to operate them with the ruthlessly unsentimental efficiency characteristic of private equity ownership. Federal regulators were also expected to look skeptically at the proposed combination of Paramount and Columbia and its impact on the already highly consolidated studio business.

Skydance, backed by RedBird Capital Partners and KKR, instead sought to purchase only Redstone's holding company, NAI, which owns a roughly 10% equity stake in Paramount Global but controls around 80% of its voting shares. At its peak, NAI—which also owns several small regional theater chains—was valued at nearly \$10 billion. In July 2024, Skydance agreed to purchase NAI for about \$1.75 billion, thereby gaining control of Paramount Global, which would then acquire Skydance in all-stock deal for about \$5 billion. To mollify other restive shareholders, Skydance also agreed to infuse Paramount Global with \$1.5 billion to pay down its crushing debt, and to set aside over \$4 billion to buy out (with a small premium) roughly 50% of shares held by other Paramount investors. The total cost price tag to Skydance and its backers is about \$8 billion—less than a third of what Sony and Apollo were prepared to spend. Skydance owner David Ellison, the billionaire son of Oracle founder (and seventh richest man in the world) Larry Ellison, is understood to relish the opportunity to establish himself as a true Hollywood mogul by making himself the steward of one of the industry's oldest and most storied brands.

Getting to that deal, however, proved to be a painful and protracted affair that spanned the entire first half of 2024. Redstone was immediately drawn to Skydance's offer, which would likely have

TABLE C.1 (Continued)

<i>Deal</i>	<i>Reported Deal Value</i>	<i>Announced</i>	<i>Closed</i>	<i>Outcomes (as of May 17, 2024)</i>
T-Mobile acquires (reported as “merges with”) Sprint (retaining T-Mobile brand)	\$26 billion	April 2018	April 2020	• T-Mobile grows in value and subscriber base, expands 5G network, and keeps prices low. • Mobile/wireless business spun off to DISH (to win regulatory approval) has failed to thrive, reducing the market of major cellular providers to three.

So, to quickly recap the success stories:

- T-Mobile acquired Sprint for \$26 billion in April 2020, with significant commitments made to the FCC to secure regulatory approval for the deal, including spinning off part of its business to DISH. By May 2024, DISH’s wireless business had failed to emerge as a fourth major competitor in the market, and T-Mobile had (disputedly) fallen short on promised job creation, but the company had grown in value and subscriptions while keeping prices low and retaining the quality of its service.

personally enriched her more, kept the company her father built substantially intact (at least for a while), and carried less risk of the bid going down following due diligence. Most Paramount Global shareholders (and at least some members of its board of directors) favored the Sony/Apollo offer, under which they would get to join NAI in being bought out in full with a more robust premium on their existing stakes. The creative community, fearing the loss from the industry of yet another major studio (only a few years following Fox’s merger into Disney) seemed to prefer the Skydance offer (though less vociferously than some analysts had expected).

Conversations dragged on for months, until finally—following the resignation of four board members and the firing of longtime loyalist CEO Bob Bakish over their opposition to the deal—Redstone finally secured the Paramount Global’s board’s approval to try to close a deal to sell NAI to Skydance. But in June 2024, with the parties seemingly “at the one-yard line,” Redstone abruptly and publicly walked away. Officially, the deal fell apart over the final valuation of NAI and the negotiation of language that would personally shield Redstone from shareholder lawsuits challenging the deal. Unofficially, many observers ascribed the breakdown to Redstone’s complex personal feelings about selling off her father’s legacy. In any event, following the deal’s collapse, Class B shares of Paramount fell below \$10 per share for the first time since the 2019 re-merger of Viacom and CBS, representing a market capitalization under \$7 billion. Senior leadership at both companies sent company-wide emails thanking employees for their perseverance and promising to move on from the abandoned deal toward better opportunities.

Three weeks later, in early July, news broke that the parties had not only resumed negotiations, but already closed a preliminary deal. The response I heard from one senior Paramount executive? “My neck is hanging by a thread from the whiplash.”

The “middle-of-the-road” or “jury-is-still-out” stories:²²

- Charter Communications acquired Time Warner Cable and Bright House Networks for a combined \$88.8 billion in 2016, and used its scale to better weather the inexorable decline of the pay TV business, losing subscribers more slowly than Comcast and overtaking it as the largest MVPD provider in America by the end of 2023. “Success” currently looks like a market capitalization of \$40 billion (down roughly 65% since the merger) and just over 14 million subscribers (down from 17.25 million at closing, a 17% decline).
- Disney bought most of Fox for \$71.3 billion (plus \$13.8 billion of debt) and built the largest streaming business outside of Netflix and Amazon—one which, more than five years later, has racked up over \$11 billion in losses and continues to lose money every quarter, with the broader company bogged down by debt. (There is hope for the streaming business to turn the corner sometime in the next year. Maybe.)

And the outright cautionary tales:

- AT&T acquired DirecTV for \$48.5 billion (plus \$18 billion in debt) in 2015, then spun it off in 2021 at a value of \$16.25 billion. Along the way, DirecTV lost 40% of its subscribers, and then its signature product (promising more subscriber losses to come).
- Lionsgate bought Starz for \$4.4 billion in 2016, and then spent most of 2022 and 2023 looking for a buyer to take it off their hands, before essentially divesting itself into a new company to separate itself from the network.
- AT&T bought Time Warner for \$85.4 billion in 2018 (after fighting through a nightmare antitrust challenge from the Department of Justice), and less than three years later, spun it into a merger with Discovery for \$44 billion (plus relief from some debt), creating a new company with a market capitalization of \$60 billion (plus \$55 billion of debt). In November 2022, the New York Times asked, “Was this \$100 billion deal the worst merger ever?” By May 2024, the combined Warner Bros. Discovery had paid off

22 Not included in the foregoing chart and these summaries (because it had not been announced at the time of the 2018 publication of the first edition of *The Business of Television*) is Amazon’s \$8.5 billion acquisition of MGM, which was announced in May 2021 and closed in March 2022. This one can be filed with the “jury-is-still-out” stories.

Amazon’s acquisition of MGM has resulted in the obligatory layoffs—several hundred in January 2024, at the same time that Amazon cut jobs across the conglomerate (including about 35% of the workforce at Twitch, the gaming livestream platform). It will take years for Amazon to effectively extract value from the MGM library, especially its crown jewel, the *James Bond* franchise. And it may take years more to fully untangle the knot of rights in the MGM library, which has passed through multiple secured lending transactions and numerous bankruptcies over the last several decades.

But the deal has already made a notable impact on Amazon’s strategy, including its heightened focus on theatrical distribution and on off-network monetization of its original series—both encouraged and facilitated by the robust distribution operation that Amazon acquired as part of its (primarily library-driven) deal for MGM.

over \$12 billion of that debt and had a market capitalization of less than \$20 billion (a decline of over 65%). After a bidding war, Comcast bought 75% of Sky in 2018 at an implied valuation of \$39 billion. By 2022, it wrote down its investment by \$8.6 billion and started looking for someone to take some or all of the company off its hands.

- In 2019, by sheer force of controlling shareholder Shari Redstone's will, CBS (market capitalization \$19.7 billion) acquired Viacom (market capitalization \$12.7 billion) for \$15.4 billion. By May 2024, the rebranded Paramount Global was worth around \$8 billion (a 75% decline), had nearly \$16 billion of debt and a BBB-credit rating,²³ and doubled down on layoffs as surviving employees spent the entire first half of 2024 enduring a messy and protracted competitive bidding process for the company, including a months-long will they/won't they negotiation with Skydance that (finally) culminated in a deal in July 2024 (requiring yet another last-minute revision to this section, deep into the production process for this second edition)

So, other than to alienate numerous potential employers with my criticism, why am I laying all of this out? To draw out a few lessons:

First, that merging with or acquiring a company based on a plan of "we'll figure out the plan after we merge" is not a sound business strategy. Successful combinations require a sharper understanding of the value to be created or opportunities to be unlocked by a proposed merger than "synergy and layoffs."

Second, that companies ignore culture at their peril.²⁴ AT&T in particular is known for its extremely specific corporate culture—and the difficulty it has integrating with (or simply tolerating) different ones.

Third, that it should come as no surprise that companies whose stock prices are usually bid up in anticipation of a merger tend to decline in value immediately following major deals, as the promised "efficiencies" come at significant cost to the output of employees whose morale, creativity, energy, and motivation are degraded over months (if not years) of distracting, distressing, and conversation-consuming speculation and trauma during successive rounds of layoffs.²⁵

And fourth, that just because a merger makes sense does not mean that it makes sense at the inflated price that an acquirer would have to pay to make it happen. Disney's acquisition of Fox and Comcast's acquisition of Sky are both examples of strategically sound deals that could have worked had their costs not been driven up by competitive bidding. One wonders whether any company could ever truly "win" after a bidding war for an acquisition target.

Naturally, given the sterling track record of these deals over the last decade, the years ahead promise only more mergers and acquisitions. As of this writing,

23 The lowest "investment-grade" rating.

24 Insert obligatory "Culture eats strategy for breakfast" quote from Peter Drucker here.

25 Even where layoffs are genuinely necessary and undertaken with the best of intentions, the requisite secrecy during planning often requires that decisions be made by those who are too far removed from day-to-day internal-facing operations to make well-informed choices.

Paramount Global is in active discussions with multiple potential buyers; a cost-cut, less-indebted Warner Bros. Discovery became free to test the market when the Reverse Morris Trust mechanism used to structure the deal that created it (which functionally precluded further M&A activity) expired on April 8, 2024; and Comcast stands alone as both the only other company big enough to buy Paramount Global or Warner Bros. Discovery, and the only company small enough to still (potentially) want to do so.

C Realigning Incentives

As this book has explored at length, the six years that have passed since the first edition of *The Business of Television* was published in 2018 have been both chaotic and consequential for the content business. In that short time, among other milestones:

- The industry endured a deadly global pandemic that brought production to an unprecedented global standstill, followed quickly by two of the most protracted and vitriolic labor disputes in Hollywood history.
- One of the industry's most storied major powers (Fox) was acquired and absorbed by its greatest competitor, while two others (Warner Bros. and Paramount) shed thousands of jobs and billions of dollars of value as they slogged through some of the most disastrous and traumatic merger processes in the history of any industry.
- Four additional major subscription streaming services entered the market (Disney+, Peacock, Paramount+, and Apple TV+), including the first film/TV venture from one of the most valuable, cash-rich, and powerful technology companies in the world.

Yet the “big question” on everyone’s mind (including my own) then is the same one that hangs over all of us today: what can the industry do to set itself back on a functional, sustainable path as it (once again) tries to figure out what we’re *finally* going to do about these tech companies?

When I offered my own answers to that question in the Conclusion of 2018’s first edition,²⁶ I tried to close on an optimistic and forward-looking (if somewhat sappy) note:

26 To check in on those: (1) international co-productions and co-commissions continue to intrigue, especially for foreign producers with substantial contacts in the U.S. market (and vice versa), but they have proven too difficult to set up and manage to offer a scalable business with real growth prospects for U.S. producers; (2) smaller companies, especially those aligned with major talent, have generally thrived more than mid-sized and large ones over the last six years (although it remains to be seen whether that success is what one might call a “low interest rate phenomenon”); and (3) the major traditional entertainment companies continue to be highly ineffective in engaging with, let alone building businesses in, the world of user-generated, influencer-driven, social media-mediated short-form content (thus allowing a distinct, if still nascent, business and creative ecosystem to instead develop in the space).

[T]he greatest opportunities to come lie just outside of our current field of vision. Television has long been a uniquely innovative and entrepreneurial corner of the broader entertainment industry, with constant experimentation in business and technical models leading to the discovery of new opportunities. . . . Ultimately, the next era in television will be defined as the last one was: not by further incremental tinkering with existing business and technological models, but by bold invention of new ones.

At the time, I believed that creative dealmakers, informed but not bound by the norms and structures on which the industry had long been built, could play a leading role in helping the industry evolve to meet the new world's unique demands and opportunities. In 2024, as I put the finishing touches on the second edition, I have a very different view.

It is highly questionable whether the industry truly “innovated” much of anything in business models over the last six years. Except for the development of the FAST channel business, proliferation of advertising, long-anticipated launches of Disney+ and Peacock, and relaunches of HBO Max and CBS All Access as Max and Paramount+ respectively, the public-facing product landscape of streaming looks pretty much the same as it did in 2018.

Meanwhile, behind the scenes, the dealmaking has only grown less creative and more calcified. In 2018, entrepreneurial studios could build their businesses as diversified investment portfolios, with varied license structures across different types of networks (i.e., for broadcast, basic cable, premium cable, domestic streaming, and global streaming) representing a variety of “asset classes” with distinct risk and reward profiles. Since then, however, the big conglomerates have shifted their investments from linear television to streaming, while placing a larger premium on maximizing flexibility to evolve their distribution and exhibition strategies across a shifting landscape of affiliated platforms. As a result, the market has congealed into only two increasingly challenged business models for original content licensing.

On the one hand are licenses for broadcast shows, with license fees and deal structures that have scarcely changed over the last two highly transformative decades, except to increasingly expand the networks' licensed digital rights for little or no incremental compensation. Consequently, the only studios that have been able to maintain meaningful sustained broadcast businesses are those affiliated with the networks themselves, plus Warner Bros. Television and Sony Pictures Television (with the latter substantially exiting the broadcast comedy business in 2020). On the other hand are full-cost/cost-plus multi-territory streaming licenses, which have steadily degraded in value as market leverage has increasingly shifted toward the major platforms. At the same time, even the traditional entertainment companies have embraced these rights-hungry licenses so completely that they have effectively supplanted every other traditional non-broadcast licensing model. As one of several available license templates, cost-plus streaming deals were the bedrock of a brief golden age of prolificness and

profits for television studios; as a ubiquitous monolith, they have helped deliver the industry to the unhappy place it currently occupies.

For all their quirks, the basic structure and business models of the television industry worked (and evolved) so well for so long because they did several things very right. They aligned the incentives of all parties in the value chain. They diversified the sources of revenue that powered the industry. They balanced the allocation of risk and reward across the major players in content production and distribution. They allowed for more variation in content and programming strategy among platforms, while offering studios multiple models with varied risk/reward profiles that collectively allowed for a robust, portfolio-based approach to running a scalable, sustainable business. They created a meaningful and consistent relationship between success and reward for individual and corporate actors alike.

These are things the industry has lost over the last ten years, and the things it needs to rediscover (or reinvent) if the next ten years are to be better than the last. While the industry has unquestionably faced tremendous disruption (if not an existential threat) from new digital technologies, the harms suffered by the industry over the decade were largely self-inflicted—a process of abandoning, rather than adapting, proven business models in the face of new challenges, with little or no specific idea of what would replace them. In some cases, these errors stemmed from reckless strategies, lazy follow-the-leader decision-making and/or irrationally exuberant faith in the inevitability of a lucrative digital future. Just as often, however, these destructive choices were expedient, rational, or virtually unavoidable, even for savvy leaders who could see their companies (and the industry as a whole) mortgaging their own futures in real-time but lacked the opportunity (or job security) to push back and help chart a better course.

In time, creativity and innovation will resume their rightful place at the heart of the industry's growth. For now, however, this industry's future, if it is to have one, lies in its past—not in the bold invention of new business and deal-making models, but in the rediscovery and adaptation of those that sustained the industry for decades, before we collectively saw fit to throw them away. In other words . . .

D The Old Ways Will Save Us

The good news is that, in many respects, this transition has already begun.

i Advertising

As the powerful first-mover and definitive brand of the streaming age, Netflix's choices in product design and business strategy established several orthodoxies that came to dominate the new industry's first decade. Perhaps the most impactful was Netflix's commitment to streaming as an ad-free experience—a product design choice that had a profound impact on its business (and that of

the competitors who took its lead) by closing the door to one of the two foundational business models for content providers in every medium (which also happened to be television's original and most proven monetization paradigm).

Eventually, pressure from Wall Street to focus on profitability forced all of the streamers to look for new sources of revenue as well as ways to reduce their costs, and the studio streamers—those owned by the major traditional studios (i.e., not Netflix, Amazon, or Apple)—all launched with or later added lower-cost advertising-supported tiers. Netflix, the most strident holdout, finally embraced advertising after a weak quarterly report caused a precipitous collapse in its stock price in April 2022 and the company sought to quickly reassure spooked investors. Amazon soon followed suit, and Apple TV+ seems poised to do the same in the near future.

The belated arrival of advertising in streaming has been well-received by both consumers (many of whom have shown that they are happy to endure ads in order to save a few bucks each month) and providers (who have discovered that “lower-cost” ad-supported subscription plans can generate more revenue per user than high-priced ad-free plans).²⁷

The advertising market in streaming has only begun to develop, however, and the streamers have yet to fully realize the potential of their technological platforms to make advertising both more appealing to consumers and more effective for advertisers. The slow move by streamers toward sharing more (and more granular) performance data—another in-progress and long-overdue shift away from an early, Netflix-defined streaming orthodoxy—will also eventually lead to a more dynamic, better-operated, and better-priced advertising market.²⁸

ii Windowing

The sequential availability of content in a variety of exhibition media over time, known as windowing, has long been a foundational monetization strategy for all kinds of creative businesses. Windowing reflects the strategic subdivision of licensed rights across media, territory, and time by a content owner looking to maximize the economic value of a film, television series, or other copyrighted content asset.

Fundamentally, windowing is about trying to find and connect with undiscovered and untapped pockets of viewers.

Over the last decade, however, windowing has declined dramatically. In the feature world, exclusive theatrical windows have shrunk and subsequent distribution windows compressed, as the streamers have dominated the market

27 For this reason, in the years ahead, subscription platforms are likely to continue steadily raising their prices for their ad-free tiers (much more rapidly than they raise prices for their ad-supported tiers), confident that they can grow their margins from high-income users who are willing to bear the increase, while preventing cancellations by more price-sensitive subscribers by actively funneling them into “cheaper” yet more lucrative “ad tiers.” See Chapter 2, Section B.i (pg. 72).

28 See Chapter 2, Section B.iv (pg. 84).

in investment and output for new films and audiences have increasingly lost their patience for delayed home viewing options. In television and streaming, the expansive demands for territory, term, and exclusivity of licensed rights in standard cost-plus streaming deals—innovated by Netflix and Amazon but enthusiastically embraced by the traditional studios in their own streaming businesses (and beyond)—have largely choked off traditional “off-network” licensing opportunities for supplier studios.

In their first years in operation, the studio streamers followed the lead of their tech rivals in prioritizing ongoing exclusive exhibition rights in substantially all of their original content. This prevailing norm of content exclusivity reflected the need for the early entrants in the Streaming Wars—Netflix, Amazon, and Hulu—to promote and justify the then-new consumer behavior of maintaining a direct monthly film/TV content subscription unintermediated by a cable or satellite provider. But as the streaming market has matured, content libraries have swelled, and streaming services are virtually utilities, the premium on exclusivity has waned. And with the benefit of years of real data, these companies are better able than ever to measure the impact that exclusive availability for any given piece of content has on the streamers’ principal goals of attracting subscribers and reducing churn.

Now that market pressures have driven the industry toward prioritizing cost savings and monetization over growth at all costs, the studio streamers have broken from their tech rivals and turned away from perpetual content exclusivity, opening the door to a revived marketplace for windowing opportunities. In July 2023, cash-strapped Warner Bros. Discovery licensed several beloved HBO library titles to Netflix.²⁹ Around the same time in 2023, the explosive popularity of USA’s *Suits* on Netflix—over a decade after the show began its run on basic cable in 2011—also illustrated (or simply reminded people of) the business opportunity in allowing shows to find new audiences in new places. During 2022 and 2023, Max and Disney+ also sought cost-saving and tax benefits by removing several underperforming shows from their services, including high-profile originals like HBO’s *Westworld* and Disney+’s *Willow*, and later licensed some of those titles to third-party streaming services and branded FAST channels. Though it is often easy³⁰ to portray Warner Bros. Discovery and its unsentimental CEO, David Zaslav, as villains, WBD’s decision to license recent HBO and Max streaming originals to Netflix is an important and positive milestone in the industry’s slot through this era of transition.

Smart windowing can be a boon to everyone involved—again, just consider the role that creative dealmaking and rights management played in turning *Breaking Bad* into one of the most successful and beloved shows of all time (to the great

29 Notably, these licenses are “co-exclusive,” meaning that Warner Bros. Discovery can continue to offer these series as part of the library on its Max service, even as it monetizes them with Netflix. See Chapter 2, Section B.vi (pg. 89).

30 And sometimes fun.

benefit of original network AMC, “out-of-season” streaming partner Netflix, and studio Sony Pictures Television alike). Time and time again, Netflix has demonstrated the power of its huge subscriber base and robust recommendation algorithm³¹ to transform unexpected titles into cultural phenomena, from much-loved but little-known recent originals to fan favorites buried deep within libraries.³²

That some such success stories will emerge is a virtual certainty; *which* shows will emerge as success stories is almost impossible to predict.³³ Thus, it is key for the parties to evolve their business models for second-run as well as first-run content (including by making more creative deals and greater use of revenue sharing structures). By allocating the risks and rewards of these opportunities in a way that better incentivizes the active participation of both content owners and distributors/exhibitors in this restored market for second-window exhibition, the industry can better generate more opportunities for shows to catch fire with the public—and, crucially, appropriately reward all constituencies when those successes emerge.³⁴

iii Bundling

Bundling is also making a comeback (the inexorable decline of traditional pay TV notwithstanding). Consumer frustration with bundling (as exemplified by

31 While this book generally speaks glowingly of Netflix’s recommendation algorithm as a cornerstone of its business success, such algorithms are at best a mixed blessing for society in general. Designed solely to encourage engagement, these algorithms promote a mindless mode of content consumption, feed people only what they already know and like, reduce users’ opportunity and capacity to discover things or otherwise evolve their tastes and beliefs; and flatten the broader culture by creating a feedback loop in which people are only shown what they like and only like what they are shown. (And of course, that is all to say nothing about the incredibly pernicious effect of algorithmic content curation in social media on American politics and civil society generally.) The author recommends *The New Yorker* writer Kyle Chayka’s *Filterworld: How Algorithms Flattened Culture* (2024).

32 See Chapter 2, Section B.vi (pg. 89) and Chapter 3, Section C.i.a (pg. 129).

33 As of this writing, long-running Fox/NBC comedy *Brooklyn Nine-Nine*, produced by Universal Television (sister studio of *Suits* studio Universal Content Productions), is enjoying a resurgence in popularity thanks to the availability of its first four (out of eight) seasons on Netflix. This has also helped driver viewership to Peacock, which exclusive streams the show’s last four seasons, and which has seen an uptick in engagement from viewers looking to continue binging the series after running out of episodes on Netflix.

34 This also feels like a return to one of the most basic value propositions of television, relative to other entertainment media like theatrical feature films and stage plays: to bring content to the consumer where they are, rather than requiring that the consumer come to the content. See Chapter 1, Section A.i (pg. 14). Historical windowing practices were aligned with this premise because they allowed consumers options for how and when they could access content based on their individual appetites for immediacy and cost. The subdivision of the content marketplace into a series of separate, subscription-authenticated libraries where content lives exclusively forever has been, in part, an abandonment of that premise, increasing the burden on consumers to keep track of where an ever-growing universe of content lives, and intentionally forcing them into (and trying to keep them locked within) distinct ecosystems.

the 200-channel cable or satellite subscription)³⁵ helped open the door for the rise of streaming in the first place. Frustrated with expensive monthly subscriptions in which they effectively paid substantial sums for channels and shows they would never watch in order to get access to those they actually cared about, consumers flocked toward lower-cost streaming services like Netflix, Amazon, and Hulu (where, at least in the early days, they could safely assume they'd eventually get to watch most of the linear shows they were interested in, if they were willing to wait). More recently, however, consumers are coming to understand what they lost when they led the industry away from bundling—a business model that consumers generally love to hate, and do not know how much they really love.³⁶

By amortizing subscription revenue across a diverse collection of channels, bundling supports a more diverse content marketplace, with every platform and program effectively providing a minor subsidy for every other.³⁷ Although the highest performers continue to receive the highest rewards, at least some of the surplus upside of a bundling-based system is effectively reallocated toward promoting a healthy overall industry environment—a rising tide that floats all boats.³⁸

35 By 2013, when streaming began its meteoric rise, the average U.S. TV household had access to over 189 channels (mostly basic cable networks), but only watched 17 of them.

36 One of the paradoxes of running a consumer-facing business is that customers are both passionate about getting what they want, and—as illustrated by decades of academic research—pretty terrible at knowing what will make them happy. The preeminent pop science book on this subject is Richard Eyre's *The Happiness Paradox* (2019).

37 When every content platform must sustain itself independently, it must be programmed for extremely general appeal (to draw in as many paying customers as possible) or extremely low cost (to operate sustainably with revenue from a small but passionate fanbase). Unbundling therefore promotes risk aversion and genericity, while bundling allows for greater risk-taking, diversity, and experimentation.

38 In this regard, it operates somewhat like the NBA's collective bargaining agreement, which, in addition to providing a "soft cap" on aggregate player compensation per team, provides a hard cap on the annual compensation that can be committed to any individual player. The end result of this system is that highly paid marquee stars like LeBron James and Stephen Curry are actually *underpaid* relative to the actual value they generate for their teams in wins, fan engagement, attendance, and ancillary revenue. The depression of these star salaries—which nevertheless remain plenty substantial, now regularly exceeding \$50 million per year for top players—increases the compensation available for journeyman veterans and mid-rotation roleplayers who may be individually replaceable, but who are collectively essential to the long-term health and competitive balance of the league. This in turn increases the overall quality of the entertainment product offered by the NBA, which lifts revenues, which lifts player compensation (which, per the NBA Collective Bargaining Agreement, is set, in the aggregate, as a percentage of league revenue). The whole model has intriguing implications for how, with a radically revised approach to collective bargaining, the industry could look at paying actors, for whom the overall dynamics of individual contribution and compensation are in many ways analogous to those for NBA players.

For reference, a "soft cap" is one that can be exceeded by a team if it is willing to pay a financial penalty, or "luxury tax," for its excess spending. This is in contrast to a "hard cap," under which teams are flatly prohibited from paying over a specified cap, whether for any individual player or

The fragmentation of the streaming marketplace (from three major subscription services to eight, plus several minor ones), together with the rise in streaming subscription prices, has resulted in many consumers piling up subscriptions that, in the aggregate, are no less expensive than the MVPD subscriptions these customers left behind. Bundled offerings relieve consumers from the decision fatigue that comes with individually valuing numerous competing options.³⁹ And a combination of individual/direct-to-consumer and bundled offerings allows services to reach a wider universe of potential customers, who would be interested in a service's offerings (especially for a deal!) but may never otherwise find and engage with it on their own. This is critical to streaming businesses, for which subscriber scale is essential to long-term sustainability.

The key question for the industry is not whether bundling should or will come back: the answer to both questions is a resounding “yes.” Already, Amazon and Apple actively offer users access to (and take a cut of the resulting subscription revenue from) competing streaming services. Streamers are being bundled with other streamers, and with traditional cable and satellite-based multichannel packages.⁴⁰ The decline of pay TV is being offset, in part, by the growth of vMVPD services like YouTube TV and Hulu with Live TV, whose product experiences are already superior to those of their traditional rivals, and still have significant room to improve further).⁴¹ In July 2024 (during the final production of this book), Disney and Warner Bros. launched a landmark bundled package of Disney+, Hulu, and Max, expected to launch in summer

for their team as a whole. For comparison, the NFL's collective bargaining agreement provides for a hard cap on aggregate team compensation, but no cap on individual player compensation. MLB's collective bargaining agreement includes no meaningful caps on player or team salaries, promoting the longstanding dominance of marquee teams in major media markets—such as the Los Angeles Dodgers, New York Yankees, and (more recently) New York Mets—which can regularly field “super-teams” with total salaries that are multiples greater than those of small-market teams like the Kansas City Royals or Milwaukee Brewers (who must rely on their own “farm systems” to develop new talent that will almost certainly eventually leave them for a bigger contract from a major-market team).

39 The obvious reference here is airline travel. At least prior to the 2020 Covid-19 pandemic, air travel was (adjusted for inflation) literally as cheap as it had ever been. (Although the pandemic briefly caused a spike in prices, that has since largely receded, with base airfare remaining at historically low levels overall.) At the same time, airline travel was also as miserable as it had ever been. Customers had once paid for “inefficient” all-inclusive tickets, which provided them with a suite of amenities like checked bags, carry-on luggage, meals, drinks, headphones, and changeability/cancelability, at no additional charge, whether or not the passenger ever used any specific benefit. Now, passengers are forced to pay a la carte, and therefore to make a cost/benefit analysis for every individual decision involved in air travel—in the process racking up additional fees that, in the aggregate, can sneakily destroy any “deal” on the initial cost of the ticket. The author recommends law professor and policy expert Ganesh Sitaraman's (quite readable) *Why Flying Is Terrible (and How to Fix It)* (2023).

40 Sometimes both at the same time.

41 That said, some analysts expect that the rising prominence of lower-cost advertising-supported SVOD services and free FAST channels, combined with the revival of licensing of library content across services and the emergence of alternative forms of bundled content packages, may come at the expense of these costlier full-service vMVPD services.

2024. This came on the heels of Disney, Fox, and Warner Bros.'s February 2024 announcement of Venu, their forthcoming sports-focused streaming bundle.

In other words, the “cable bundle” is coming back—even if everyone studiously avoids calling it that because the term itself now sounds so dated and is laden with negative connotations for high cost and bad service. The real question, then, is: who will principally own that business? Will it be the traditional pay TV companies that functionally invented the model in the first place, or the technology companies that have actively contributed to the slow demise of the “cable bundle” in its original form?

iv Letting Television Be Television

When they first arrived on the market, the streamers did everything in their power to distinguish their products from fusty old television. Streaming was better, cheaper, more convenient, more concerned with the customer's experience—streaming was *different*.⁴²

The streamers were quickly aided in their marketing effort to differentiate “streaming” by the influx into the medium of writers, directors, and actors from the feature film world, many of whom would have scoffed at the idea of “working in television” only a few years before. The talent community eagerly took on the project of branding streaming as “not just television.” With its high budgets and risky creative content, streaming was “premium.”⁴³ Shows were envisioned and described as “ten-hour movies.”⁴⁴ These “premium” series started to be creatively conceptualized more like movies; then written more like movies; then physically produced more like movies. But, as this book has repeatedly argued, streaming *is* television, and television *is* streaming.⁴⁵ And—speaking with all the bias and self-interest of a longtime TV professional, as well as the fandom of a TV watcher—television is pretty great.

a Classic TV Genres

Consumers have already sent this message to platforms with their viewing choices, consistently and voraciously consuming deep libraries of classic TV shows (like *Friends* and *The Office*), “rediscovering” recent beloved series that had never previously achieved that kind of ubiquity (like *Suits* and *Brooklyn Nine-Nine*), and elevating new “classic-feeling” streaming originals to megahit status (like *The Night Agent* and *Ted Lasso*). And the platforms have started to listen, with trade press reporting that the development market for late 2023 and

42 See Chapter 2, Section B (pg. 66).

43 See Chapter 2, Section B.i (pg. 72).

44 Later, “eight-hour movies.”

45 HBO was lying: it *was* TV, *and* it was HBO.

early 2024 has reflected particular demand for “nostalgic” shows that elevate, rather than subvert or reinvent, the creative templates of linear television.

The complex, tortured, ever-evolving antiheroes of “prestige dramas” have made for some compelling storytelling, but they have also robbed television audiences of some of the intimacy and familiarity that was once so central to the television viewing experience. Television was once the medium where viewers could find people who reminded them of themselves, and whose foibles and struggles were a metaphor for their own. It has been fascinating and gratifying to see characters like Walter White and Don Draper slowly reveal themselves, to the audience and to themselves, over multiple seasons. But that is not necessarily the same satisfaction as seeing Lucy Ricardo try to work her way into show business, week after week—always with the same goal, always with the same foibles, always somehow falling just short. Lucy Ricardo is not a great television character despite never changing; she is a great television character because she never changes, and the audience loves her for it. And while the last twenty years have given us many new Walter Whites and Don Drapers, they have given us no new Lucy Ricardos.

b More and Longer Seasons

Letting television be television again means more than embracing classic TV genres like procedural cop/doctor/lawyer dramas and multi-camera comedies. It also means a return, at least for some shows, to longer production orders over long runs of seasons.

Realistically, such a transition is likely to be slow and halting because it will need to be grounded in a more wholesale shift in how the industry’s major powers think about their interests and opportunities when it comes to original streaming content. Streamers did not settle into the habit of ordering eight-episode seasons by accident. Rather, the norm reflects the streamers’ responsiveness to data demonstrating the efficiency (for subscriber attraction and retention) of producing more series with fewer episodes rather than fewer series with more episodes.⁴⁶ The streamers have enforced that default over the objections of their key partners because it has been so plainly economically rational for them to do so.⁴⁷ The same is true of the streamers’ long-term shift toward ordering fewer total seasons of each series (which has been similarly unpopular with studios and talent), as well as their heavy investment in one-off limited series.⁴⁸

46 See Chapter 11, Section A.v (pg. 422).

47 Although much of the creative community initially welcomed the streamers’ openness to shorter episode counts, both studios and talent have been materially economically harmed by (and have tried, with little success, to push back on) the default of the eight-episode season.

48 See Chapter 2, Section B.v (pg. 88).

Yet the rationality of these strategies is grounded in the way streamers have approached original content to date—solely as a vehicle for subscriber acquisition and retention, and not for direct monetization. But to the extent that—as this Conclusion both predicts and prescribes—the years ahead bring a shift away from the “walled garden” mentality that has dominated the Streaming Wars era, and back toward a more interconnected, interdependent, and monetization-oriented way of doing business, that should force a reappraisal of the “efficiency” of these one-off limited series and extremely short seasons. Since the end of the 2023 WGA and SAG-AFTRA strikes, the market seems to reflect a renewed emphasis on ongoing rather than limited series for new development.

One thing that the success stories of linear shows in streaming (referenced in the preceding section and throughout this book) have in common is that these shows generally have many, *many* total episodes available for viewers to enjoy—134 episodes of *Suits* over nine seasons; 201 episodes of *The Office* over nine seasons; 236 episodes of *Friends* over ten seasons. It is not only that audiences seem to crave making a connection with relatable characters who never change; it is that, once they have made that connection, they often want to sustain it for as long as possible. Moreover, the more episodes a series has, the more repeatable each individual episode can be (because the viewer can watch so many other episodes before coming back to it). It is these factors (on top of the basic need for volume) that have long made a deep library of episodes so critical to unlocking major value from downstream syndication licenses.⁴⁹ Depth of library is proving to have a similarly potent influence on the value of existing series for “streaming syndication” (as the apparent successor to syndication on basic cable and/or local broadcast stations).

This suggests that, counterintuitively, the “Golden Age of Television” (as some commentators have dubbed the “Peak TV” years) might eventually be looked back upon as a “lost era” of television, because even the best shows produced over the last decade are often simply too limited in their runs, and/or too incomprehensible to consume out of order, to effectively connect with or be rediscovered by future audiences, or to hold much appeal with future licensees of library content (including FAST channels and competing SVOD services).⁵⁰ Even the most brilliant of the many closed-ended limited series produced in the “Peak TV” era seem unlikely to stand the test of time either culturally or economically.

49 See Chapter 3, Section C.i.a (pg. 129).

50 There is a chicken-and-egg dynamic here. Licensees will be less likely to buy shows that they believe are less likely to connect with audiences. The lack of demand for these shows in the licensing market will limit the availability of these shows, and therefore the opportunity for future audiences to discover them. This in turn will further depress the perceived value of these shows (and others like them) to downstream licensees.

It will likely take years for this dramatic shift in mindset and strategy to take hold throughout the industry.⁵¹ In the meantime, however, other trends discussed in this Conclusion will naturally push the industry at least somewhat in this direction.

The classic TV genres highlighted in the preceding section were historically produced in seasons of at least thirteen, usually twenty-two, and sometimes even more episodes. In part, this norm simply reflected the demands of programming a conventional broadcast schedule over the course of the year. But these genres were also honed and crafted over decades to be excellent fits for such extended seasons. Procedural dramas and multicamera comedies are significantly cheaper and simpler to produce than the “prestige series” that have dominated original series production in streaming over the last decade. With their tendency to rely upon a limited group of frequently reused “hero locations” and feature a smaller core cast of characters, they are especially efficient to produce at volume. Moreover, to the extent that the industry’s re-embrace of these genres reflects the growing influence of advertisers in streaming, that influence independently supports longer episodic runs. Risk-averse advertisers tend to like the consistency and reliability of shows with more episodes, especially when those shows develop distinct audiences that certain advertisers are especially keen to connect with frequently over time. For these reasons, it seems reasonable to expect that upcoming streaming series in these classic genres will be commissioned for runs of at least ten to thirteen episodes per season.

c Rational Budgets

Restoring the television industry to its prior creative and economic vitality also requires making television on a “television budget” again.

One reason why the industry’s business model has been so “broken” over the last several years is because it was never meant to sustain the level of spending that has grown routine during the Streaming Wars era, driven by exorbitant fees for actors, aggressive competition for intellectual property of dubious value, and overinvestment in “scope” and “scale” over story and stakes.

Netflix can handle these inflated budgets due to its singular scale and first-mover advantage.⁵² Amazon and Apple have never played by the same rules or

51 Unfortunately, the poor fit of many of the last decade’s productions for such “long tail” exhibition will also likely slow the industry’s revival and adaptation to streaming of traditional licensing and monetization strategies—especially if streamers have early difficulty implementing them and take the lesson that they simply do not work anymore. But, if the streamers interpret a soft market for their existing originals not as a repudiation of these business practices, but as a demonstration of the poor fit of such practices with the kinds of shows the streamers have been making to date, then that realization should eventually push their content strategies in the direction described here.

52 See the Introduction (pg. 1).

according to the same economic logic as companies with content at the core of their businesses, and they never will. But the unit economics of television production simply breaks down when budgets, at least for unproven series, start to climb north of \$6 million per episode (if not less). The cost-plus streaming model took over the industry, at least in part, because no other model could keep the studios running at the kinds of budgets and fees that creative partners quickly learned to expect (and demand). Yet that model—which only amplifies the already punishing expense of each new series—has, at scale, proven to be as unsustainable for platforms as it is poisonous to the overall health of the studio/production business.⁵³ For the television industry as a whole to operate sustainably, it has to make good TV for TV prices.

Some may protest that this is the advice of a penny-counting business executive with little concern for the quality of the shows, or appreciation for what the medium has achieved creatively over the last several years. Nothing could be further from the truth. To briefly digress into sharing my personal tastes:

I count many of the major “prestige” series of the last twenty years among my all-time favorites—including *The Americans*, *Mad Men*, *Breaking Bad*, *The Leftovers*, *The Sopranos*, and *The Wire*, among others. These shows are nearly universally acclaimed, and perennially appear on people’s “all-time top-ten” lists of their favorite shows. They have many things in common, but perhaps the least appreciated is that *they were all financially constrained*, and they all created incredible art because of it. All of these shows were, at least at their starts, considered “low budget” even for their times.⁵⁴ Several spent their first several seasons limping from renewal to renewal, beloved by critics but largely ignored by audiences (which largely discovered them only in their later seasons, if not after they had completed their runs). These shows maintained their longevity in part by making sure they were delivered at reasonable price points, lest the combination of high cost and low viewership doom them to cancellation.⁵⁵ That financial pressure forced the creative teams to invest in character-driven

53 See Chapter 3, Section C.ii (pg. 139).

54 This argument should not be read hyperbolically to say that expensive shows cannot be great too, especially when they use their expanded budgets in creatively meaningful ways. The author’s list of all-time favorites also includes more recent HBO hits like *Succession*, *The Watchmen*, and seasons 1–6 of *Game of Thrones*. Each of these shows was *very* expensive, at least by the standards of its day—the \$6 million per episode budget for the first season of *Game of Thrones*, released in June 2011, was at the time considered a huge investment for an unproven series, but would place it on the lower end of the range for first-season original dramas in streaming in 2024. But each one deployed its considerable budget in ways that—whether apparent to the audience or not—enhanced its effectiveness at telling its stories, communicating its themes, and creating a world with a “lived-in” feel.

55 *Breaking Bad*, in fact, was briefly canceled after its critically acclaimed, little-watched third season, before the renegotiation of Sony Pictures Television’s deal with AMC and the licensing of out-of-season episodes to Netflix saved the show, set the conditions for its explosive future success, and changed the business forever. See Chapter 3, Section C.i.a (pg. 129).

stories with personal stakes, brought to life with sharp writing and memorable performances from unfamiliar faces who could disappear into their characters. They were cast with amazing actors, most of whom became stars because of their performances in these series (rather than being cast in them because they were already stars). Perhaps the most celebrated episode of *Breaking Bad*, the Rian Johnson-directed “Fly” from the show’s third season, is famously a “bottle episode”—a mid-season episode intentionally written with very few speaking parts and/or locations, so that it can be produced unusually cheaply, to get a production season that is running overbudget financially back on track.

Breaking Bad with a streaming budget does not produce “Fly,” or even take a chance on Bryan Cranston—then best known as the harried dad on Fox’s *Malcolm in the Middle*⁵⁶—to portray high-school-chemistry-teacher-turned-drug-kingpin Walter White. Netflix’s *Mad Men* probably would have traded its patient plotting and inimitable style for melodrama unfurled across glittering parties and gratuitous sex scenes. As produced for Amazon, the taut pilot for *The Americans*⁵⁷ would likely have seen its careful, tension-building camera work and focus on family drama overwhelmed with noisy explosions and spycraft set-pieces. Large budgets are a tool, but they can also be a crutch—one on which the industry has grown increasingly reliant since these shows completed their runs. In some ways, these celebrated series were towering creative successes not in spite of their relatively modest resources, but because of them.⁵⁸

56 Also, a delightful recurring guest role on *Seinfeld* as noted “re-gifter” and “dentist of Caligula” Dr. Tim Whatley who—allegedly—converts to Judaism for the jokes.

57 In the author’s opinion, a strong contender for best pilot of all time.

58 To stay on my soapbox for a moment here, notably, none of the “all-time greats” on my list are streaming originals. This is in part because I have watched only some of streaming’s most celebrated series (and have particular affection for *BoJack Horseman*, *Andor*, *Arcane*, *Fleabag*, *The Bear*, *The Boys*, and *Severance*). But it is also because, frankly, I have never understood the creative community’s infatuation with the “eight/ten-hour movie”-style premium series.

I, for one, do not ever want to watch an eight- or ten-hour movie. I believe that any film director that wants to deliver a film over 2 hours and 26 minutes in length should submit a three-page essay explaining why they cannot tell their story within the running time that Martin Scorsese needed to make *Goodfellas*—an all-time great movie that flies through every one of its 146 well-used minutes. Martin Scorsese himself would not be exempted from this essay requirement.

Television episodes are each structured with a beginning, middle, and end. They are at once standalone productions and parts of a greater whole, and must balance serving a larger story with delivering an immediately entertaining and satisfying experience. On a great series, every episode justifies its own existence. But a series written and produced “as an eight-/ten-hour movie” often starts and ends strong, but drags terribly through the middle episodes, which tend to be individually devoid of meaningful stakes and satisfying arcs. For some such series, a “binge watch” is not simply the best way to experience the series; it is the only way to have a decent experience with it. Getting through an entire season is not always a complete entertainment experience, so much as two incomplete entertainment experiences interposed with an hours-long chore. In short: make TV TV again.

(If you’re still reading this footnote: thank you for coming to my TED talk.)

v *Meaningful Backend*

Chapter 9 of this book explored at length how recent changes to the dominant licensing and exhibition models of television have fundamentally transformed backend, severing the traditional alignment of interests between studio and participant, as well as the traditional relationship between success and reward. Making backend meaningful again, and restoring the logic and values that historically underlied it, will be both a cause and an effect of the industry's success in the years ahead.

The effect part is easy enough to understand—as “walled gardens” and platform-level economics give way to industry interconnection and monetization, the relationship between success and reward will slowly be restored. Once that shift happens at the studio level, it will naturally be passed through to participants in their backends (at least for those with somewhat more conventionally structured contingent compensation definitions).

But the relationship between success and reward is not the only key link that has been largely severed over the last several years; so, too, has the relationship between responsibility and reward. In traditional backend, the direct deductibility of costs from revenues, as well as the ways that increased costs are effectively multiplied by corresponding interest and overhead charges, meant that participants on efficiently produced shows were significantly more likely to see any backend, and that the backend they saw could be significantly more valuable. Thus, writers and producers were naturally incentivized to control their own creative appetites, make rigorous choices about what kind of spending was truly “worth it,” and think hard about how to realize their most ambitious ideas in the most efficient possible ways.

That built-in incentive, and the thoughtful choices it created, has largely evaporated over the last decade. The tendency for most streaming shows to generate backend based on only one or two produced seasons has diminished the importance of properly conceptualizing and implementing production plans that are built to last. Alternative “dollars-for-points”-type backend definitions are often structured in ways that mostly or entirely insulate participants from any diminution in the value of their backends due to high budgets or production overages. And even among those participants with more traditionally structured backends, the erosion of trust between talent and studios and the prevailing (and accurate) perception that backend “just isn’t worth what it used to be” has caused many artists and their representatives to largely write off the importance of backend (and therefore, of making choices that maximize it) in favor of squeezing as much up-front compensation as possible out of every project.⁵⁹

59 This statement also presumes that artists actually understand the dynamics of their backend definitions, but are making considered choices to deprioritize them. The reality is that in most cases, these artists have little or no working understanding of how these definitions work and what factors

Realigning the interests of the companies and the creative community is key to the future success and longevity of the television production business. An effective realignment of those interests must reflect the importance of cost as well as revenue.

vi Prioritizing Experience and Investing in Professional Development

Many industry commentators have observed that the fundamental problem with having 600 original scripted series in a single year is that there simply are not 600 writers qualified to create and run their own shows.⁶⁰

While studios and networks have always developed projects with young and inexperienced writers with great ideas, such projects historically struggled to compete with those created and helmed by experienced writer/producers. In part, that bias reflected the industry's general preoccupation with "dues-paying" by young talent and executives, as well as the pervasive and longstanding (though previously less intense) risk aversion among executives. But this preference for proven creators and showrunners had a substantive core to it as well—the creator's presumed role as series showrunner comes with

impact their value. That has no doubt always been the case, at least somewhat, given many artists' personal aversions to engaging with business matters—or worse still, math—and reliance on their representatives to think about those issues so they don't have to. But the more that the talent community collectively writes off backend as incomprehensible and meaningless (as has been the trend during the "Peak TV" era), the less effort artists make to actually develop such an understanding.

A few years ago, the author gave a talk about backend to a group of working writers, which included "baby writers" at the start of their careers, mid-career "working writers," and a few well-established powerhouse creators/showrunners. The purpose of this talk was to demystify backend for these writers, and to help them understand how their choices in writing and production could directly impact their financial interests. At one point, the author explained that, on a cost-plus streaming show, additional production cost necessarily depleted the value of each backend point, even if the streamer paid for every dollar of that initial cost, because of the impact of cost-based interest and overhead charges. Thus, even if a streamer was generous in its financial support for breakage requests, all such requests were necessarily also being subsidized by the participants themselves, in the form of a reduction in the value of their "points." One of the powerhouse creators in the room—someone name-checked in this book—raised their hand to comment that they had been writing and producing television for decades, and never previously understood that even "fully covered" breakage or overage amounts were partially coming out of their own pocket. This creator also said that this knowledge would impact their future decision-making around potential "luxury items" in creative and production. The author took two critical lessons from this experience. First, that at least some artists are highly responsive to financial incentives, if they understand them; and second, that too few talent representatives seem to invest sufficient time or effort into making sure that their clients understand these incentives (or how the business works more generally).

60 To quote legendary TV director James Burrows from a 2023 interview about his work on the revival of *Frasier* (a show whose original pilot Burrows had directed in 1993, just as he had directed the 1982 pilot for *Cheers*, from which *Frasier* was spun off): "When I started out in the seventies, there were three networks and thirty great comedy writers. Now we have five hundred networks and thirty great comedy writers. The product is not going to be as good."

a significant responsibility to lead a smooth and effective production. Some young writers may be precociously talented; but for the “producer” part of the “writer/producer” job, there is simply no substitute for experience.

Under the best circumstances, the rapid spike in the industry’s volume of output would have overwhelmed the supply of qualified creators and showrunners.⁶¹ But this shortage was exacerbated by all the ways that the defining characteristics of the series production process during the “Peak TV” era also deprived young writers of opportunities to develop their skills as producers—short episodic orders, long production periods and hiatuses between seasons, brief writers’ rooms with few writers getting the opportunity to experience and contribute to production, all combined with the undisturbed norm of virtually always bumping writers up a level in job title from project to project (regardless of the depth of their experience from those prior projects).⁶²

Meanwhile, as the industry celebrated its growing prestige and the increasingly “premium” quality of its output, many studios and networks substantially deprioritized producing experience and skill as an essential quality for creators. This was, in part, simply an adaptation to the depleted supply of such creators (because virtually all of them were perpetually employed, if not tied up in long-term exclusive overall deals). But it also reflected a real change in the industry’s priorities and sensibilities, as it elevated and empowered “great writers” and “overlooked voices,” while the streamers’ willingness and ability to support huge budgets and bear most (if not all) overages reduced the apparent stakes of working with creators who lacked both the knowledge and the discipline necessary to effectively run (as well as write) a series, or even a well-formed understanding of how choices made in scriptwriting can dramatically impact the practical realities of budgeting and scheduling in production. Platforms and studios also embraced the opportunity to work with the most respected and admired writers from the feature world, and frequently sold such writers on the opportunity to exercise more meaningful ongoing creative control over a project than they had ever been able to in movies. But in so doing, they willfully turned a blind eye to the fact that most of these writers had no idea how to effectively or responsibly exercise that control. Moreover, such writers tended to be significantly older, richer, and more assured (by years of praise) of their own genius than the “baby writers” from the TV world who would occasionally get an early shot as a creator—and therefore more resistant to sharing power with or accepting help from the experienced showrunners studios often hired on to support them.⁶³

61 FX Chairman and CEO John Landgraf made this observation as far back as 2015, when he delivered his now-iconic speech at the Television Critics Association in which he coined the term “Peak TV” (and predicted that its crest was only a year or two away).

62 This dynamic is explored at length in Chapter 3, Section A.vi (pg. 116).

63 See Chapter 6, Section C (pg. 240).

Many of the new rules around writers' rooms introduced in the 2023 WGA Basic Agreement are intended to—and hopefully will—generate more opportunities for writers to truly develop their crafts as producers as well as writers. These learning opportunities will be critical to their success when these writers eventually get the chance to create and run shows of their own, and will hopefully help remedy the supply side of the problem here. Meanwhile, the widely anticipated decline in overall series production will certainly ameliorate the demand side of the problem. But beyond these numerical shifts, restoring the entire industry to sustainability will require executives to change their own perspectives, and to once again ascribe sufficient value to producing skill and responsibility when deciding what shows to invest in each year.

vii Pilots

Pilots are another example of a generally sound business practice that seemingly fell victim to the “break stuff” ethos championed by Netflix and copied by the rest of the industry in the competitive fervor of the “Peak TV” years. While one can reasonably debate the advantages, disadvantages, and worth of pilots in any given instance,⁶⁴ there is no question that they persisted in the television business for as long as they did because they were a valuable tool both for evaluating a proposed project's creative quality and commercial prospects, and for gaining valuable creative and production insights that would contribute to the resulting series's success.

At first, many creators welcomed being freed from working on pilots, which they often viewed as an unwelcome extra audition step, for which writers and other key contributors were paid relatively little given the intense work such pilots demanded. But now that the mini-room has emerged as the streamers' preferred evaluative tool for prospective series, some writers have reconsidered their positions on pilots, coming to view them as a faster, more effective, and less maddeningly futile-feeling way to prove a project's worth as a series.

Like so many other things about the business, pilots are not purely good or purely bad, so much as they are good for the right project, at the right price.⁶⁵ They are not a panacea, and they require discipline with respect to budgeting. But used thoughtfully, they can help platforms and studios make better decisions, run more efficient productions, and save money in the process. Outside of the broadcast world, they have been wildly underutilized for several years. Studios and platforms alike would do well to rediscover them.

64 See Chapter 3, Sections A.ii (pg. 103) and A.iv (pg. 112).

65 If nothing else, the renewed conversation around pilots reflects the industry's effort to restore some kind of rigor to how shows are developed and evaluated—a welcome relief following many years in which creative decision-making sometimes felt remarkably unmoored from any objective metrics or goals.

viii *The Social and Cultural Experience of Television*

The monoculture of the pre-internet era is irretrievably gone. But the social experience of television does not have to go with it.

For most of its history, even though television programming was mostly enjoyed in the privacy of people's homes, it was a decidedly social experience. Families with only one or two television sets often watched TV together (sometimes following intense negotiations about what channel to put on); even those who watched in relative isolation knew that friends and families were experiencing the same shows at exactly at the same time (subject to time zones); and colleagues gathered daily in office hallways and breakrooms to talk about the big shows they watched the night before.

On-demand streaming has given consumers unprecedented control over their viewing experience, but at the expense of sharing that experience with others. While that is by no means an original observation, it seems like one that gets less attention than it deserves. For all the metrics that streaming platforms use to understand their customers' choices around initiating and cancelling subscriptions, to date, they seem to have done little to generate or measure the kind of bona fide shared social experiences that truly cement a viewer's loyalty to a show (or the platform that provides it).

Reviving the social experience of television does not require abandoning the convenience of on-demand streaming; it only requires getting creative with it. In a September 2023 appearance on Matt Belloni's *The Town* podcast, producer and former NBC President of Entertainment Warren Littlefield speculated about how Netflix could turn the release of *Wednesday*'s second season into a "Must See TV"-like event by premiering its first episode on a Wednesday, with special access to additional episodes only for those who watch the season premiere on its release date (with other subscribers forced to wait until the weekend for access to the rest of the season). Such a unique approach would cost Netflix little or nothing, but it would go a long way toward restoring television's capacity to generate meaningful cultural moments (and along the way generate huge amounts of free "earned media" from press covering the innovative release).⁶⁶ The industry as a whole thrives on the relevance that comes from that kind of major shared cultural moment—and streamers have struggled to capture the "appointment viewing" quality of the timed weekly exhibition of a major ongoing series. To secure the industry's future, it is critical to develop novel marketing and releasing strategies that revive the social experience of television (and with it, television's place as a common cultural language).

Preserving the essentiality of television programming also requires some humility on the part of television executives, who are fond of programming

⁶⁶ Leave it to a guy who ended his (legendarily successful) run as a network president in 1998 to give the streamers great advice about their programming and releasing strategies.

for their own tastes rather than those of the general viewing public. Television has long been the exemplar of “mass media”—which is to say, media for the masses. But the success of faith-based programming like 2023’s *The Sound of Freedom*, middle America’s longstanding love affair with *Young Sheldon*, and CBS’s perennial success as America’s most-watched (non-streaming) network all speak to the broad disconnect between the tastes of most professional Hollywood creatives and those of much of the general public. A healthy and vibrant industry will continue to take chances on challenging programming that may not be for everyone. Creative curation at the highest level is an alchemical mix of giving people some of what they want, and some of what they don’t yet know that they want. But the industry’s professionals, eager as they are to challenge the tastes of their audiences, must also remember to recognize, acknowledge, respect, and serve those tastes as well—if only because, if they fail to do so, they will not have the ongoing opportunity to make the things they most want to make either.

E What About Regulation?

Many industry observers have called for the federal government to intervene to help right the industry’s course by implementing a modernized version of the financing and syndication (or “fin-syn”) regulations, that, until the early 1990s, generally prohibited U.S. broadcast networks from owning their own content. For decades, this regulatory prohibition, which blunted the extraordinary leverage that otherwise could be (and eventually was) exerted by the handful of major broadcasters, fostered a robust and dynamic market of independent television producers, as well as vibrant competition among the major networks for the best shows. Some producers—the Aaron Spellings and Norman Lears of the world—got very, very rich.

Virtually as soon as these regulations were repealed, the broadcast networks pushed aggressively into content production and ownership, ordered content preferentially from their own affiliated studios, and squeezed most independent producers out of the market, thereby setting the industry on the course that led it to where it is today. The thinking goes that a restored fin-syn scheme would help bring the industry back to the vibrant and decentralized competitive landscape of the 1970s–80s.

It sounds great. And the “Rules of Trade” that govern content licensing in the United Kingdom, a spiritual cousin of the U.S.’s defunct fin-syn regime, show that this regulatory approach can work in the modern content market. But it is nevertheless a terrible place to rest our collective hopes for the industry’s future.

The fin-syn regulations of the pre-internet era were promulgated by the FCC, whose jurisdiction over broadcast and (eventually) cable networks was indisputable. But the FCC has always had an uncertain regulatory relationship

with the internet, one which has been heavily constrained by politics and pragmatism.⁶⁷ As of this date, its constitutional and statutory authority to impose such requirements on streaming platforms is debatable at best.

Even greater than the legal obstacles to a modern fin-syn revival, however, are the political ones. Any effective version of a restored fin-syn scheme would require action from Congress. That alone renders it moot as a viable path for reform, at least for the foreseeable future. There is simply no discernible political coalition to take on the complex and wonky work of media consolidation reform. Existing moneyed interests have more than enough motive and opportunity to stymie meaningful reform.

There is a spirited debate to be had about the wisdom of a fin-syn regulatory scheme for the modern day, but as of this writing, it is no more than an academic debate. Those who hope to restore a diverse and dynamic original content licensing marketplace must look not outward to legislators and regulators, but inward to executives and negotiators to design and embrace a dealmaking framework for a healthy and long-lived industry.

F Deals of the Future

If we must look to our own decision-makers and dealmakers to chart the course ahead, what kinds of deals can they make to create and sustain this optimistic vision of the industry's future?

i *Narrowly Tailored Rights*

With the industry looking to rationalize its spending at every level, the standard cost-plus licensing model is ripe for reform. For the first time in years, the incentives seem aligned at every level.

Platforms are looking to cut their content costs and achieve (or cement) long-term profitability. One surefire way to do so is to stop paying for rights they cannot use and exclusivity they do not need. There now seems to be sufficient market experience to conclude that, from the perspective of both sides, the standard cost-plus deal that dominates the contemporary market is too long in term, too expansive in granted rights, and too restrictive in its holdbacks on other exploitation. For years now, the motivating logic behind content licensors' dealmaking has been "*how many rights can I grab for little or no extra charge?*" In the best version of the years ahead, that logic will shift to "*how much money can I save by acquiring only the rights I need?*"

In the modern market for original content, studios have lost the opportunity to choose among licensing opportunities with diverse risk and reward profiles.

67 Many, *many* books and articles have been written about the years-long battle over "net neutrality," a fascinating and vitally important subject that is beyond the scope of this book to discuss.

Many would welcome the opportunity to take on *some* measure of additional risk if it came with sufficient rights to offer the promise of meaningful upside from a major success. Some particularly entrepreneurial studios might be willing to accept even less in guaranteed compensation, if that concession came with major bonuses that allowed the studio to capture a much greater share of the pie generated by a bona fide hit. Platforms that are willing to limit their demands to the rights they need, rather than the rights they can get, will likely find many studio partners eager to take them up on the opportunity to bet on their own success (and with them, millions of dollars in savings from reduced license fees).

ii Revenue Sharing

A classic (but lately underutilized) deal structure is the revenue share. Revenue sharing is a simple and intuitive way to align the interests of the parties in a deal. That alignment of interests—between talent and studios, and between studios and networks—has been a key characteristic of the television business in its most vibrant and healthy eras.

Revenue sharing reduces the financial stakes of “giving up” valuable rights in a deal. It invests a payor of money in the success of the payee, and even offers the promise of an effective “refund” to the payor of at least part of its investment. Although negotiators justifiably make frequent use of intuitive defaults like 10% shares and 50/50 splits,⁶⁸ the percentage scale still goes from 0 to 100, and revenue sharing arrangements can be constructed with nuance and specificity to intelligently allocate potential value from a deal.

Just as importantly, revenue sharing also reduces the *reputational* stakes of giving up those rights. Too often, savvy executives who know better are nevertheless strongly incentivized to make expedient, rather than good, choices. Consciously or not, the question “*Will this get me fired?*” hangs over every consequential decision an executive makes. This is of course human nature, but it is also a distressingly rational response to the sometimes capricious and unmeritocratic nature of professional advancement in the entertainment industry. There are few things more likely to put an executive on the hotseat than a competitor thriving on content the executive’s company created without benefit to the company itself.⁶⁹ As a result, at the highest levels of corporate decision-making, consciously or not, dealmaking strategy is too often oriented toward avoiding embarrassing outcomes rather than maximizing the opportunity for successful ones. Whether they realize it in the moment or not, negotiators (as well as the principals they represent) are sometimes so afraid to make the other side look good, they would sooner give up an opportunity to “grow the pie” of

68 Some business affairs executives joke that they only know how to count in increments of \$2,500.

69 Or, worse, content they declined the opportunity to create.

value in a deal than let the other side capture too much of it—a myopic perspective that ignores myriad ways to align interests and spread value holistically across a deal as complex and multifaceted as the license agreement for an original series.

Fixing the tangle of risks, anxieties, and perverse incentives that drive such problematic decision-making in business is well beyond the ambitions of this book. But what it can do is highlight revenue sharing as an elegant, mutually beneficial, and extremely easy way to blunt those risks, ease those anxieties, and resist those perverse incentives when crafting the deals that represent the lifeblood of content businesses.

iii Success-Based Compensation

One of the essential characteristics of the television business, when it was thriving the most, was a reliable relationship between success and reward. The boom-or-bust nature of content creation required that wins be *big* wins—lucrative enough to absorb the losses and the cost of doing business, with plenty to spare for the dividends and/or private islands. But the cost-plus model of streaming licensing flattened the studio business into a no-risk/limited reward proposition—never lose money, never hit it big. And as the model matured, the risk stayed as low as ever, but the rewards got less and less meaningful.

As one of a variety of licensing models, cost-plus streaming could be “part of a balanced breakfast” of business opportunities for content providers. As the only game in town, it has begun to squeeze the life out of the studio business.

The dream of success-based compensation in streaming has remained out of reach for years because of the streamers’ stranglehold on the data necessary to make such a system work. But between the growing importance of advertising and streaming, and the sliver of data transparency obtained by SAG-AFTRA and the WGA following their 2023 strikes, the door has opened for data to become a meaningful factor in creative dealmaking around success-based compensation for both studios and talent. Though the process will surely be gradual, it seems likely that in the long term, the streamers will eventually meaningfully integrate performance data into the structures of both their license deals and their participations definitions—a process that seems to have already begun, at least on the talent deal side.

Success-based compensation has a vital role to play not only in the licensing market for original content, but also in licenses for library content that can sometimes yield surprising runaway phenomena. UCP will materially benefit from the success of *Suits* on Netflix, but only in indirect ways; the unexpected value generated directly by the show’s explosive success on the platform was captured by Netflix and Netflix alone.⁷⁰ Netflix clearly stands to benefit from

70 See Chapter 3, Section C.i.a (pg. 129).

attracting more major studios willing to take its money for their library series. It will get many more shots at finding the next *Suits* if it offers those studios an opportunity to capture some of the incredible surplus value created by an unexpected phenomenon like *Suits* on Netflix. And in the process, it might also save a few bucks on all the shows that fail to perform for it, let alone achieve *Suits*-like heights.

Indeed, the hard reality for studios and talent alike is that raising the compensation ceiling for high performers will require lowering the floor for low performers, and public data will force platforms, studios, and creators alike to abandon pretenses of commercial success from well-liked but little-watched series. The era of “treating everything like a hit, except the actual hits” must end for the era of “treating hits like hits again” to begin.

This is an ideal everyone can subscribe to—until they find themselves doing worse in the new system than they would have done in the old. Though it seems clear that this is the world that much of the business and creative community justifiably professes to want, it is far from clear that they have the endurance and will necessary to achieve it.

iv The New Best Deal in Town

Since at least the moment when FX’s *The Shield* and HBO’s *The Sopranos* brought cable into the original series licensing marketplace, there has often been one buyer that is the semi-official “best deal in town.” The title has been held at various times by Netflix for its terrifically high premiums, Amazon for its comparably high premiums and more favorable rights structure, and (at separate times) Hulu and Max for standing out as deep-pocketed domestic-only buyers in a market increasingly dominated by global platforms. For those stretches when they offered the “best deal in town,” these platforms had an advantage in every competitive bidding situation. Of course, other than in extreme circumstances, business considerations could never overcome considerations of a project’s creative fit and the network’s apparent commitment to it. But more often than not, the platform offering the best deal for a project would also come to feel like its best creative home. Word of an exciting new opportunity travels fast, and the market has shown itself to be responsive to the quality of the deals on offer from each buyer platform.

As of this writing, there is no “best deal in town.” The deals are, for all intents and purposes, the same.⁷¹ This represents an opportunity.

71 As of this writing, Apple is arguably the current “best deal in town” in terms of offering the highest premiums while supporting the highest budgets. But the basic rights architecture of its license deals with studios is equivalent to that of every other streamer (if not somewhat more demanding), and Apple both has the smallest subscriber base and tends not to extend significant marketing support to individual titles. No matter how appealing the immediate financial prospects of an “Apple Original Series” may be, it is certain that fewer people will see it than if that series were available

Smaller platforms often copy the templates used by the top-tier SVODs, if only because they can—these deals are well-established and well-understood in the market, and fairly easy and convenient to replicate. But a scrappy player whose executives are safe to take risks has the chance to establish itself as the new “best deal in town,” and secure for itself priority access to a universe of top-tier projects that may have been beyond its reach to date.

The nice thing about being the “best deal in town” is that it does not necessarily cost money;⁷² only a willingness to allow one’s partner to make more money (in which the platform itself can participate),⁷³ and a somewhat more constructive (and less competitive) view of tactical non-exclusivity. It also isn’t a lifetime commitment. As each new “best deal in town” secures more and more premium projects for development and production, the platform that offers it builds up the deep bench, goodwill, and leverage it needs to slowly pull back on its deal terms over time, financially or otherwise⁷⁴—thus opening the door for a new “best deal in town” to emerge.

Someone should want to be the new “best deal in town.”

G Who Stands to Win?

No doubt, the years ahead will be challenging ones for the television industry and for the people and companies operating within it. But it may also offer opportunity for some.

The first edition of *The Business of Television* closed with a prediction that the companies that would thrive in the years to come would be the smallest/most entrepreneurial and the biggest/most diversified, while mid-sized companies with specialized businesses would be left to muddle through as best they could. That prediction has been borne out, at least in part. Startup companies, especially those aligned with talent, have benefitted tremendously from low interest rates and active private investment markets, which delivered relatively easy access to capital and generous valuations, often with surprisingly little rigor demanded by well-funded investors eager to get in on an apparent content gold rush. And the largest of the traditional media companies, Disney and Comcast/NBCUniversal, seem to have weathered the challenges of the last few years somewhat more successfully than their smaller “major” rivals, like Warner Bros. Discovery and Paramount Global. But as the Federal Reserve has sought to rein in inflation and deliver a “soft landing” (reducing inflation

on other platforms. If nothing else, this illustrates that the “best deal in town” and the “best home for the project” are not always necessarily the same thing.

72 But it can certainly also mean just spending a lot more money, if that is what one has to spare.

73 See Section F.ii.

74 Hopefully in ways that actually generate value for itself, as opposed to just depriving the studio of it.

without triggering a recession), interest rates have risen quickly, and those capital markets have substantially dried up. Meanwhile, the fraught integrations and at best mixed results of companies that sought to bulk up via M&A activity, as well as the struggles of the smaller majors like Warner Bros. Discovery and Paramount Global, have illustrated that getting big *enough* to compete directly with technology companies is an extremely difficult and risky strategy to execute successfully.

As the industry moves beyond the “Peak TV” and Streaming Wars eras, mid-sized companies now look poised to be the beneficiaries of this moment of transition. Sony/Columbia is the model for this kind of success, leveraging its status as the largest remaining “true independent” to become the industry’s most prolific “arms dealer” to every competing service, while most effectively and uncompromisingly protecting its legacy businesses (especially in feature production and distribution), without burning huge amounts of capital trying to compete in the crowded market of streaming services. Sony’s film and TV business is big enough to finance its own production, take on calculated risk, and directly exploit whatever rights it is able to hold onto in its deals with partners, while also small enough to focus on what it does well, make relatively simple and unconflicted choices about how to generate the most value, and not burden itself trying to beat significantly better-funded rivals at their own game.⁷⁵

Most of Hollywood’s traditional powers have sought to respond to the arrival of technology companies in the entertainment industry by essentially trying to transform themselves into technology companies—at great expense, and with thus far disappointing results. They have sought to survive and thrive by “getting big,” but are now finding that there simply might not be any such a thing as “big enough” to truly succeed in that strategy. And in these choices, they have been forced to walk an almost impossible tightrope—using the free cash flow from their hugely successful but inexorably withering legacy businesses to fund their transformations for the future, but in so doing, only accelerating the decline of the historical businesses on which they are relying in that effort.⁷⁶

75 Sony has been widely praised for succeeding in recent years by essentially zigging when the rest of their competitors zagged, and deserves credit for both its focus and its execution. That said, Sony’s decision to eschew moving into content exhibition and retain its focus on production is as much a function of pragmatism and necessity as it is strategic genius. For many years, Sony explored ways to transition into the consumer-facing exhibition market, kicking the tires on an acquisition of Starz before Lionsgate bought it in 2016, and engaging in extensive discussions with the affiliated Sony Interactive Entertainment about building its own subscription service in the PlayStation ecosystem (which operated its own short-lived vMVPD offering, PlayStation Vue, between March 2015 and January 2020). It was only after these efforts failed that Sony definitively embraced its focus and independence as a pure-play content producer.

76 People sometimes talk about running a startup as “building the plane while you’re flying it.” The task of the major Hollywood studios, as they have undertaken their digital transformations, could be compared to rebuilding a zeppelin into a plane while flying it, but by doing so, using and depleting the hydrogen fuel that is keeping the whole thing afloat until the new engines can take over.

As the industry's "walled gardens" are dismantled over the next several years, there is an opening for capable, capitalized, just-the-right-size companies like Skydance, Legendary, MRC, and Fifth Season to replicate Sony's strategy (and success) of the last five years.

H Final Thoughts

The portrait of the years ahead painted in this Conclusion is not a happy or easy one. The industry has spent years struggling to transform itself for the future, and not only is that task far from complete, but the industry's powers seem to have no choice but to reverse course on many of their most consequential choices of the last decade if they are to finally secure their futures. As critical as this book can be of these companies' recent choices, it is important to also acknowledge the incredible complexity and difficulty of the task they have undertaken.

The next era is unquestionably one of contraction, but that does not have to be a purely bad thing. The strain of building up to 600 scripted originals in a single year has made for too much mediocre content, as well as for too much great content that—despite the investment of so much blood, sweat, and tears, and so many millions of dollars—is simply doomed to never find an audience. But this industry, as it is built today, was never built to last, and a whole lot of very smart and very powerful people realized that early on, but were given every incentive to pretend otherwise.

Television, as both an industry and a creative medium, thrived for decades with only three networks. It thrived even more for several years with a fourth (after the launch of the Fox network).⁷⁷ Four networks was a universe small enough for audiences to wrap their heads around, but big enough for networks to continue to experiment and innovate and to develop distinct identities and audiences. There is no question that creativity blossomed, and audiences benefitted, from the emergence of cable networks that could invest in the creation of the kinds of shows that the broadcasters never could, particularly (but not exclusively) HBO, FX, and AMC. But the rapid proliferation of viewing options over the last decade is not the continuation or acceleration of a long-term trend; it is an anomaly, and one that seems to have already exhausted the financial and attentional appetites of the audience. The industry's "new normal" might look a whole lot like the old one—four to six meaningful and productive outlets at a time, each offering a bit of the same as every other, and each offering something unique and distinct.⁷⁸

77 And fifth, if you count the collective WB-UPM-C/W network.

78 Since the author assumes that readers expect some kind of prediction here about which ones: Netflix, Amazon, Disney (incorporating Hulu and FX), and a yet-to-be-created fourth company that combines at least two extant companies (with the author betting on Comcast spinning off

Even if that new normal will be a creatively and economically healthy, happy, and productive one,⁷⁹ there is no doubt that the road there will be difficult, painful, and perhaps forever uncertain. But success in entertainment has never been easy, and the industry's history is rich with moments of existential threat from dramatic transformation—to name just a few, the traumatic collapse of the “Studio System” that dominated the 1910s–40s; the humiliating subordination of Hollywood's major powers to gin and oil and home appliance companies in the 1960s–70s; the rise of independent film in the 1960s, followed by its decline in the 1980s, its rise again in the 1990s, and decline again in the 2000s; and the sudden and dramatic proliferation of new cable networks from the 1980s–2000s (followed by their rapid decline in the 2010s–20s). Although many of the industry's current “majors” trace their roots to the dawn of Hollywood, most of those companies have changed hands several times. And that list has never stayed exactly the same for very long, as once seemingly invincible powers like MGM and RKO have occasionally succumbed to the overwhelming challenges of these transformational moments.

So yes, the next five years or so are probably going to be no fun for most everyone. And any given company might not survive that stretch, no matter how powerful its brand or how storied its history. But the industry will carry on, as it always has. And because people will always want and need their stories, there will always be a special place in our culture and in our economy for the people and companies who can bring those stories right into people's homes.

NBCUniversal into a combination with Warner Bros. Discovery, with the new company also saddled with some of Comcast's debt, but hopefully not to the crippling extent of Warner Bros. Discovery following WarnerMedia's spinoff from AT&T). To those, add a few broadcast networks, one or two of which will be part of smaller, steady but low-growth, totally linear-oriented companies that do not attempt to compete in streaming, plus Apple as a wildcard that will do whatever it wants for however long it wants to do it (which allows for a very wide range of outcomes). And around those behemoths, a small but substantial community of mid-sized, highly professionalized, “pure” studios/content providers that look to ally with every platform (rather than to compete with any of them).

79 No promises on this.

GLOSSARY

- 100/5 Royalty.** A standard rerun formula for episodic royalties, most commonly in the context of broadcast network series. It means that the holder of the royalty receives additional payments equal to 20% of the initial royalty amount, payable for each of the first five reruns of the applicable episode (i.e., a further 100% of the royalty over five reruns, hence, 100/5).
- 12/6 Proration.** A standard proration formula applicable to series sales bonuses. It means that the full bonus is payable based on the production of twelve series episodes (excluding the pilot), with proration downward for smaller production runs, and no bonus payable for fewer than six episodes produced.
- 3/3/10 Package.** A standard traditional formula for agency package commissions, comprised of three elements: (1) an up-front budgeted fee equal to 3% of the initial domestic network license fee; (2) an additional fee, equal to the first 3% fee, which is deferred and payable (if ever) out of the “Net Proceeds” of the series; and (3) a backend equal to 10% of MAGR (generally on the same definition as the most favorable definition accorded by the studio to any of the agency’s clients on the project, but with no third-party participations of any kind taken off-the-top).
- 5/2.5 Royalty.** A standard royalty formula granted to actors in connection with merchandising. It means that the actor receives 5% of the studio’s “net merchandising receipts” (the studio’s merchandising receipts, less distribution fees for the studio or its subdistributors, and out-of-pocket expenses), reducible by royalties granted to other actors featured on the same piece of merchandise to a floor of 2.5% of the studio’s “net merchandising receipts” from each such product.

5/7 Holdback. A standard holdback formula in underlying rights deals, providing that specified reserved rights are “held back” (i.e., may not be exploited) until the earlier of five years following the initial exhibition of a production based on the property, or seven years following the execution of the rights agreement.

Above-the-Line. A category of production costs that covers writing and underlying rights fees, plus fees payable to the major talent (i.e., actors, writers, directors, and producers) who centrally influence and guide the creative process. The term refers to the traditional format of budget “top sheets,” which displayed these costs above a literal line.

Active Integration. A form of product integration in which the characters on screen actively touch and use the advertiser’s products, the products’ logos are visible and reasonably conspicuous on screen, and characters may go so far as to mention the products by brand name in dialogue.

Actual Malice. A legal requirement for defamation liability, derived from the First Amendment, which applies when the allegedly defamed individual is a public figure. It requires that, to be liable, the speaker knew that his or her statement was false or acted with reckless disregard for the statement’s truth or falsity.

Affiliation Agreement. An agreement entered into between an independently owned local broadcast station (i.e., one that is not owned by one of the four major broadcast networks) and a broadcast network, by which the station gains access to such network’s programming and agrees to terms around the sharing of revenue and advertising inventory.

Agency Package Commission. A payment made to a talent agency, out of the budget and profits of a television series, in exchange for the agency’s efforts in bringing together the key creative elements of the project, or alternatively, as a condition of the engagement of a single particularly significant element that is represented by the agency.

Agent. A licensed representative of motion picture or television talent (e.g., actors, writers, directors, producers, etc.) whose principal role is to find work for his or her client.

Allied and Ancillary Rights (or Subsidiary Rights). A set of rights to use and/or exploit elements of a copyrighted work, beyond the distribution and exhibition of the actual work. Prominent examples include licensing and merchandising, soundtracks, music publishing, novelization, theme park, and live stage rights. As a technical matter, these may include derivative/subsequent production rights, although such rights are typically addressed separately.

AMPTP. The Alliance of Motion Picture and Television Producers, a trade organization that represents Hollywood’s major motion picture studios, television networks, and more recently, the largest tech streamers. The

AMPTP negotiates on the industry's behalf collective bargaining agreements with all of the major entertainment unions, under the control of its "Class A" members—currently Disney, NBCUniversal, Paramount, Sony, Warner Bros. Discovery, Netflix, Amazon, and Apple.

Arcing Competition Series. A type of unscripted competition program that follows a narrowing group of competitors over an entire season, such as *Survivor* or *Top Chef*. A distinct type of format from, for example, traditional game shows that bring in new contestants for each episode, or for which only a single returning champion returns from episode to episode.

Article 14 Writers. Any writer with a title of "Story Editor" or above, whose terms of employment are covered by Article 14 of WGA Basic Agreement, governing "Writers Employed in Additional Capacities."

Artificial Span Protection. Directly negotiated limitations on the number of weeks of services that can be required from a writer who is not eligible for span protection under the WGA Basic Agreement before they become entitled to overage compensation.

Arranged Marriage. An informal term for a one-off co-writing/co-creation arrangement between two writers who do not customarily work together as a "bona fide writing team."

AVOD. "Advertising-Supported Video on Demand," i.e., customer access to one or more pieces of on-demand streaming content, which is provided at no charge to the customer but is accompanied by advertisements.

Backend. A colloquial term for defined contingent compensation or participation in the contractually defined profits of a series.

Backstop. A slang term for a minimum revenue guarantee. In the context of network license and co-production agreements, it refers to a network or co-production partner's obligation to reimburse the other party for any shortfall between the party's actual revenues from exploiting certain specified rights on the one hand, and contractually defined revenue benchmarks for those same rights on the other hand.

Backup Script. An episodic script for the second (or later) episode of a proposed television series, commissioned by a studio or network during the development phase (in addition to the pilot script), to demonstrate the potential of the series, persuade executives that there is a real plan for the proposed series, and assist executives in making series ordering decisions. The applicable WGA scale minimum episodic script fee for a backup script is 115% of the amount applicable to episodic scripts that are written after a series has been greenlit.

Barter. An agreement, often included as part of a syndication license between a studio and a broadcast station, by which the studio that produces and distributes the show gets the right to sell, for its own benefit, some portion of the available advertising time during the program.

- Baseball Arbitration.** An arbitration system for resolving negotiating impasses, borrowed from Major League Baseball, in which both parties submit their proposed deal terms to a neutral third-party arbitrator, who chooses one of the proposals as-is (without modification or compromise).
- Below-the-Line.** All production costs other than “above-the-line” costs, including physical production expenses, and services fees for editors, camera operators, electricians, carpenters, and the dozens of other types of crew members who participate in production.
- Best Seller Bonus.** In an option/purchase agreement for a book that has not yet been published, a negotiated escalation to the purchase price triggered by the book’s appearances on the New York Times Best Sellers list.
- Bible.** A WGA-covered written document prepared by a writer that sets out major themes, storylines, character arcs, or other information about an intended series. A series bible is understood to be longer and more detailed than a “format”—another WGA-covered piece of writing that serves the same purpose, but requires lower scale minimum compensation—but there is otherwise no standard length, structure, or contents for such documents, nor any clearly delineated features that differentiate bibles from formats, leaving writers to largely craft them as they see fit (with the input of the studios and/or networks that have commissioned them).
- Bite.** A network’s option to order production of a pilot and/or series, and/or the option to engage a service provider in connection with such a production. The term is most often used to refer to options to order broadcast series, for which the applicable dates for each “bite” are based on a standard broadcast calendar, but may also be used to refer to options to order non-broadcast series, which are based on a negotiated period of months.
- Blind Script.** A firm (i.e., guaranteed, non-contingent) deal to pay a writer to write a pilot script based on a to-be-determined, mutually approved creative concept, whether or not the studio is ultimately able to enter into an agreement with a network to develop the project.
- Block Shooting.** A production model in which episodes are shot in two- or three-episode batches, with a single director engaged for each block to allow for cross-boarding.
- Bottle Episode.** A mid-season episode intentionally written with very few speaking parts and/or locations, so that it can be produced unusually cheaply, to get a production season that is running overbudget financially back on track. One of the most celebrated examples is the Rian Johnson-directed “Fly” from the third season of *Breaking Bad*.
- Box Rentals.** Small additional weekly payments to compensate a line producer or department head for contributing the individual’s own equipment for use on the production, from the personal laptops these individuals use in their day-to-day lives to extremely specialized lens and lighting kits that will be used on set.

Branded Content. Audiovisual content (often short-form digital series) that is produced in partnership with, and primarily or entirely at the expense of, major brands who wish to feature one or more of their products.

Break Point (or Break or Breakeven). The point at which revenues exceed costs and other deductions pursuant to a contractually defined formula, whether in a contingent compensation definition or a waterfall of distribution revenues between co-production partners (after which participants and partners begin receiving a share of calculated “profits”).

Breakage. Extra amounts paid by a network, beyond its initial negotiated license fee, to support proposed “creative enhancements” to a series that are not contemplated by the ingoing budget (typically to enhance the production value or marketability of the show or episode).

Breaking the Season. A slang term to describe the process by which the writers in the writer’s room of a television series determine the overarching narrative and character arcs for the season before the individual writers and writing teams are assigned specific episodes to write.

Broadcast Series. A shorthand term to refer to a series that is produced for primetime exhibition on one of the four major broadcast networks (ABC, CBS, Fox, or NBC).

Broken Pilot (or Busted Pilot). A produced pilot that is not ordered to series.

Business Affairs Executive. An individual, usually (but not always) a lawyer with years of dealmaking experience, who negotiates the substantive terms of a company’s key business agreements.

Cable Syndication. The licensing of library episodes of existing television series for reruns on a basic cable network.

Carriage Agreement. An agreement by which an MVPD agrees to pay a network some portion of its collected subscriber fees in exchange for the MVPD’s right to include the network as part of its channel offering to customers.

Changed Elements Protection. A term in a first-look agreement requiring a producer to resubmit projects for which the studio initially declined to proceed with development if material creative elements are added or changed before the project is set up with a third-party studio or network.

Chargebacks. A budgeted charge payable to a production company in exchange for the company’s provision of certain critical production resources owned by the company (e.g., office space; studios and other production spaces; editing bays and other costly computer hardware and software; and cameras, lighting, and other physical production necessities), which, if not provided by the company, would have to be obtained from a third-party. Such costs are typically charged at market rates and passed through to the financier of the series, most often in the context of unscripted productions.

- Charge-off.** The recoupment of an individual's earned services fees against their guarantee under an overall term deal, with the allocable amounts (pursuant to negotiated "inside terms") charged into the budget of each project on which the individual works.
- Churn.** In the context of streaming, the rate or number of subscribers who cancel or let their subscriptions lapse, usually measured as the percentage of subscribers that disconnect per month. "Churn" is also sometimes used less technically to describe the tendency of some subscribers to repeatedly cancel and re-subscribe to a service, based on the timing of releases of certain content.
- Classic Merchandise.** Merchandising that is based solely on the intellectual property elements of a preexisting work (such as a book or comic book), without incorporating any of the specific original intellectual property elements of a series that may be produced based on that underlying work.
- Clearance.** The process of obtaining licenses (or making a legal determination that a license is not needed) for the depiction of material that appears on-camera, such as real-life company names featured in plot and/or dialogue, or logos on wardrobe, props, and/or set dressing.
- Co-Commission (or International Co-Commission).** A project produced based on concurrent pre-production commitments from separate exhibitors in multiple territories. Sometimes referred to as "international co-productions," although such arrangements may or may not technically provide for co-ownership among international partners.
- Co-Exclusive.** A term describing content licensed to a third-party platform on an exclusive basis relative to all other third parties, but allowing ongoing exhibition of the same content by the licensor on one or more of its affiliated platforms.
- Commercial Tie-Ins.** An arrangement between a show and a brand, by which the brand provides advertising for the show as part of advertising its own products.
- Companion (Digital/Streaming) Rights.** Additional digital/streaming rights that are granted to a network licensee, beyond the standard rights necessary for the network's linear exhibition of the series, to allow the network to provide its viewers with convenient digital access to the show, e.g., through a network-owned/affiliated on-demand streaming application and/or through an MVPD-run VOD service.
- Conflict-Free Window.** Under the SAG-AFTRA Basic Agreement, a window of at least three months following the completion of principal photography of a season (with at least thirty days' notice of the start of the window), during which series regulars are permitted to take permitted outside work without first having to confirm schedule or availability with their first-position studio employer.

Consulting 1:1 (or Consulting One-for-One). Shorthand for a deal term, typical in agreements with television producers, providing for the producer to be engaged as a consultant on a pay-or-play basis for one year for each year that the individual had previously rendered executive producer services on the program.

Consulting Producer. A producing credit of ambiguous hierarchical stature, which may be granted to writer/producers who are working on a part-time basis or otherwise below their usual rank and/or pay. This credit may also be accorded, as a higher-level option than “Executive Consultant,” to an underlying rightsholder who agrees to render ongoing consulting services as part of an option/purchase agreement for rights he or she controls.

Contingent Compensation (or Contingent Participation or Profit Participation). A contractual financial interest in the contractually defined “profits” of a series, granted as a key substantive term in various types of agreements for writers, producers, directors, underlying rightsholders, and sometimes actors.

Contract of Adhesion. An agreement that is presented on a take-it-or-leave-it basis, where the party with superior bargaining power refuses to negotiate most or all of its terms.

Co-Production Agreement. An arrangement between two or more studios to jointly produce, own, and distribute a television series.

Copyright. The core intellectual property asset of the content industry, protecting “original works of authorship fixed in any tangible medium of expression,” including: (1) literary works; (2) musical works, including any accompanying words; (3) dramatic works, including any accompanying music; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; (7) sound recordings; and (8) architectural works. The owner of a copyright exclusively enjoys four basic rights (which include the exclusive right to authorize others to exploit these rights): (1) to copy or reproduce the copyrighted work; (2) to prepare derivative works based upon the copyrighted work; (3) to distribute the copyrighted work; and (4) to publicly perform or display the copyrighted work.

Cord Cutting. The phenomenon of consumers canceling their subscriptions to traditional cable, satellite, and other MVPD services in favor of consuming content through a variety of free over-the-air and internet-based subscription services.

Cost of Production. The actual, out-of-pocket third-party costs paid out by a studio to produce a television series.

Cost-Plus Deal. A license agreement, typically between a studio and a streaming service with an international footprint (such as Netflix or Amazon), in which the up-front license fee exceeds the cost of production of the series.

- Credit-Based Entitlements.** Entitlements in a writer/producer deal that are contingent on the writer receiving “sole” or “shared” “created by” credit on the series, i.e., locks, royalties, bonuses, backend, and subsequent production rights.
- Cross-Boarding.** The scheduling of production to maximize the efficient use of common locations, actors, or other resources across all of the episodes in a single block with a common director (rather than only across a single episode, as in the traditional episodic production model).
- Cross-Collateralization.** In the participations accounting context, the extent to which revenues and expenses from separate categories of exploitation are aggregated with one another for purposes of determining whether expenses have been recouped and participations are due. In the context of an overall term deal, the extent to which the guarantees paid and fees recouped in separate years of the deal are aggregated with one another for purposes of determining the vig and the availability of fresh cash.
- Day-and-Date.** The simultaneous release of a television series across multiple territories (e.g., in the United States and abroad) or media (e.g., simultaneous release in theaters and streaming, without an exclusive theatrical window).
- Day Player (or Weekly Player).** A series performer in a minor role (who may or may not be named, have spoken dialogue, or qualify for screen credit), who is typically paid scale minimum compensation and engaged pursuant to a simple, usually unnegotiated (and sometimes largely non-negotiable) form “day player” or “weekly player” agreement.
- Defamation.** The general term for a legal claim involving injury to an individual’s reputation arising out of the publication of false statements about the individual. Sometimes referred to colloquially as “libel” or “slander.”
- Deficit.** The difference between the cost of a series and the initial license fee paid by the commissioning network, representing the studio’s at-risk investment in the series.
- Deficit Recoupment.** A negotiated term of network license agreements providing for the network’s reimbursement to the studio, typically in the fifth (or fifth and sixth) seasons of a series, of the studio’s production deficits from the first four production seasons of the show.
- DGA.** The Directors Guild of America, the union representing professional directors working in the U.S. television industry.
- Digital Rights.** In a license agreement with a traditional broadcast or cable network, exploitation and distribution of a series to customers via the internet, typically on an “on demand” (rather than preprogrammed/linear) basis, that does not fall within the definition of “network exhibition.” In a license agreement with a digital platform, the direct exhibition rights that are granted by the studio to the licensee.

Distribution Expenses. All expenses incurred by a studio in the process of distributing a television series, including, without limitation, advertising and marketing expenses; costs for subtitling or dubbing of foreign versions; the expense of duplicating and transporting physical materials to licensees; clearance fees that have not otherwise been accounted for as production costs; residuals and reuse fees payable to talent pursuant to applicable union collective bargaining agreements; costs of enforcement (including intellectual property and audit litigation); and other so-called “off-the-tops” (referring to checking, collection, currency conversion, and certain tax [but not income tax] expenses).

Distribution Fees. A defined percentage of revenues received from nearly all sources, which the studio retains as compensation for its investment of time, effort, overhead, and other resources in the process of distributing a television series.

Dollar-for-Dollar Basis. The reduction of a negotiated financial term—such as an up-front fee, bonus, or contingent compensation entitlement—by a dollar for every corresponding dollar paid or committed to a third-party (as specified in the applicable deal). In the context of backend, from the perspective of profit participant with a favorable backend definition, a “dollar-for-dollar” reduction is more favorable than a “point-for-point” reduction (in which the participant’s entitlement is reduced by a percentage point for every percentage point of contingent compensation granted to a third party, as specified in the deal) if the value of such third party’s “point,” as defined in such third party’s own agreement, is less than the value of a “point” of backend for the party bearing the reduction.

Dollars-for-Points. Bonus structures adopted by streamers for their self-produced series, replacing traditional contingent compensation formulas with a system of flat bonuses “per point,” tied to benchmarks like renewals and viewership rankings, sometimes with tiered value tables approximating the dynamic of stature-based differences in standard backend definitions.

Double Banger (or Triple Banger). A “double banger” is a 40+ foot trailer with two separate side-by-side private compartments for use as dressing rooms by actors or other high-level crew members. A “triple banger” is a similar trailer, but with three smaller compartments, rather than two larger ones.

Drop Down. The right of an individual who is under contract to render exclusive or first priority services (such as a showrunner) to reduce their level of contractually required services (e.g., to part-time and/or non-exclusive services), for a lower fee.

DTR. “Download-to-Rent,” i.e., a temporary time-limited download/viewing right, akin to the rental of a traditional physical DVD or Blu-ray. A subcategory of TVOD, DTR may also be referred to as “ERT” (or “Electronic Rental”).

Earn Out. In the context of recoupable guaranteed compensation (as in over-all deals), guaranteed minimum distribution revenue (as in distribution or sales agency deals), or advances against contingent compensation, the point at which the “earned” value of the fixed or contingent compensation (e.g., worked fees, earned distribution revenue, or vested and calculated backend) equals or exceeds the initial guarantee or advance.

End Credits (or End Titles). The credits that roll at the end of an episode of television, where most cast and crew are accorded credit.

Equivalent Rights (and Equivalent Reserved Rights). In the context of option-purchase agreements, rights in author-written sequels that are consistent with those granted to the studio for the initial acquired property (e.g., motion picture, television, and ancillary rights) are known as “equivalent rights,” while those that are consistent with rights that are reserved by the rightsholder for the initial property are called “equivalent reserved rights.”

Errors and Omissions Policy. An insurance policy that provides coverage against liability for copyright and trademark infringement, defamation, violation of the rights of privacy and publicity, and comparable claims.

ERT. “Electronic Rental,” i.e., a temporary time-limited download/viewing right, akin to the rental of a traditional physical DVD or Blu-ray. A sub-category of TVOD, ERT may also be referred to as “DTR” (or “Download-to-Rent”).

EST. “Electronic Sell-Through,” i.e., a permanent download of an episode or series, akin to the purchase of a traditional physical DVD or Blu-ray that the customer gets to keep. A sub-category of TVOD.

Excluded Advertising. A contractually defined subset of “paid advertising” for a series that is excluded from the definition of “paid advertising,” for purposes of a studio satisfying its obligations to a credit recipient (such as an actor) with respect to according credit in advertising for a series. This category frequently includes television and radio commercials.

Extended Term. A sub-category of broadcast network license agreements that provides for seven-year (or seven-and-a-half-year) terms, thereby delaying the risk of the network facing a costly renegotiation with the studio to a point that few series have the longevity to achieve.

Extraordinary Bumps. Larger, usually flat (rather than percentage-based) year-over-year increases to a studio’s license fee or premium in a license agreement or to an actor or producer’s episodic fees in a services agreement that do not conform to a standard pattern of 4% or 5% cumulative annual increases.

Fair Use. An affirmative defense to a claim of copyright infringement, derived from the First Amendment, which allows limited use of a copyrighted work without compensation or liability to the copyright owner. In considering a claim of fair use, courts look at four elements: (1) the purpose

and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.

False Designation of Origin (or False Endorsement). A trademark-type claim, which may be asserted under the federal Lanham Act or corresponding state laws, based on a defendant's alleged misuse of material (e.g., a celebrity name or likeness, or a product or corporate name, slogan, logo, or other text or visual identifiers) that is publicly identifiable with the plaintiff and its business but that is not actually registered as a trademark.

False Light. A privacy-based tort claim closely related to defamation, which creates liability for a defendant who widely publishes a statement that identifies the plaintiff and places the plaintiff in a "false light" that would be highly offensive to a reasonable person. Many states understand "false light" claims to be based on implications rather than outright factual statements (which would likely be the subject of a defamation claim).

FAST. "Free Ad-Supported Streaming Television," i.e., streaming access to one or more channels of "always-on" linear channels, distinct from "AVOD" in that it involves a "traditional television"-like pre-programmed schedule of content, rather than an "on-demand" viewing experience.

FCC. The Federal Communications Commission, i.e., the principal government regulatory agency overseeing the television industry, by virtue of its exclusive jurisdiction over the granting and transfer of broadcasting licenses and its role in regulating certain aspects of the cable and broadband industries.

Firm Script. A guaranteed, non-contingent deal to pay a writer to write a pilot script based on a specific creative concept, whether or not the studio is ultimately able to enter into an agreement with a network to develop the project.

First Look Deal. An agreement by which a writer/producer, producer/director, or, most often, non-writing producer grants a studio an exclusive first opportunity to develop and produce projects that are created, owned, or controlled by that individual/company, before the individual/company may present any such projects to another studio or network for consideration. The "first look deal" usually provides for pre-negotiated terms that automatically apply if the studio wishes to proceed with development, although, especially in the context of a staffing deal, it may simply be a first negotiation right, with the eventual substantive terms being subject to good faith negotiation.

First Negotiation (or First Opportunity or First Opp or FN or ROFN). A contractual requirement that the seller of rights must undergo exclusive good faith negotiations with the holder of the first negotiation right before the seller may negotiate with other interested parties.

First Priority (or First Position). A class of services that gives an employer studio the general right to require the individual to render services when and where required by the studio, with the individual's services for third parties being subject to the individual's commitment to satisfy his or her obligations to the first-priority employer.

First Refusal (or FR or ROFR). A contractual requirement providing that, if the seller of rights is prepared to accept terms less favorable to the seller than those last offered by the holder of the first refusal right (or, alternatively, less favorable than those last demanded by the seller), then prior to accepting the deal, the seller must give the first refusal holder an opportunity to purchase the rights on those same terms. This right is typically granted alongside a first negotiation right.

First-Run Syndication. Licensed broadcasts of first-run original content produced by third-party studios or production companies directly for broadcast stations without an intermediary commissioning network, frequently in the genres of daytime talk shows and daytime game shows.

Force Majeure. "Acts of god" (such as war, earthquakes and major weather events, union strikes, and other events beyond any party's reasonable prediction or control) that may serve to extend time periods or excuse the performance of obligations under a contract.

Forced Co-Production. A co-production arrangement between a supplier studio and a network's studio affiliate that is "forced" upon the seller studio by the network as a condition of making a deal for a series.

Format. The overall concept and branding of a copyrighted television program, including general story, setting, and characterization, but not including the specific scripts and/or shot episodes of the original series. The term "format" also refers to a WGA-covered written document prepared by a writer that sets out major themes, storylines, character arcs, or other information about an intended series. A format document is understood to be shorter and less detailed than a complete series "bible"—another WGA-covered piece of writing that serves the same purpose, but requires higher scale minimum compensation—but there is otherwise no standard length, structure, or contents for such documents, nor any clearly delineated features that differentiate formats from bibles, leaving writers to largely craft them as they see fit (with the input of the studios and/or networks that have commissioned them).

Format Fees. Fees payable to the owner of a television format in exchange for the right to create a local television series based on the format of an existing show.

Fresh Cash. In the context of an overall term deal, additional payments due to the talent in excess of the minimum guarantee under the deal (i.e., payments that are not recouped against the guarantee). More generally, whenever someone receives any kind of financial guarantee or advance,

additional sums actually earned and payable beyond that initial guarantee or advance may be referred to as “fresh cash.”

Frozen Rights. Rights that are unexploitable by both the buyer and the seller under an option/purchase agreement unless the parties are able to reach some future agreement on the terms for the “unfreezing” and exploitation of the rights, or the “freeze” otherwise expires according to the terms of the contract (and the rights revert to the sole control of one of the parties).

FVOD. “Free Video on Demand,” i.e., access to digital content without a direct charge, paid subscription, or requirement of viewing ads.

Generic Spinoff. A spinoff television series that includes as a principal character one or more principal characters who appear in the original series, or the underlying work on which the original series is based.

Greenlight. An order of a pilot or series to production that has cleared necessary corporate approvals and, while still subject to outstanding mutual approvals between studio and network (e.g., for budget or casting), is considered “firm” or “non-contingent” and leads to a rapid build-up in hiring, spending, and preparation for production.

Gross Budget. The production budget (i.e., anticipated cost of production) of a television series, without regard for any applicable tax incentives.

Gross Receipts. A contractually defined term to capture the accountable revenue received by (or credited to) a studio from its exploitation of a television series and all rights therein, from all sources. In the context of talent profit participations (as opposed to co-production waterfalls), it may exclude certain revenues or provide for special accounting terms (e.g., a royalty) for certain types of revenues.

Guest Star (or Guest Deal). A major speaking performer in a series who is not a series regular, but who is more prominent than “co-stars” in smaller roles or background actors, and who is explicitly credited as a “guest star” (or under the heading “guest starring”). The deal to hire a guest star to perform on a series is usually called a “guest deal.”

HBAVOD. “High-Budget AVOD,” a category created in the 2023 WGA Basic Agreement to newly extend MBA minimums to high-budget original series for FAST channels/services like Roku and Freevee, based on budget thresholds.

HBSVOD. “High-Budget SVOD,” a category defined in the WGA Basic Agreement for purposes of determining scale compensation and other minimum terms of employment for original series in streaming, based on subscriber count and budget thresholds.

Holdback. A contractual agreement not to exploit reserved rights in a piece of intellectual property until a specified amount of time has passed or some triggering event has occurred.

Horizontal Integration. An acquisition or merger of companies that produce the same (or closely related) products, creating a larger-scale business that

can operate more “efficiently” (i.e., lay off now-redundant employees) and has greater market power and leverage (due to no longer having to compete with one another).

Horse Race. A situation in which multiple projects/studios have equivalent “no position” deals with a single writer, and therefore, the first of the writer’s projects to be ordered to production is the one that secures the first priority right to the writer’s services for the two-year term of the writer’s deal.

IATSE. The International Alliance of Theatrical Stage Employees, the union representing most “below-the-line” crew working in the U.S. television industry.

Idea Theft. A patchwork of state law actions available to plaintiffs who believe their ideas have been unjustly stolen, primarily a claim of breach of implied contract, on the theory that a studio’s decision to hear a pitch implies a commitment that it will not use the idea presented without entering into some kind of agreement with the pitching party for rights and/or services.

If/Come. An agreement by which a studio negotiates writing and producing terms for a writer to develop a specific creative concept, but the entire agreement (including all financial commitments) is contingent on the studio, in turn, selling that idea to a third-party network licensee (which will contribute to the development costs of the project).

Impairment Charge. Under Generally Accepted Accounting Principles (GAAP), a one-time write-off on a company’s balance sheet of the “goodwill” value of assets that have lost most or all of their value. An “impaired asset” is one that has a market value less than the value listed on the company’s balance sheet or, put another way, an asset whose fair market value is less than its “carrying value” (historical cost minus accumulated depreciation).

Imputed License Fee. A contractually defined amount, used by a studio calculating contingent compensation due to profit participants, representing the revenues received by the studio from a license to an affiliated network.

In the Field. Production of a television program on location and not in a studio environment, often associated with lower-budget unscripted documentary series.

Independent Studio. A television studio that has no corporate relationship, or only a highly attenuated corporate affiliation, with a network, and which usually has the capacity to finance production of a series (with cash or debt).

Initial Domestic License. The original license agreement entered into between a studio and the commissioning U.S. network, providing for the production of a television series.

Inside Terms. The specific terms (e.g., fees, bonuses, royalties, contingent compensation, etc.) applicable for every individual project initiated or serviced during the term of an overall or first-look agreement.

Intentional Infliction of Emotional Distress. A tort claim whose elements are: (1) an intentional act by the defendant; (2) the defendant's conduct was extreme and outrageous (beyond the standards of civilized decency); and (3) the plaintiff suffered severe emotional distress (as manifested by physical symptoms, a demonstrated lack of productivity, or a medically diagnosed mental disorder) that was caused by the plaintiff's act.

Intervening Days. In episodic directing agreements, scheduled or unscheduled hiatus days, of which seven per episode must be treated as paid work days before the studio can treat further hiatus days as unpaid.

Last Refusal (or LR or ROLR). A somewhat uncommon and burdensome contractual right, also granted alongside a first negotiation right, which requires that the seller of rights give the last refusal holder a final opportunity to accept the terms of any deal that the seller is prepared to enter into with a third party, even if the third party has offered the seller more favorable terms than were previously offered by the last refusal holder.

Laverne & Shirley Credit. A form of joint first-position credit granted to two co-leads, in which both credits appear on a single card, with one name positioned to the bottom-left and the other to the upper-right.

Lead Studio. In a co-production arrangement, the studio that is responsible for managing physical production of the series.

Libel. Written or otherwise fixed and recorded defamation.

Libel-Proof. A legal term for an individual whose reputation is so tainted that he or she can no longer sustain claims for defamation, at least regarding certain subjects.

License Agreement. An agreement between a studio and a network or other licensee, by which the studio grants the network/licensee specified, limited rights in the series, for a specified territory and period of time, in exchange for negotiated compensation.

License Fee. The base compensation payable by a network or other licensee to a studio in connection with a license agreement.

Life Lock. A guarantee (potentially subject to specified conditions) that an individual will receive payment of his or her episodic fees for all episodes produced for the entire run of a television series.

Life Rights Agreement. A waiver of claims that may otherwise be brought by an individual who is depicted in a television series without his or her consent.

Likelihood of Consumer Confusion. The key concept that must be proven in order to establish liability for trademark infringement. In assessing the likelihood of consumer confusion, courts consider: (1) the strength of the plaintiff's mark; (2) the similarity of the marks; (3) proximity of the products and their competitiveness with one another; (4) evidence that the plaintiff might "bridge the gap" by developing a product for sale in the defendant's market; (5) evidence of actual consumer confusion; (6)

evidence that the defendant adopted or used a mark in bad faith; (7) the respective quality of the parties' products; and (8) sophistication of consumers in the relevant market.

Limited Series. A series which is creatively designed and intended to run for a single season from inception, and which therefore usually features a story arc that wraps up neatly by the end of the final episode of the initial season. In earlier eras, such programs were usually referred to as "mini-series." Ongoing anthology series which feature new storylines, characters, and performers (or past performers in totally new roles) from season to season are sometimes treated as a succession of "limited series," rather than successive seasons of a single ongoing series, especially for purposes of awards consideration for the Emmys, Golden Globes, and other major awards in which the "limited series" categories are often perceived as less competitive.

Linear Exhibition. Exhibition of a continuous pre-programmed stream of content that is accessed by the customer by dipping into the stream at any given time, without the customer having on-demand control over what he or she watches and when.

Liquidated Damages. Specific contractually defined monetary damages, which are often used in contracts when it would be difficult or impossible to accurately measure the real-world economic harm of a given contractual breach (such as a breach of confidentiality obligations).

Literary Agent or Manager. An agent or manager who specializes in representing writers, directors, and/or producers, as opposed to actors.

Live + Same Day ["SD"] (or Live + 3, or Live + 7). Categories of television ratings published by the Nielsen Company, measuring the number of viewers who watched a given television program as it aired in real time or by 3 a.m. the day after the initial broadcast (for Live + SD), or within three or seven days after the initial broadcast (for Live + 3 and Live + 7, respectively).

Lock. The period of time for which a writing or non-writing producer's fees are guaranteed, if the series is actually produced for that long, whether or not the individual's services are actually used.

Logo Credit (or Company Credit). A logo that appears after the end credits at the end of each episode of a television series, which bears the name of the "production company" of a showrunner or high-level non-writing executive producer, or of the studio(s) behind the series.

MAGR. "Modified Adjusted Gross Receipts," a common term for the principal form of defined contingent compensation accorded to profit participants in television series. Different studios may use different terms for this concept, including "Modified Gross Receipts" or "Contingent Proceeds."

Main Titles (or Main Credits). An opening title/credit sequence that precedes the actual action of each episode of a television series, which may be

elaborately animated or produced. This term may also be used somewhat interchangeably with “opening titles.”

Main-On-End. A format of “main titles” or “main credits” appearing immediately after the action of the episode rather than before, in which the standard order of main title credit groupings is reversed, but credits within each grouping (e.g., all series regular credits) appear in the same order as they would in standard main title formats.

Major Role Performer. Performers whose compensation exceeds 10% of the daily minimum with a guarantee of eight days for a one-hour program or five days for a half-hour program (but lower than the compensation threshold for “modified guest performers”), whose services are governed by Schedule C of the SAG-AFTRA Basic Agreement (which provides for less restrictive work rules than applicable to daily performers governed by Schedule A or weekly performers governed by Schedule B). Sometimes referred to as “top-of-show,” especially where a studio treats the “major role performer”/Schedule C minimum as its “top” permitted guest star fee for a series.

Manager. A representative of motion picture or television talent (e.g., actors, writers, directors, producers, etc.) whose principal role is to counsel clients on their careers and/or to serve as creative partners on clients’ projects, but not necessarily (or at least officially) to procure employment for the client.

MBA. “Master Basic Agreement,” the official term used to describe the primary collective bargaining agreements for each of the major entertainment unions.

MFT (or MOW). “Movie for Television,” an updated version of the older broadcast-oriented term “Movie of the Week,” referring to a feature-length production that is produced for initial exhibition on television or streaming (but not considered to be the equivalent of a “theatrical” feature film that is released directly to streaming).

Mid-Roll. A term for advertising that appears as part of a distinct commercial break that interrupts a given piece of content.

Mini-Room (or Development Room or Pre-Greenlight Room). A “miniature” writers’ room—shorter in length and smaller in size than a “full” writers’ room for a firmly ordered series season—convened by a studio and/or network to engage in further creative development prior to the network committing to the production of a first or subsequent season of a series.

Mini-Series. A series which is creatively designed and intended, from inception, to run for a single season, and which therefore usually features a story arc that wraps up neatly by the end of the final episode of the initial season, today more often referred to as a “limited series.” A true “mini-series,” however, as the term was long used in broadcast and basic cable television, also comprised fewer episodes than a standard full-length season of a standard ongoing series.

Modified Deal Performer. A new sub-category of performers under Schedule C of the 2023 SAG-AFTRA Basic Agreement, for guest stars with higher fees than those for “modified guest performers” but lower than the Schedule F threshold, that is generally governed by Schedule C but permits longer work periods (up ten days times the number of guaranteed episodes, over a period of up to thirty days times the number of guaranteed episodes).

Modified Guest Performer. A new sub-category of performers under Schedule C of the 2023 SAG-AFTRA Basic Agreement, for guest stars with higher fees than those for “major role performers” but lower than the threshold for “modified deal performers,” that is generally governed by Schedule C but permits longer work periods (up eight days times the number of guaranteed episodes, over a period of up to twenty-three days times the number of guaranteed episodes).

Modified Two-Year Lock (or Two-Year Warner Lock). An initial one-year lock that automatically expands to cover the second season of the series if the studio fails to exercise its “pay-or-play” right (i.e., termination without cause) prior to the completion of the individual’s services on the first season.

Money Break. An MBA-defined threshold minimum amount or rate of compensation above which one or more specific collectively bargained protections applicable to lower-paid union-covered employees no longer apply (or the applicable terms become “freely negotiable”).

Morals Clauses. Contractual terms, most often found in acting and commercial endorsement agreements, that give a studio or other employer the right to terminate an individual’s engagement (and void any applicable guarantees, and sometimes credit requirements) if the actor commits or is convicted of a crime, or engages in other conduct that may offend the general public or otherwise damage or reflect unfavorably upon the studio or network.

Multi-Camera Comedy. The traditional form of television comedy (such as *The Mary Tyler Moore Show* or *Friends*), characterized by: (1) filming before a live studio audience (with multiple cameras simultaneously filming each take of each scene); (2) use of a small number of stage-built sets; (3) frequent reliance on laugh tracks; (4) a more “old school” or “classic” feel to audiences; and (5) generally lower production costs, relative to single-camera comedies.

Must Carry. The right of a broadcast station, pursuant to the 1992 United States Cable Television Consumer Protection and Competition Act, to compel an MVPD to offer the station to local subscribers in their markets for no compensation paid to or by the MVPD.

MVPD. Multichannel video primary distributors (MVPDs), i.e., cable, satellite, and telecommunications providers that sell to consumers subscriptions for packages of various television networks.

Net Budget. The gross budget of a series, after deducting tax incentives or rebates obtained (or anticipated) by the studio in connection with the production.

Network. A business that aggregates content and markets and exhibits that content to customers, but is not necessarily the producer or owner of the content that it exhibits.

Network Code. The SAG-AFTRA National Code of Fair Practice for Network Television Broadcasting, a SAG-AFTRA collective bargaining agreement (distinct from the SAG-AFTRA TV/Theatrical Contract that governs feature films and scripted television) that governs news, shows, talk shows, soap operas, variety, reality, game shows, and sports programming.

Newsworthy. A legal concept, derived from the First Amendment, that identifies “matters of legitimate public concern.” If true facts are deemed to be newsworthy, then the publication of those facts cannot be the basis of liability for the tort of public disclosure of private facts.

Nominative Fair Use. A defense to a claim of trademark infringement, derived from the First Amendment, which allows the public to freely use a protected trademark to literally describe the product or service underlying a mark. In considering a claim of nominative fair use, courts look at three elements: (1) the product or service in question must be one not readily identifiable without use of the trademark; (2) only so much of the mark may be used as is reasonably necessary to identify the product or service; and (3) the user must do nothing that would, in conjunction with the mark, suggest sponsorship or endorsement by the trademark holder.

Non-Writing Executive Producer (or NWEP). An individual who is not a writer but who serves an important role in the creative development and/or physical production of a television series. This category may include individuals who scour the marketplace for interesting pitches from writers and underlying properties to adapt and bring to studios; individuals with close relationships with key talent who can attract prominent writers, directors, or actors to a project; directors who work on the production of a series on an ongoing basis even when not personally directing a particular episode; and managers or other close confidantes and creative partners of writers, rightsholders, star actors, or other key creative elements.

Off-Network. A term that generally describes a studio’s distribution/exploitation of a television series outside of the original commissioning network. It frequently refers more narrowly to *television* exhibition of the series off the original network, and may be used interchangeably with “syndication.”

Off-the-Top. A term that refers to the deduction of expenses as part of a contractually defined contingent participation formula to calculate a specific accounting unit in which a profit participant has a share (e.g., “Modified Adjusted Gross Receipts”). As a plural noun, “off-the-tops” may also refer to a specific sub-category of distribution expenses that includes checking,

collection, currency conversion, and certain tax (but not income tax) expenses.

On Demand. In a streaming environment, the ability of viewers to select specifically what programs they want to watch and when they want to watch them; as distinct from linear exhibition, which entails the viewer “dipping into” an ongoing pre-programmed/scheduled stream of content.

On-or-About. As applied to work dates, indicates the studio’s right to move an actor’s start date within a specified period (often up to two weeks on either side of a tentatively provided date), as permitted under the applicable schedule of the SAG-AFTRA Basic Agreement.

Online Video Distribution. The FCC’s preferred regulatory term for the market most people refer to as “streaming” or “digital video.”

Opening Titles. Credits that appear at the beginning of each episode of a television series, with text superimposed over the actual filmed action of the episode, often appearing after and separate from a dedicated main title sequence. This term may also be used (albeit less precisely and accurately) as a synonym for “main titles.”

Option. In the context of an option/purchase agreement, the buyer’s right to purchase the negotiated rights. In the context of a services agreement, the studio/employer’s right to require an individual to continue rendering services on a television series (whether for an extended period on the current season, or for a subsequent season) on pre-negotiated terms.

Option/Purchase Agreement. An agreement by which a buyer (in the television context, typically a studio) acquires the exclusive and irrevocable right, for a specified period of time, to purchase certain specified rights in a given property, on pre-negotiated terms.

Overages. Production costs incurred by a studio in excess of the ingoing budget for a production.

Overall Deal (or Overall Term Deal). An agreement by which a studio obtains the fully or substantially exclusive services of an individual for the term of the agreement.

Overhead. In the context of profit participation or co-production waterfall definitions, a percentage of production costs (usually 10% to 15% for talent participants, and 5% to 7.5% in co-production agreements) deducted by the studio from a television series’ gross receipts, as compensation to the studio for the in-house salaries, offices, and other overhead expenses used in the studio’s production business. As a more general term, “overhead” identifies such salaries, facilities costs, and other general operating expenses of a business (which are not related to any specific production).

Override. A distribution fee charged by a studio on the gross receipts generated by a subdistributor, over and above the distribution fee charged by the subdistributor, as compensation to the studio for the effort and expense of managing and monitoring the subdistributor.

Over-the-Top. A catch-all term for content services that users access through their general-purpose internet subscriptions, without relying on a separate, service-specific technological system (such as the coaxial cables that underlie cable television or fiber-optic cables used by telecom providers).

Owned & Operated (or O&O). A local broadcast station that is directly owned and operated by the national broadcast network whose programming it carries.

Page One Rewrite. A rewrite of an existing script that is so extensive that it functionally amounts to throwing out the existing script and starting from scratch on a new first draft.

Paid Advertising. A contractual defined term that identifies what type of advertising activity is deemed to be a “paid ad” (as opposed to, e.g., an “excluded ad”) for purposes of a studio satisfying its obligations to a credit recipient (such as an actor) with respect to according credit in advertising for a series.

Passive Integration. A form of product integration in which a product or logo appears visibly but passively on screen during a program, without the characters on screen actively touching, using, mentioning, or otherwise interacting with the product.

Pay-or-Play. A guarantee that an individual will be paid some specified amount, whether or not the artist’s services are actually required or used by the hiring party. May also be used as a verb to describe terminating a service provider without legal cause.

Pay TV. In common usage, a blanket term for cable, satellite, and other traditional MVPD subscriptions. As used in the WGA and DGA Basic Agreements, “pay TV” refers more narrowly to premium pay networks (as distinct from “cable” or “basic cable”).

Peak TV. A term coined by FX Networks Chief Executive Officer John Landgraf, in an August 2015 presentation to the Television Critics Association, to describe the then-current era of prolific television programming, characterized by: (1) a high volume of series being produced and exhibited; (2) significant fragmentation of the television audience; (3) escalating production budgets and fees for the most valuable talent on the most premium productions; (4) the prevalence of low-cost programming alternatives from parties unwilling or unable to compete in the blockbuster arms race; and (5) significant disruption and innovation in business and exhibition models.

Penalty. A significant payment, negotiated as part of a development deal between a network and studio, owed by the network to the studio in the event the network elects not to proceed to production of a pilot and/or series.

PH&W. “Pension, Health, and Welfare” benefit plans that are provided to members by all the major entertainment unions, which are primarily financed by direct studio contributions to the union-affiliated plans

(calculated as a percentage of the guild member's compensation, and subject to caps above which no further PH&W contributions are due).

Picking Up. A slang term for exercising an option. It may be used to refer to a network exercising its option to order production of a pilot and/or series (first or subsequent seasons), or a studio exercising its option to purchase a property or to engage an individual to render services on such pilot and/or series.

Pilot/Feature Out. In an episodic directing agreement, the director's negotiated right to opt out of their engagement (with at least three or four weeks' advance notice) in favor of accepting a conflicting (and more lucrative) outside pilot directing, feature directing, or (sometimes) producing/directing opportunity.

Pilot (or Prototype). A standalone episode of a television series that is used to establish and demonstrate the style and content of a proposed television series, and to persuade a network to order production of a full season's worth of episodes for that series.

Pilot Commitment. A commitment by a network to order (and pay its applicable license fee/cost share for) the production of a pilot. This term may sometimes be used interchangeably with "put pilot."

Pitch. As a noun, it refers to a verbalized idea for a new series that has not been reduced to a written screenplay. As a verb, "pitch" refers to the act of trying to sell a project to a buyer (e.g., a writer may pitch a studio; and a studio and writer may jointly pitch a network).

Planted Spinoff. A spinoff television series that follows a character who is introduced anew into the original series to set that character up for his or her own series, e.g., the character of Mork from Ork, played by Robin Williams, who appeared in a single episode of *Happy Days* before being spun off into the series *Mork & Mindy*.

Point. A slang term for a single percentage point of contingent compensation (in television, typically MAGR).

Point-for-Point Basis. The reduction of a participant's contingent compensation entitlement by one percentage point for every percentage point of contingent compensation paid or committed to a third party, without regard for any differences in the definition of such "points" for each of the participants. From the perspective of a backend-granting studio, a "point-for-point" reduction may be more favorable than a "dollar-for-dollar" reduction if the "points" of the party bearing the reduction are more favorably defined (and therefore more valuable) than the "points" granted to the third party triggering the reduction.

Polish. A revision to a screenplay that is less intensive than a "rewrite," in which changes are made to dialogue, narration, or action, but without altering the basic storyline or interrelationship of characters in the script.

Position (or Priority). The right of one prospective employer to require the services of an individual, as, where, and when required by that employer, relative to the potentially competing right of a different employer to require the same individual to render services.

Post-Roll. A term for advertising that appears after a completed view of a piece of content.

Premium. In a cost-plus deal, the amount by which the license fee exceeds the show's cost. Also, sometimes a euphemism for "expensive."

Premium Pay Network. "Premium channels" offered on pay TV with an additional monthly fee beyond that for the base cable/satellite bundle (e.g., HBO, Showtime, etc.). In the WGA and DGA Basic Agreements, such networks are referred to as "pay TV."

Precedent. The universe of financial and non-financial deal terms that a studio has ever agreed to in its deals, which is often rigorously monitored and enforced as a way of resisting constant pressure from talent representatives for ever-improving deal terms.

Pre-Roll. A term for advertising that appears before a given piece of content.

Product Integration (or Product Placement). A broad term capturing the paid use, depiction, and/or mention of an advertiser's product within a television show (or other filmed entertainment).

Production Company. A company that manages the physical production of a series (i.e., the day-to-day management of all the human and physical resources that go into the production process), without necessarily owning the intellectual property in the produced series. Alternatively, "production company" may refer to a company brand for a prominent individual writer, director, or non-writing producer (who may work in conjunction with one or more creative assistant(s) and/or executive(s) on that individual's payroll).

Pro Rata. Proportionate.

Public Disclosure of Private Facts. A privacy-based tort claim whose elements are: (1) a public disclosure by a defendant; (2) of one or more facts about the plaintiff that were private; (3) whose publication was offensive to a reasonable person of ordinary sensibilities; and (4) where the facts being published are not newsworthy.

Public Domain. The status of a once-copyrighted work whose copyright has expired, or has otherwise terminated for technical reasons applicable to older works under the 1909 Copyright Act. A "public domain" work may be used freely by any member of the public without permission from or compensation to the original copyright owner. The term "public domain" may also be used to identify material that is not eligible for copyright protection and is therefore also free to use, such as facts.

Purchase Price. The pre-negotiated amount paid by the optioning party to acquire the rights under option in an option/purchase agreement.

Put Pilot. A sub-category of “pilot commitments” for which the network owes the studio a further penalty if it declines to order a series following production of the pilot. However, this term may casually be used interchangeably with “pilot commitment.”

PVOD. “Premium Video on Demand,” i.e., a variation on TVOD in which especially highly anticipated films are made available for download concurrently with, or very shortly after, their initial theatrical releases, at a significantly higher price point than a standard movie ticket or TVOD transaction (e.g., \$29.99). The availability of a title on PVOD may or may not be limited to subscribers of a related SVOD service (on which the title would be offered to subscribers at no additional charge after a further delay).

Ratings and Rankings Bonuses. Additional payments from the network to the studio pursuant to a network license agreement (often, but not always, on a per-episode basis) that are triggered by a series achieving certain average viewership benchmarks, as measured and published by the Nielsen Company.

Recoupability. The extent to which guaranteed compensation under an overall deal may be treated as a pre-payment of, or an advance against, fees that are actually earned by the talent for services rendered during the term of the overall deal.

Recurring Guest Star (or Recurring Guest Deal). A guest star who is engaged to perform in multiple episodes of a series without being a series regular (or the deal to engage that performer).

Reserved Rights. Those rights in a piece of intellectual property that are excluded from the grant of rights under an option/purchase agreement and that are therefore “reserved to” the seller/grantor of rights (e.g., the author of a book).

Residuals. Passive payments owed to talent, as a percentage of revenues received by a studio from international and other secondary exploitation of a series, pursuant to applicable union collective bargaining agreements.

Retransmission Consent. The right of a broadcast station, pursuant to the 1992 United States Cable Television Consumer Protection and Competition Act, to negotiate with an MVPD for economic and/or non-economic compensation from the MVPD in exchange for allowing the MVPD to include the station in packages for local subscribers.

Reverse Retransmission. The practice of broadcast stations sharing with their affiliated networks some portion of the retransmission consent fees they receive from MVPDs.

Reverse Royalty. In the context of unscripted documentary series that follow the personal and professional dramas surrounding real-life businesses, money or equity owed by the subject of the series (either as an individual

or a company) to the network or production company in exchange for the promotional value provided by the series.

Reversion. Following the acquisition of rights pursuant to an option/purchase agreement, the return of certain rights to the original rightsholder/grantor after a specified period of time, depending on whether or to what extent programming has actually been produced based on the granted rights.

Right of Publicity. An individual's commercial right, derived from the more general legal right of privacy, to control the use of his or her name, likeness, or other indicia of identity in commerce. The elements of a claim for infringement of the right of publicity are: (1) the defendant's use of the plaintiff's identity; (2) the defendant's appropriation of the plaintiff's identity to the defendant's advantage, commercial or otherwise; (3) the absence of consent from the plaintiff; and (4) injury to the plaintiff.

Roll a Deal. A studio's decision to postpone the commencement of a writer's services under a firm script deal by up to twelve months, into the next development season. The decision and right to roll a deal may be based on the writer's professional unavailability, or, if the deal permits, the studio's convenience and discretion.

Rolling Five. A once-common standard for companion digital rights in licenses to linear networks, granting the network the right to make available to customers up to five episodes of the series at a time on an on-demand basis, to enable customers who fall behind on a series to catch up on recent episodes. In more recent licenses, the "rolling five" right has mostly been replaced with full in-season "stacking rights."

Royalty (or Passive Royalty). A passive (i.e., no-services-required) episodic payment that is usually granted to an individual or rightsholder pursuant to an option/purchase agreement for underlying rights, the agreement with the pilot writer/series creator, and/or the pilot director agreement.

Run. A distinct scheduled exhibition of an episode of a television series. A network license agreement with a traditional broadcast or cable network will typically limit the network to a specified number of runs for each episode of the series, or allow the network to make additional runs in exchange for additional license fee payments.

Run-of-Show. In content licensing, a phrase used to help define the exhibition term for granted rights, generally from the initial exhibition of the pilot/first episode of a series until the initial exhibition of the final episode of its last season; most streaming license terms for ongoing series are defined as "run-of-show" plus a number of years (often ten). The term "run-of-show" may also be used as slang in physical production, especially for feature films, to refer to the full scheduled period of principal photography for a series season.

SAG-AFTRA. The Screen Actors Guild/American Federation of Television and Radio Artists, the union representing professional actors and other on-camera performers working in the U.S. television industry.

Scenes a Faire. “Stock scenes” and other creative elements that are expected for a particular genre and are not protectable under copyright.

Script-to-Series. A common term for an agreement between a studio and network for the development of a proposed series in which the network does not have the right to order a pilot, and (absent a future concession from the studio) will therefore have to choose between committing to a series season or producing nothing at all.

Second Unit. A group of crew members who work largely independently of the production’s “main unit” to capture scenes that are too time-consuming, too dangerous, or not important enough for the main unit to handle. Common assignments for second units include scenes with stunts, drone and other aerial photography, establishing shots, B-roll, inserts, cutaways, and pickups.

Separate Pot. A royalty or profit participation in a specified category of rights (most commonly merchandising), for which the applicable revenues and expenses are not cross-collateralized with revenues and expenses from other rights or from the production and distribution of the series generally.

Separated Rights. Certain allied and ancillary rights (including stage, theatrical, publication, and merchandising rights) that are automatically reserved to the writer/creator of an original television series under the WGA Basic Agreement, unless the commissioning studio satisfies the upset price for the pilot script and purchases the separated rights from the writer in a separate negotiated document.

Series Bonus Exhibit (or SBE). A streamer-like bonus structure adopted by Disney, starting in November 2019, to replace traditionally defined contingent compensation for shows produced by Disney/Fox studios.

Series Commitment (or Straight-to-Series Order). A commitment by a network to order (and pay its applicable license fee/cost share for) the production of all episodes of a proposed series’ first season, without going through a pilot step.

Series Production Bonus. An alternative term used to describe a “series sales bonus” that is not subject to episodic proration.

Series Regular. One of the six to ten lead actors (or more in later seasons of a series) who are most central to a show’s creative content and who enter into complex, multi-year deals that firmly establish the television series as their primary employment obligation for as long as the studio and network maintain options for the actor’s services and wish to continue to employ them.

Series Sales Bonus (or SSB). A bonus payment payable in the event a series is ordered to production of its first season (or, in rarer cases, subsequent seasons), usually proratable based on the number of episodes produced. These bonuses are commonly granted in connection with option/purchase agreements for underlying rights, agreements with show creators, and pilot director agreements, and may also be agreed to for non-writing producers.

Series Term. The number of consecutive, dependent options held by the network to order additional seasons of a series pursuant to a network license agreement.

Set-Up. The act of entering into an agreement with a network to develop and/or produce a new television series.

Shiny Floor Show. A high-budget game show or studio-based competition show produced in a glossy studio environment, such as *\$100,000 Pyramid* or *The Voice*.

Shopping Agreement. An agreement by which the parties agree to jointly develop and pitch a project, and agree that neither party will enter into a further agreement with a studio (or other buyer) in connection with the project unless the other party also successfully negotiates a deal for itself.

Showrunner. The lead individual creative force guiding the production of a television series, with primary responsibility for generating story arcs, leading large teams of writers and other production personnel, understanding and managing budgets and schedules, and otherwise coordinating with studio and network executives. The showrunner is typically a writer, and frequently/ideally the writer who wrote the pilot script and created the series (if that individual is senior and experienced enough to be able to handle the role).

Showverall. A slang term for an overall deal that is entered into solely or primarily to retain the services of the writer for the benefit of a specific ongoing series.

Single-Camera Comedy. The more contemporary and recently fashionable style of television comedy (such as *The Office* or *Modern Family*), characterized by: (1) more location (rather than stage) filming; (2) lack of live audiences and laugh tracks; (3) a more “premium” feel to audiences; and (4) generally higher production costs, relative to multi-camera comedies.

Slander. Spoken defamation.

Soft Work Window. Under the 2023 SAG-AFTRA Basic Agreement, a date range provided by studios to recurring guest stars without firm working dates, equal to the guaranteed period of employment in the performer’s contract (based on business days), plus five business days before and after the guaranteed period of employment. During the soft work window, a contracted performer must notify the studio of any new proposed conflicting work and give it an opportunity to preempt the outside job, reschedule around it, or reduce the actor’s guaranteed engagement (to the extent unfulfilled due to the outside job).

Source Credit. Credit accorded to the underlying work from which a series is adapted, e.g., “Based on the novel by [AUTHOR].”

Span Protection. A protection for television writers pursuant to the WGA Basic Agreement providing that, for writers earning episodic fees with guaranteed annual compensation under an MBA-dictated threshold

amount—for the 2023–26 contract term, \$450,000 for primetime network/HBSVOD or \$375,000 for cable/HBAVOD—each episodic fee can buy out no more than 2.4 weeks of services (with additional weeks payable at the pro rata weekly rate).

Spec Script. A fully written script prepared by a writer “on spec,” i.e., independently and without guaranteed compensation, in order to help the writer convince a studio to develop the project.

Special Purpose Vehicle (or SPV). A one-off subsidiary of a larger studio, through which the studio elects to enter into all of the relevant contracts for the production of a series. Such SPVs may be favored by studios for reasons of liability management, union obligation management, and/or tax and accounting preferences, among other considerations.

Stacking Rights. In a license agreement with a broadcast (or other linear) network, streaming exhibition rights for all episodes of the current, ongoing season of a series, which may be exploited by the network directly on its own branded digital platforms or via affiliates (such as Hulu).

Staff Writer. The junior-most rank of television writer, whose terms of employment are governed by Article 13 of the WGA Basic Agreement.

Staffing. The process of engaging writers and writer/producers to join the writer’s room of a series. The term “staffing writer” may be used to refer to a writer or writer/producer who is engaged to work on a series, but who is not the series creator or showrunner.

Step Deal. An engagement that is divided into a smaller initial guaranteed work period and (at the studio’s option) a more “complete” total period of services. Step deals are common for early-stage hires, such as line producers and casting directors, and are used to manage the extent of the studio’s guaranteed financial obligations when a series is in contention or has been ordered subject to a contingency (such as approval and casting of a lead actor), but not fully greenlit.

Story. As used in the WGA Basic Agreement, literary or dramatic material indicating the basic characterization of the principal characters and primary storyline of a script, but without detailed dialogue or scenes sufficient to constitute a complete teleplay.

Story Editor (and Executive Story Editor). The second and third most junior rank of television writer, respectively, and the first two that are subject to the more favorable provisions of Article 14 of the WGA Basic Agreement, governing “Writers Employed in Additional Capacities.”

Straight Offer. A firm offer of employment to an actor for a role (often but not necessarily as a series regular), without the requirement that the actor submit to an audition or “test” process.

Stripping. The licensing of library episodes of existing television series for reruns on a basic cable network or broadcast station(s) on a more-than-once-per-week basis (typically five-times-per-week).

Studio. The entity responsible for the financing, development, production, and distribution of television productions, and the core rightsholder for such productions, traditionally controlling every facet of their worldwide exploitation.

Stunt Casting. The casting of an especially significant star in a relatively minor supporting role (typically motivated by the marketing or publicity value to the network of the special appearance).

Subdistributor. A third-party distributor that is engaged to assist a studio in distributing a series in media or territories where that studio lacks the necessary resources, relationships, or expertise to effectively distribute the applicable rights itself.

Subsequent Productions (or Derivative Productions). A broad term for additional audiovisual productions that feature or are based on the plot, main characters, or other principal elements of a television series, including, without limitation, television sequels and prequels, television spin-offs, and theatrical feature films based on a television series.

Substantial Similarity. A key legal factor for determining liability for copyright infringement, addressing whether a defendant's work is so similar to a plaintiff's as to amount to actionable improper appropriation.

Substantial Truth. In defamation law, the concept that a disputed statement or depiction need not be perfectly accurate in every conceivable way to be immune from defamation liability, so long as it is *substantially* true.

Supervising Writer (or Supervisor). An experienced creator/showrunner attached to a development project during its early phases to "supervise" and guide the work of a junior creator, typically with the expectation that the supervising writer will also be the showrunner (or senior partner co-showrunner alongside the creator) of the eventual series, if produced.

Suspend and Extend. A studio's rights, most prominently (but not exclusively) in the context of overall term deals, to suspend the payment of compensation and running of any applicable time periods while an individual is unable to render required services due to their disability or default, or a force majeure event (including a union strike); and, at the studio's independent election, to extend the term of the agreement by the same amount of time (to preserve the studio's right to the individual's services for the full duration contemplated by the deal).

SVOD. "Subscription Video on Demand," i.e., authenticated access for paying subscribers to a library of on-demand streaming content.

Syndication Agreement. A catch-all term for the licensing of episodes of a television series other than to an initial commissioning network, usually in reference to licensing to broadcast stations. If the license is for library episodes of an existing television series that was previously exhibited by a network, the more specific term "second-run syndication" may apply. If the license is to a cable network, it may be referred to as "cable syndication."

If the license is for an original series, it is typically referred to by the more specific term “first-run syndication.”

Taft-Hartley Waiver. Named after the Taft-Hartley Act (one of the major U.S. federal statutes on unions and labor law), a waiver that allows a “union shop” (which is otherwise committed to exclusively hire union workers for positions within a signatory union’s jurisdiction) to hire some non-union personnel so long as they are paid equivalently and otherwise accorded the same protections as union-covered talent on the same program.

Talent. A catch-all term covering all of the major artists involved with a series across all crafts (e.g., actors, writers, directors, producers); or, more specifically, a reference to actors in particular.

Talent Agent or Manager. A catch-all term covering agents and managers who represent various types of creative professionals (e.g., actors, writers, directors, producers); or, more specifically, agents and managers who specialize in representing actors in particular.

Tax Incentives. A catch-all term for tax credit, rebate, and/or exemption programs that have the effect of lowering a studio’s effective out-of-pocket cost to produce a television series, which are instituted by local and national governments to incentivize studios to produce projects within their jurisdictions.

Television. The distribution of professionally produced audiovisual content to individual consumers at times and locations of their own choosing, which is principally (but not necessarily exclusively) intended for consumption on non-mobile devices.

Tenpercentery. A slang term for talent agencies, referring to the standard 10% commission they charge on all revenues earned by their clients.

Test Option. An agreement between a studio and an actor, granting the studio a short-term option to engage the actor to render acting services on pre-negotiated terms for the series pilot (or, if there is no pilot, first season). Test options are typically simultaneously negotiated with multiple actors auditioning for a single role so that the studio can choose among multiple options and have a locked deal firmly in place with the actor it decides to hire.

Tethered Download. A download (rather than stream) of content by a customer of an SVOD service, by which the customer receives permanent or semi-permanent access to the content off-line so long as the customer maintains an active subscription.

Third-Party Participations. Contingent compensation payments owed or made to third parties other than a specific profit participant, whose payments may or may not be deducted by the studio as expenses and therefore reduce the amounts payable to that specific profit participant.

Top-of-Show. A SAG-AFTRA-defined rate for “Major Role Performers, that buys out all services required from the actor for a single episode’s work (for

up to eight days for a one-hour or five days for a half-hour) and makes the actor subject to less restrictive work rules and overage requirements than applicable to day performers. May also be used to refer to the “top” guest star compensation allowed by policy (where such a policy exists) on any given series (even if higher than the SAG-AFTRA “Major Role Performer” rate).

Trademark. A limited property right in a particular word, phrase, or symbol that is used to identify an individual or company as the source of a given product or service.

Tradeout. An agreement by which an advertiser provides a television production with free products that can be used as wardrobe, set dressing, or props on screen (thereby saving the studio the expense of buying or renting such items), but does not provide any separate compensation to the studio, or receive any separate assurances about the nature and extent of the show’s depiction of the brand’s products.

Transformative Use (or Transformation). In right of publicity law, a balancing test derived from the First Amendment, which may eliminate liability for the unauthorized use of an individual’s name, likeness, or other indicia of identity so long as the defendant has sufficiently “transformed” that celebrity’s identity. In considering a claim of transformative use, courts look at five elements: (1) whether the celebrity likeness is one of the raw materials from which an original work is synthesized; (2) whether the work is primarily the defendant’s own expression if the expression is something other than the likeness of the celebrity; (3) whether literal and imitative or creative elements predominate in the work; (4) whether the marketability and economic value of the challenged work derives primarily from the fame of the celebrity depicted; and (5) whether the artist’s skill and talent has been manifestly subordinated to the overall goal of creating a conventional portrait of a celebrity so as to commercially exploit the celebrity’s fame. In a fair use analysis under copyright law, “transformation” also refers to a critical element of how courts evaluate the “purpose and character” of the defendant’s use of a copyrighted work (i.e., the first and arguably most important factor of the four-factor fair use test).

Tri-Pro. Slang term for a co-production arrangement among three studio parties, usually the result of two studios that are already in a co-production with one another selling a project to a platform that forces a further co-production with its own affiliated studio.

TVOD. “Transactional Video on Demand,” i.e., paid access to content online, with purchase and/or rental fees paid on a specific product-by-product basis (rather than for a blanket subscription to a library of content).

Unscripted Television. A blanket term, sometimes used interchangeably with “reality television,” that broadly encompasses several sub-genres, including “unstructured reality” or “documentary” (aka “docu-follow”) series

(e.g., *Deadliest Catch* and *Keeping Up with the Kardashians*), “structured reality” series (e.g., *Shark Tank* and *Mythbusters*), “reality competition” series (e.g., *The Voice* and *Top Chef*), game shows (e.g., *Jeopardy!* and *Family Feud*), and other “alternative” forms of programming such as late-night talk shows (e.g., *The Tonight Show* and *The Late Show*) and awards shows (e.g., the annual broadcasts of the Academy Awards and Golden Globes ceremonies).

Upfront. An event thrown by a television network, attended by talent, press, and major advertisers, during which the network announces its newest series for the upcoming season and solicits commitments from advertisers.

Upset Price. A WGA-determined minimum writing fee or script purchase price that, if paid, allows the studio to buy out certain “separated rights” that are otherwise automatically reserved to the writer/creator of an original television series under the WGA Basic Agreement.

Vertical Integration. A combination of two companies, by acquisition or merger, into a single conglomerate that owns/controls multiple entities in the distribution/supply chain that brings a product from creation to consumer.

Vig. A colloquial term for the difference between an individual’s guaranteed compensation under an overall term deal and the amount recouped against the guarantee based on the individual’s actual services during the term of the deal.

Virtual MVPD (or vMVPD). A subscription service that substantially recreates the multichannel subscription package traditionally delivered by MVPDs such as cable and satellite television providers, but which is delivered to subscribers over the internet and accessed through applications on third-party devices like smart TVs and multipurpose set-top boxes, rather than through dedicated hardware provided by the vMVPD. Such services are often functionally indistinguishable from traditional MVPDs, but do not fall within the technical regulatory definitions of “MVPD” under U.S. communications law because of their internet-based (rather than cable or satellite-based) delivery.

VOD. “Video on Demand,” a somewhat ambiguous term that may be used as a catch-all for all forms of video on demand (e.g., AVOD, SVOD, TVOD, etc.); as a synonym for “ERT”; or to refer more narrowly to a free or ad-supported form of ERT that is offered through MVPD set-top boxes in connection with the customer’s subscription to a television network included in his or her cable/satellite package.

Walled Garden. A business strategy in which a large, vertically integrated conglomerate seeks to exploit its wholly owned content across a variety of affiliated consumer-facing platforms in various media and territories, while intentionally limiting the company’s efforts to sell original or library content to third-party platforms or acquire it from third-party studios.

Waterfall. The flow of distribution revenues through a series of deductions pursuant to a contractually defined formula, as is applicable for talent profit participants or between co-production partners in a television series.

WGA. The Writers Guild of America, the union representing professional writers working in the U.S. television industry.

WGA Credit Determination. The process by which the WGA, which has exclusive jurisdiction over the final determination of writing credits for all episodes of a series, determines the credited writer of any given script. In the case of a pilot script, this decision typically determines who receives “created by” credit for the resulting series.

Windowing. The sequential availability of content in a variety of exhibition media over time. Windowing reflects the strategic subdivision of licensed rights across media, territory, and time by a content owner looking to maximize the economic value of a film, television series, or other copyrighted content asset.

Work-for-Hire (or Work-Made-for-Hire or WFH). A concept arising under U.S. copyright law, which designates the employer of a party or parties creating intellectual property (e.g., writers, directors, and actors) to be the legal author and owner, from inception, of the copyright (and other intellectual property rights) in the employees’ work.

Work Rules. A catch-all term for the minimum protections, requirements, and entitlements applicable to an actor under any given schedule of the SAG-AFTRA Basic Agreement (including, e.g., limitations on working hours, scheduling requirements, overage compensation entitlements, and rules on the length, timing, and financial penalties for violating mandatory meal and rest periods).

Writer/Producer. A sub-category of Article 14 television writers, comprising all ranks above Executive Story Editor (i.e., Co-Producer, Producer, Supervising Producer, Consulting Producer, Co-Executive Producer, and Executive Producer). The WGA Basic Agreement dictates not only the minimum number of writers, but also the minimum number of writer/producers in particular, who must be employed in both pre-greenlight “mini-rooms” and full post-greenlight writers’ rooms. Writer/producers are subject to higher minimum weekly compensation requirements than Story Editors and Executive Story Editors (the two most junior ranks of Article 14 writers).

Writers’ Room. A group of writers and writer/producers who, together, determine the story for a season of television, write the individual scripts for the season’s episodes, and serve as key lieutenants to the showrunner in that individual’s creative leadership of the production. The term may also refer to the literal physical room in which the writers meet to engage in major creative discussions as a group.

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