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E-ISSUES TAKE CENTER STAGE: 
THE 2000 SAG/AFTRA STRIKE

CRAIG J. ACKERMANN*

I. INTRODUCTION: TECHNOLOGICAL CHANGE AND LABOR RELATIONS IN THE ENTERTAINMENT INDUSTRY

It would be difficult to overstate the importance of technological innovation on labor relations in the entertainment industry. Traditionally, the introduction of new media – movies, television, cable, VCRs and satellites – has created conflict between management and labor over compensation and working conditions. According to some industry spokespersons, "the rapid pace of technological change is the single most important influence on labor relations and is at the root of most labor-management disputes in the [entertainment] industry." The unions seem to concur in this assessment. For example, an official of the Screen Actors Guild ("SAG") has opined that, "all of the major strikes of the talent unions have been 'technology driven.'"

Like its technological predecessors, the Internet is a divisive labor relations issue because of its potential, based on the introduction of increasingly sophisticated streaming video and compression technology, to displace the use of older media such as television and, thereby, bypass established frameworks for payment of residuals to commercial actors and erode the jurisdiction of SAG and the American Federation of Television and Radio Artists ("AFTRA"). Generally speaking, the industry pays actors and actresses who work on commercials "minimum scale" with residual compensation

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2. Id. at 4.

3. Id. at 46.
amounting to as much as four times the initial session fees. As a result, “commercials are the largest source of residual income for actors.” In particular, commercials generate approximately $700 million annually for union members. Anecdotal evidence confirms that commercials are the “mainstay” of most actors and actresses. Consequently, both SAG and AFTRA have been highly motivated to seek jurisdiction over, and residual compensation for, the playing of commercials on any new media such as the Internet. The motivation was not only to prevent erosion of traditional residuals from the displacement of old media by new media, but also to capture additional residuals for any supplemental play of commercials in the new media format.

This paper will analyze the recently settled SAG/AFTRA strike and the significant impact of the Internet on SAG/AFTRA’s dispute with advertisers. Part B discusses the bargaining history of the parties and key non-Internet issues. Part C analyzes Internet issues and the argument that the imminent arrival of e-TV was the most important factor in the negotiations. Part D discusses the parties’ settlement agreement and the compromises made by both sides. As the terms of the new collective bargaining agreement suggest, SAG/AFTRA was willing to sacrifice key demands on cable residuals in order to establish a jurisdictional foothold in the Internet world. In this regard, SAG/AFTRA may be the first of a number of entertainment unions willing to make hefty compromises in order to facilitate the seizure of jurisdiction in cyberspace. Finally, Part E presents tentative conclusions about the nature of technological change and collective bargaining drawn from the experience of the 2000 SAG/AFTRA strike.


5. UNDER THE STARS, supra note 1 at 170.

6. See Roger Armbrust, SAG-AFTRA Calls Spot-Pact Strike, Back Stage 1, Vol. 41, Iss. 16, 2000 WL 19738877, Apr. 21, 2000 (stating “[t]he lucrative commercials contract has brought the two unions’ members nearly $700 million annually”); see also American Association of Advertising Agencies, ANA/AAAA Joint Policy Committee on Broadcast Talent Union Relations’ Strike Alert, at http://www.aaaa.org/downloads/negotiations00/strike/6-26.html (stating “[i]n 1999, the SAG/AFTRA talent payroll for television and radio commercials was $708,500,000”).

7. See Bill Dunlap, Striking a Chord, SHOOT 21, Vol. 41, Iss. 20, 2000 WL 18256540, May 19, 2000 (quoting Susan Boyd, President of AFTRA, Los Angeles local: “We do movies, we do TV, industrials and so forth, but commercials have always been the mainstay.”).
II. THE LONGEST STRIKE IN HOLLYWOOD'S HISTORY: GENERAL BACKGROUND TO THE SAG/AFTRA DISPUTE

On October 12, 2000, the SAG/AFTRA strike against the commercial advertisers became the longest strike in Hollywood history, surpassing the 154-day Writers' Guild Strike that took place in 1988. When the parties finally announced the settlement of their dispute on October 22, 2000, it was the SAG/AFTRA strike's 175th day.

This section sets forth the bargaining history between SAG/AFTRA, the Joint Policy Committee ("JPC") of the Association of National Advertisers ("ANA") and the American Association of Advertising Agencies ("4A"), which led to the extended strike. Specifically, this section analyzes the parties' respective positions with respect to non-Internet issues such as rates of pay for television residuals, cable pay-per-play and monitoring of residual payments for accuracy. As shown below, the bargaining positions of the advertisers and the unions were heavily influenced by the trend in viewership rates from network television to cable and the parties' prior negotiations (or lack thereof) with respect to cable residuals. This analysis is pertinent to the discussion of the Internet, not only because the parties' negotiations with respect to cable impacted their negotiating strategies with respect to the Internet, but also because Internet issues are intertwined in complex ways with the more traditional subjects of negotiation.

A. Summary of Bargaining History Between SAG/AFTRA and the JPC: Why Couldn't the Parties Just Get Along?

The SAG/AFTRA strike arose in the context of a negotiation over the renewal of an industry-wide collective bargaining agreement between SAG/AFTRA and the JPC of the 4A that was scheduled to expire by its own terms on March 31, 2000. Commercial negotiations began on February 14, 2000; on that date, four major issues were on the agenda: (1) rates of residuals for network television; (2) rates of residuals for cable; (3) monitoring of residual payments for accuracy; and (4) pay-per-play.

8. See John Herzfeld, SAG/AFTRA, Advisors Break Off Talks, Missing Chance to End Five-Month Strike, 190 DLR A-10 (Sept. 29, 2000).
sion commercials; (2) cable pay-per-play; (3) monitoring of residuals for accuracy; and (4) the Internet.\textsuperscript{12}

The parties quickly reached impasse over the main subjects of the negotiations. According to SAG/AFTRA representatives, negotiators for the JPC refused to discuss pay-per-play for cable or jurisdictional issues relating to the Internet unless SAG/AFTRA agreed to change the general framework of residuals for network television commercials from pay-per-play to a flat fee. As SAG's Gordon Drake explained, "[t]heir negotiators won't address cable or the other issues until we accept the Class A rollback. We'll never accept it."\textsuperscript{13} For SAG/AFTRA, the retention of the existing residuals framework was a strikable issue, as were the other key topics on the agenda. Accordingly, on March 28, 2000, SAG/AFTRA voted to give its board authority to call a strike if necessary. Of the 135,763 SAG and AFTRA members nationwide, 40,956 members cast votes and 93% of those returning ballots voted to authorize the strike.\textsuperscript{14}

In early April 2000, SAG/AFTRA made the following proposals in negotiations with the JPC: (1) Cable: SAG/AFTRA proposed extension of the pay-per-play formula from network television to cable; (2) Internet: SAG/AFTRA proposed (a) that the current television and radio commercials agreement be expanded to include commercials made for the Internet and (b) that a use measurement residual system be adopted for the Internet; (3) Monitoring: SAG/AFTRA proposed a fund to establish a monitoring system for commercial usage on network, cable and the Internet; (4) Television: SAG/AFTRA proposed a 14% across the board wage increase in all other areas, except for Spanish language (25% increase) and foreign use payments (125% increase); and (5) Benefits: SAG/AFTRA proposed an additional 1% of all talent payments to be paid to the

\textsuperscript{12} \textit{See} Roger Armbrust, \textit{SAG Strike Head: It's Internet, Stupid}, \textit{BACK STAGE 1}, Vol. 41, Iss. 29, 2000 WL 24046683, July 21, 2000 (quoting Gordon Drake: "There are four major issues in the talks: rollbacks, cable pay-per-play, monitoring and the Internet."); \textit{see also} David Mason, \textit{Three Unions Vote Next Summer}, \textit{NATIONAL POST}, 2000 WL 26898712, Sept. 21, 2000 (Arts & Leisure) ("AFTRA and SAG have been on strike against the advertising industry since May 1 because of a dispute over residual payments for commercials on cable, the rate of payment on broadcast TV, and payments for ads rebroadcast on the Internet.").

\textsuperscript{13} Armbrust, \textit{supra} note 12 (noting Drake told national board of directors that guild would never agree to one-time buyout on network spots).

\textsuperscript{14} \textit{See} Screen Actors Guild, \textit{at} http://www.sag.org/pressreleases/pr-la000328.html (stating "SAG/AFTRA Commercials Contract Strike Authorization Receives 93% Approval").
pension and health funds which would increase the existing 12.65% contribution to 13.65%.15

On April 14, 2000, the JPC made its “final offer” to SAG/AFTRA, which consisted of the following proposals: (1) Session payments: the industry proposed an increase in daily session payments of 4.4% from $478.70 to $500; (2) Extra Performer Rate: the industry proposed an increase in daily payments of 6.2% from $259 to $275; (3) Network-Flat Payment Guarantee: the industry proposed changing the existing “pay per use” network residual payment (which contained no guarantee) to a flat guaranteed payment of $2,575 for unlimited use of commercials during a standard thirteen-week period; (4) Cable Residuals: the industry proposed a 60% increase in the maximum cable residual payment from $1,014 to $1,627 for unlimited use during a thirteen-week period; (5) Spanish Program Commercials: the industry proposed an increase of 7.2% for Spanish program commercials from $1,399 to $1,500; (6) The Internet: the industry proposed that for television and radio commercials transitioned or “moved over” for Internet use, the existing rate of two session fees be incorporated into the commercials contract. The industry further proposed to meet and confer over commercials made exclusively for the Internet until jurisdictional issues are resolved; and (7) Monitoring: the industry proposed the formation of a special industry/union committee to study the conversion of the existing residual payroll and reporting system to one that pays and reports residuals based on verification of use, for example, media invoices and station reports.16

Because the JPC’s “final offer” fell significantly short of SAG/AFTRA’s wish list and arguably constituted a “roll-back” of pay-per-play residuals for network television, SAG/AFTRA rejected these proposals outright and elected to strike. Accordingly, on April 19, 2000, SAG/AFTRA mailed out a Strike Notice to members, which defined the key issues as follows: (1) Pay per play for cable; (2) monitoring of commercials for accuracy in payment of residuals; (3) Internet broadcast of commercials (both jurisdiction over commercials made for initial use on the Internet and residuals for television commercials used on the Internet and/or e-commercials


made for use on the Internet); and (4) the industry’s expressed desire to eliminate Broadcast Network Class A pay-per-play formula and instead pay a flat fee of $2,575 for unlimited use in a thirteen-week cycle.17

B. Analysis of Key Non-Internet Issues: “If They’re Watching Cable, We Can’t Pay” vs. “Let’s Try and Catch The Long Departed Boat.”

As shown below, the advertisers’ proposals in the SAG/AFTRA negotiations were motivated primarily by a shift in viewership from network television to cable. The unions’ positions, on the other hand, were heavily influenced by SAG/AFTRA’s prior failure to capitalize fully on the trend toward cable in terms of negotiation of a residual formula. The background history is critical to understanding the parties’ respective positions with respect to the Internet, which appears to be the first post-cable technological trend with significant long-term consequences for labor relations in the advertising industry.

1. Residuals for Network Television Commercials: Rollback or Bankroll?

At the commencement of the SAG/AFTRA negotiations, the JPC proposed a replacement of the pay-per-play residual structure for network television commercials with a guaranteed flat fee:

Currently for commercials which air on the networks (ABC, CBS, NBC, FOX, WB, UPN and PAX), performers are paid residuals on a [pay-per-play] formula. The new proposal restructures that current formula and replaces it with a flat rate of $2,045.05 (on-camera) for an unlimited number of Class A uses in a [thirteen] week period. This proposal eradicates the unions’ long standing [pay-per-play] residual structure for this type of use.18

The JPC attempted to justify this change in payment structure with two distinct lines of argument. First, the JPC asserted that, given certain industry trends – specifically, the lower ratings on network

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18. See http://www.sag.org/contract2000/proposal (noting that under industry’s proposal, actors and actresses were guaranteed $500 when they performed in commercial; if commercial played on broadcast television, $500 fee was to be applied against total $2,575 flat fee).
versus cable television – the pay-per-play system was no longer financially viable:

The industry explained prior to negotiations that the pay-per-play methodology designed in the 1950’s for commercials run on the “Big 3” networks, which then delivered over 90% of the American television audience, is outdated given the change in viewership, the demise of network dominance, and the proliferation of cable and network viewing options. These fundamental changes require advertisers to play television commercials many more times than in the past to reach the same viewership. A pay per play system in today’s TV market is unjustifiably costly. 19

The basic argument advanced here is that if the American public is watching cable more frequently now, then the old payment model does not suffice. Stated differently, advertisers must now run commercials more times on the networks to reach the same total number of viewers. 20 Under a pay-per-play model, SAG/AFTRA members benefit from this “windfall” of additional play even though the clients and the industry presumably secure no more “benefit” from the supplemental airing of commercials because the audience size remains the same. 21

The JPC’s second argument in defense of its proposal to eradicate pay per play on network television was that their guaranteed flat fee proposal would benefit more actors and actresses than the current pay-per-play method:

The industry firmly believes that its proposed guaranteed residual methodology in which a principal actor will be paid a guaranteed residual payment of over $4,200 for one day of work filming a commercial aired on network and cable during its initial cycle of use, more for spot use and

20. See American Association of Advertising Agencies, at http://www.aaaa.org/downloads/negotiations00/strike/6-26.html (“The Association of National Advertisers conducted an industry study and analysis of these trends in 1998-99 prior to the commencement of the current SAG/AFTRA negotiations. The goals and analysis of this study were four-fold: (1) Bring the methodology under which talent is compensated current with present trends in viewership of TV advertising, (2) eliminate windfall payments born out of an industry structure which no longer exists.”).
21. See id. (arguing that repeat commercials to same size audience have “value” to industry irrespective of diminished viewer size; in theory, additional play to same/smaller audience should operate to increase sales of any product).
more in subsequent cycles will benefit well the vast majority of SAG members. Under the old [pay-per-play] residual formula, pay was based on a gamble that a commercial would play many, many times. In fact, 50% of all actors made less than $2,045 in network residuals per cycle. Trading a gamble for a guarantee is the only prudent way to provide economic stability to scale actors. It is truly a “win win” way of modernizing the contract for effective use in the year 2000 and beyond.\(^{22}\)

To promote this argument, attorneys and officials representing the industry during the SAG/AFTRA strike reiterated time and again that under the prior collective bargaining agreement, 50% of all actors and actresses made less under the pay-per-play structure than they would under the industry’s proposed flat fee system.\(^{23}\)

These arguments were not very persuasive to the unions’ negotiators. SAG/AFTRA maintained that the industry’s logic was untenable in light of its recent record profits.\(^{24}\) Because advertising revenues were allegedly up, the JPC had a difficult time persuading SAG/AFTRA to alter the established pay-per-play formula for network television residuals. Significantly, SAG/AFTRA also pointed out that, notwithstanding the network’s diminished percentage of the total viewing audience, “the total number of television viewers has grown by 66% in the last thirty years.”\(^{25}\)

The JPC’s second argument that the proposed flat fee would benefit most actors and actresses arguably proved too much. From a financial standpoint, if this argument were true, why would the industry support this framework? The crux of SAG/AFTRA’s re-

\(^{22}\) See American Association of Advertising Agencies, at http://www.aaaa.org/downloads/negotiations00/strike/6-6.html.

\(^{23}\) See, e.g., American Association of Advertising Agencies, at http://www.aaaa.org/downloads/negotiations00/strike/6-12.html (stating that “half of all scale actors received pay per play network residuals under the expired contract of less than $2,045 per cycle, plus a maximum cable residual of $1,014 per cycle, for a total of $3,059, or less”); see also American Association of Advertising Agencies, at http://www.aaaa.org/downloads/negotiations00/strike/6-26.html (noting industry’s new residual guarantee of $4,202 per quarter of use in network and cable constitutes at least 37% increase per quarter for half of SAG members, and benefits vast majority of SAG/AFTRA members).

\(^{24}\) See Screen Actors Guild, SAG/AFTRA Commercials Strike 2000 Commercial Strike Information, at http://www.sag.org/strike/faq.html (stating “[a]dvertising revenues are up dramatically. According to Advertising Age, total gross income for the top 500 U.S. based ad agencies increased by over 22% in 1999. Additionally, an accounting by Cable Television Advertising Bureau revealed a 33% gain in cable billings up to $10 billion”).

\(^{25}\) Id. (arguing network is just as powerful today as it ever was).
joinder was that, with more play of commercials on network television, last year's residual payment figures would not be an accurate indication of anticipated figures for the coming years. That is, 50% more actors and actresses over the next decade will likely do better under the established pay-per-play scheme than under the company's proposed flat-rate scheme due to additional play of network television commercials. Thus, while the industry's proposal was perhaps unfairly characterized as a "rollback" when viewed against last year's residuals for SAG/AFTRA members, it could be so construed when viewed against current projections of future residual payments.

Needless to say, SAG/AFTRA took the position that pay-per-play would benefit the vast majority of actors and actresses. The following question and answer were found on the SAG/AFTRA Commercials Strike 2000 Website:

Q. I understand the Industry is offering $2,575 per network cycle (on-camera principal) whether the commercial runs once or a hundred times. Isn't that a good deal if the commercial runs only a few times?
A. No, not at all. The Industry admits that the average network commercial runs [forty-two] times or more during a thirteen-week cycle. The current contract pays $3,025 for [forty-two] runs, $5,730 for [one hundred] runs. Further, one of the commercial actor's greatest and most perplexing problems is overexposure. The more your commercial runs, the less likely you are to get another commercial any time soon. It is vital — and only fair — that performers be paid adequately for each run in order to help compensate for this effect.26

Without access to the underlying financial information, it would be difficult to deliver judgment on the authenticity of each side's claims. However, assuming for the sake of argument that new technologies such as the Internet operate to supplement, rather than to replace, existing network television commercials, SAG/AFTRA members may be sitting on the network television residual equivalent of a gold mine. Suffice it to say that SAG/AFTRA was clearly convinced that its members would be better served by the

26. Screen Actors Guild, at http://www.sag.org/strike/faq.html (demonstrating union's answer is not actually an implicit yes, and that industry's flat fee may be superior for commercials that run significantly less than 42 times).
pay-per-play formula in both the network television and cable arenas.

Although not explicitly admitting that SAG/AFTRA's arguments on the network residuals issue were meritorious, the JPC implicitly did so through its subsequent negotiating reversals. On September 13, 2000, the parties returned to the negotiating table in New York City at the request of federal mediators.27 On September 27, 2000, after three days of pre-negotiation mediation and nine days of face-to-face negotiations with full negotiating committees, discussions broke down without an agreement.28 Significantly, however, the JPC agreed during these marathon negotiations to rescind its proposal to change the structure of residual payments for network television commercials:

In a major effort to settle the longest strike in SAG's history, the industry removed prior proposals that the union had been characterizing as "roll-backs." The industry had proposed a guaranteed residual formula as the centerpiece of its attempt to modernize the contract. The industry proposed this as a way to more accurately reflect the contemporary television advertising market in which network viewership has declined and cable viewership has risen. We consider dropping the network proposal to be a major concession to the unions' number one articulated concern. This, as well as our offer of lucrative increase in cable residuals, should have settled the strike. Nonetheless, the unions have continued to negotiate from a position that they require capitulation to all of their other demands.29

The most interesting aspect of this press release is the way in which the advertisers portrayed their decision to relinquish their demand to change the structure of residual payments on network television as a major concession to SAG/AFTRA. Apparently, one group's "windfall" is another group's bargained for benefit. From the position of SAG/AFTRA, this alleged "concession" is nothing more than a promise to maintain the status quo prior to the commencement of the negotiations, hardly a dramatic "concession," except when viewed against unexpected changes in viewership.

27. See Herzfeld, supra note 8.
28. See id.
The JPC portrayal of its decision to change its position on television residuals as well as the complete reversal of its position on the necessity to alter network television's pay-per-play formula suggests that the industry may have used the threat of a network residual "rollback" as a bargaining chip with which to make a "major concession." Arguably, the JPC gave away nothing by agreeing to maintain the status quo ante. On the other hand, given current viewership trends, the industry could argue in good faith that it made a real concession, which required some reciprocation by SAG/AFTRA prior to, or in connection with, any substantive discussion on cable and/or Internet-related issues.

2. Cable Pay-Per-Play: SAG's Attempt at Come From Behind Bargaining

The second major issue in the SAG/AFTRA dispute with the JPC concerned the unions' demand for a new pay-per-play formula for cable television residuals. In the negotiations, SAG/AFTRA attempted to remedy its past bargaining mistake of agreeing to a flat fee for unlimited use of cable commercials in a thirteen-week cycle by proposing a radical new residual formula for cable. Needless to say, the parties were initially unable to agree on a solution to the cable residual issue.

There is a generally held view in the entertainment industry that SAG/AFTRA "missed the boat" in prior negotiations over residuals for commercials aired on cable. Some objective evidence supports this view. Payment of cable residuals under the collective bargaining agreement operative in the early part of 2000 were capped at $1,014 for unlimited use during a thirteen-week cycle. Apparently recognizing that this flat fee does not adequately compensate actors and actresses, the JPC proposed an increase in the cap of 60% to $1,627 for unlimited use during a thirteen-week cycle.

Based on tremendous increases in cable viewership, SAG/AFTRA proposed a pay-per-play system for cable residuals:

Members have been concerned over the inequities in cable residuals paid to performers over the past several years. The union proposal establishes a [pay-per-use] residual formula which is similar in concept to the existing Class A program residual structure. The unions are pro-

31. See id.
posing that the "per use" fee is tied to a 37% factor of the corresponding Class A use paid to the performer. According to the JPC, SAG/AFTRA's proposed formula would have produced a "350% increase in the annual cable residual payments" and cost the industry $650 million more in cable payments alone over three years. Before the strike, the parties were able to make limited progress on the cable residual issue. For their part, the unions reduced their demands and insisted on increases of cable residuals by only 150% during the new contract. The advertisers, in turn, proposed increases of 85%.

It seems reasonably clear that the unions were engaged in "come from behind" bargaining with respect to the issue of cable residuals. That is, SAG/AFTRA attempted to recapture monies their members would have received had the unions negotiated a pay-per-play regime for cable residuals into the prior contract. Unsurprisingly, the advertisers were unwilling to revisit the flat-fee system in part, based on the parties existing practice. The cable pay-per-play issue emphasizes the importance of prophecy in the bargaining process. If only SAG/AFTRA had anticipated viewership shifts to cable, they could have negotiated far stronger formulas for cable residuals on behalf of their members. As evidenced by the final settlement terms of the 2000 strike, SAG/AFTRA did not want to make the same mistake with respect to the Internet.

3. Monitoring of Residuals for Accuracy

The third major issue in the SAG/AFTRA negotiations, the monitoring of commercials for accuracy in the payment of residuals, is relevant in the network television, cable and Internet contexts. At first glance, this issue appears to be one in which the parties early in their discussions should have been able to find some common ground. After all, neither side could deny the proposition that actors and actresses should be paid the residuals owed them under formulas negotiated through the collective bargaining process, whatever final shape those formulas assume. Nevertheless, as discussed more fully below, the parties were initially unable to make


significant progress on this issue, and the issue remains open and subject to further study under the terms of the recent strike settlement.

At the commencement of negotiations, SAG/AFTRA demanded independent verification that its actors and actresses were being paid appropriate amounts of residuals: “The unions demand that the industry agree and pay for an unspecified method from which a third party may be able to institute a monitoring system to track the playing of all commercials on network and cable.”35 In April 2000, the JPC counter-proposed the “formation of a special industry/union committee to study converting the present residual payroll and reporting system to one that pays and reports residuals based on verification of use, for example, media invoices and station reports.”36 After these initial discussions, no serious progress was made toward a bargained resolution of this relatively non-ideological issue until September or October 2000, when the parties essentially agreed to study the issue further.37

One reason for the stale-mate may be the fact that SAG/AFTRA implicitly accused the industry of dishonesty with respect to payment of current residuals. Specifically, Gordon Drake stated that SAG/AFTRA’s own ad hoc investigations demonstrated that actors and actresses are often underpaid their accrued residuals: “Every time we’ve taken a group of commercials and studied them, we’ve found underpayment [for actors]. It’s always fallen in favor of the advertisers. We’ve never owed them money. They’ve always owed us.”38 This statement implies the impossibility of anything but intentional and systematic underpayment by its use of the terms, “every time,” “always” and “never.” These allegations may have ossified the advertisers’ position on this issue, by focusing on the industry’s honesty and integrity.

A second stumbling block to a resolution of the monitoring issue may have been SAG/AFTRA’s insistence that the industry bear the full cost of the monitoring regime. On its Commercials Strike 2000 Website, SAG/AFTRA did not deny that their proposal was expensive, but took the position that dramatic underpayments of residuals justified the expense of the effort:

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38. Armbrust, supra note 12.
Q. Is monitoring the use and frequency of commercials even possible? Doesn’t the industry claim it will cost a fortune?

A. Yes, it is possible; yes, the industry does claim it will cost a fortune. But SAG has run a few tests to check the accuracy of commercial payments. Checking only 36 commercials, we collected more than $100,000 in underpayments! Obviously, some of that “fortune” belongs to us. Even more important, actors deserve to have the assurance that they are being paid accurately. Systems and technology do exist that can dramatically improve accuracy and, with some cooperation from the industry, those systems can be expanded to cover the majority of commercial use. Now is the time to get that cooperation.39

Here, SAG/AFTRA avoided any discussion of the JPC’s central concern of how to pay for the monitoring. To resolve this issue, SAG/AFTRA needed to demonstrate that a monitoring system could be implemented without great expense or else suggest some creative financing solutions. Because the former proposition appears untenable, the parties will have to study the latter.

One possible solution might be a cost-sharing arrangement. If SAG/AFTRA is confident in its assessment of widespread underpayment of residuals, it may be sensible to finance part of the cost of the monitoring regime. SAG/AFTRA could contribute its share of the expense via a deduction of a percentage from the recovery of any additional residuals secured for actors and actresses through additional monitoring. In the long-run, as I further suggest below, the Internet itself may be the most cost-effective tool for monitoring payments of residuals.

III. IS THE TV SKY FALLING?: WHY E-TV WAS THE KEY ISSUE IN THE SAG/AFTRA DISPUTE

Although each of the issues previously discussed is important in its own right, the Internet was arguably the single most sensitive and explosive issue in the SAG/AFTRA negotiations with the JPC. As shown further below, the imminent convergence of cable and the Internet will very likely have the effect of conflating all of the

critical issues discussed during the course of the SAG/AFTRA negotiations. Moreover, as both parties to the negotiations may already intuit, the Internet is a technological tsunami that has the long term potential to weaken significantly entertainment companies and unions unwilling to adapt to the new technology. For these reasons, the prospect of online television was probably the core issue in the 2000 SAG/AFTRA strike.

According to senior officials in SAG and AFTRA, the JPC initially did not want to discuss the Internet issue because the advertisers already recognized in early 2000 that a significant part of the future of television commercials is on-line. Based on this theory, Gordon Drake, SAG's national strike captain, accused the advertisers of using "rollbacks on network residuals" as a "smokescreen" to avoid negotiations on the unions' Internet jurisdiction proposal.40 According to Drake, who supplements his acting income by working as a web consultant for Internet companies, television and the Internet will soon merge so that "prime time is near, in Internet time."41 This convergence theme was emphasized on SAG/AFTRA's Commercials Strike 2000 Website:

Most industry insiders believe the Internet will converge with cable television to become the primary medium for entertainment and information delivery to the home in the next few years. However, the industry has refused to recognize SAG and AFTRA as having any jurisdiction to cover performers' work directly for the Internet. Subsequently, the industry has refused to discuss it at the negotiating table. It is one of the key issues about which we are striking. Without that jurisdiction, the Internet will become a haven for non-union, underpaid work. Just as cable became vital to television, the Internet will probably become crucial to our future. We must not let the future become unprotected and non-union.42

Stated otherwise, SAG was concerned that increased use of the Internet by advertisers would erode their muscle by reducing their jurisdiction to "old economy/old technology" advertisements. The

40. Roger Armbrust, Tiger's Spot Lands Him in a SAG Trap, BACK STAGE, Aug. 4, 2000, at 47.
41. Armbrust, supra note 12 (quoting Gordon Drake: "The convergence of TV and the Internet is getting closer and closer; it's upon us, basically.").
basic message here was that SAG/AFTRA determined that they needed to unionize cyberspace to maximize their future relevance.

Although unions are sometimes prone to hyperbole in the midst of a strike, SAG/AFTRA's analysis of the convergence of television and the Internet appears to be consistent with the prognostications of technical experts. Analysts predict that, by 2005, 47 million households will have high-speed Internet connections. By 2009, the number is expected to climb to 107 million households, equivalent to ninety percent of Internet users. New video compression technology, such as "DivX" developed by Microsoft, has laid the foundation for Internet video to be the next major trend on-line. As one industry observer recently noted, "Internet and new media convergence now completely engulfs the entertainment industry."

The "engulfment" phenomenon has expressed itself in various ways pertinent to the future of television commercials on-line. First, nearly every major advertising agency has established a "New Media" division, the objective of which is to capture part of the $2 billion annual on-line advertising market. Second, web and new media firms are constantly merging "in efforts to take advantage of changing technology, and in the hopes of offering consumers everything from film, network and cable TV, and music over the Internet." Third, numerous start-up companies are working on

43. See, e.g., Mary Rasenberger & M. Lorraine Ford, Untangling the Web of Rights to Film and Video: Before Putting Such Content On-Line, Clear it for Use on the Internet, N.Y. L.J., Sept. 18, 2000, at S3 (stating that "[b]roadband access is coming even faster than anyone thought").


45. See id.

46. See id.

47. Armbrust, supra note 12.

48. See 98 DLR A-11 (May 19, 2000) (quoting SAG President John MacGuire: "Nearly every major ad agency has now established New Media divisions actively pursuing how best to utilize the Internet for commercial uses."); see also Edwin Molina, USA Video Interactive Corp-USA Video and Lightforce Films Sign Internet Contract, CANADA STOCKWATCH, Dec. 22, 1999, available at 1999 WL 27161735 ("Internet advertising reached $2 billion last year, is headed above that this year and is growing exponentially.").

49. Armbrust, supra note 12; see also Robert Goldrich, 4MC's Riot, Digital Magic, POP Merge, SHOOT, Mar. 24, 2000, at 18 (discussing merger of several companies and concluding that, "the newly formed RIOT will be well positioned to serve the changing landscape in which television and the Internet, as well as advertising and entertainment, are coming together"); Eleftheria Parpis, Breaking Through, HOLLYWOOD REPORTER, July 12, 2000 at S4 (discussing deal between Propaganda Films and Internet aggregate Atomfilms to produce short films for web);
more advanced video compression software that will facilitate the airing of commercials on the Internet as if they were running on network television.\textsuperscript{50} Finally, the prospect of e-TV has spawned the creation of "virtual studios" in Hollywood, armed with state-of-the-art equipment for the production and distribution of e-TV, virtual advertising and webcasting.\textsuperscript{51}

The future of Internet television will likely be impacted more by the networks and large players in the entertainment industry than by these early e-entrepreneurs. As an attorney for the industry has written:

The future of video on the web may not be truly discernable until the entertainment industry begins to concentrate more of its firepower on finding ways to harness the new Internet technologies rather than railing against them – to find methods by which the Internet will capitalize, rather than cannibalize, content.\textsuperscript{52}

Although it is still early in the process, one thing is clear to most observers: "Come the broadband revolution . . . video will be ubiquitous [on-line]."\textsuperscript{53}

The manifold potential ramifications of the Internet may explain the JPC's initial unwillingness to discuss the merits of SAG/AFTRA's assertions of jurisdiction in cyberspace. The advertising industry initially took the position that it was "premature" to discuss the issue of SAG/AFTRA's jurisdiction over commercials made for the Internet:

\textbf{Molina, supra} note 48 (discussing merger aimed at bringing live video content, including live video advertising, to web).


51. \textit{See Producers Ivan Gulas and Christopher Eberts Form MirageQuest Entertainment}, \textit{Business Wire}, June 2, 2000 (discussing new company formed to provide state of the art studios for web TV, Internet commercials and music video productions).


53. \textit{Id.} at S3.
SAG/AFTRA demands exclusive jurisdiction over commercials made exclusively for the Internet – something they have never had before. The industry proposed a "meet and confer" agreement under which the industry and unions would exchange information while this area develops during the next three years. The industry states that Internet advertising is still in its infancy and it is premature to grant jurisdiction over this presently undefined area.\footnote{4}

Nevertheless, SAG/AFTRA continued to assert jurisdiction over commercials made for the Internet based on the similarity of the work involved in comparison with television commercials. AFTRA President, Shelby Scott, summarized her position on management's refusal to recognize SAG/AFTRA's jurisdiction over the Internet as follows:

[The] position is totally untenable . . . . The performers are the same, the work is the same, the employers are the same. The only difference is that the industry seeks to deny these actors the benefits provided by their unions for all other commercial productions.\footnote{55}

These arguments were not necessarily persuasive to the industry. As insiders are well aware, the mere fact of similarity of work does not imply automatic union jurisdiction. For example, ESPN, CNBC and MSNBC are all currently non-union despite the fact that the work performed is equivalent to NBC's unionized, non-cable work. Still, as the SAG/AFTRA strike settlement demonstrates, the industry was eventually willing to compromise on the issue of Internet jurisdiction.

IV. THE CENTRALITY OF E-ISSUES TO THE SAG/AFTRA STRIKE SETTLEMENT

The SAG/AFTRA strike revealed the critical importance of the Internet as an issue in labor relations in the Internet industry. As shown in this section, the settlement of the strike indicates that the unions were willing to make deep concessions in order to secure a foothold in cyberspace.

\footnote{55. Herzfeld, supra note 8.}
On October 19, 2000, after a three week hiatus, negotiations were reconvened in New York City by a federal mediator. After several days of lengthy discussions, on October 23, 2000, SAG/AFTRA and the JPC announced a settlement of their dispute and the basic framework for a new collective bargaining agreement.

The basic terms of the final settlement between SAG/AFTRA and the advertisers were as follows: (1) retention by the advertisers of the pay for play structure for residuals for network television commercials; (2) an increase for the unions of up to 100% in the rate of residuals for commercials running on cable television; (3) recognition of SAG/AFTRA’s jurisdiction over commercials made for, or used on, the Internet (although such jurisdiction is limited to the definition of “commercial” set forth in the existing collective bargaining agreement between the parties); and (4) an agreement to study jointly for six months the possibility of implementing a monitoring system for residuals.

It is fair to say that, with respect to the issues of cable and network television residuals, the basic pre-existing regime for payment of residuals persists under the newly-negotiated collective bargaining agreement. Clearly, the JPC did not secure a “roll-back” of the pay per play system for network television commercials, the maintenance of which had been a “key union goal.” Conversely, SAG/AFTRA did not secure its proposed pay-per-play model for cable television commercials. Thus, “the industry mostly got what it wanted on the cable front.” In essence, neither side persuaded the other to accept a fundamental change in the residual payment regime for commercials running on established technologies.

Some observers have gone a step further and opined that “the settlement reached between the union and the advertisers is little more than a return to the status quo that prevailed before the strike began.” This analysis, however, trivializes major concessions secured by SAG/AFTRA in the Internet arena. Although the advertisers initially refused to recognize, or even discuss, any union jurisdiction over Internet advertising, they eventually conceded ju-

56. See Herzfeld, supra note 37; see also Wayne Freedman & Richard Linnett, Six Month Strike is Over, But No Victor is Declared, ADVERTISING AGE, Oct. 30, 2000, at 3.

57. See Herzfeld, supra note 37; Freedman & Linnett, supra note 56.

58. See Herzfeld, supra note 37; Freedman & Linnett, supra note 56; see also SAG, AFTRA Members Vote to Ratify Contract with Commercial Advertisers, 234 DLR A-10 (Dec. 5, 2000).

59. See Herzfeld, supra note 37.

60. Friedman & Linnett, supra note 56, at 26.

risdiction over certain Internet commercials. The industry recognized SAG/AFTRA’s jurisdiction over the Internet because “the unions were insistent in moving in that direction . . . .”62 It should be emphasized that this was the first time ever that the advertisers recognized the unions’ jurisdiction over commercials made for the Internet.63

However, SAG/AFTRA’s beachhead in cyberspace came at a significant cost. First, the unions’ jurisdiction is limited to and by the definition of “commercials” set forth in the existing collective bargaining agreement. Second, SAG/AFTRA was forced to agree to a flat rate compensation formula for commercials “moved over” from television to the Internet.64 Depending on the ease with which commercials may be “moved over,” this loophole may prove to be an ill-advised concession. SAG/AFTRA apparently believes in a future world filled with residuals on commercials made exclusively for the Internet, a topic which has been deferred to future negotiations.65 As one commentator observed, “the union won in terms of getting jurisdiction over Internet ads, while the advertisers won in terms of limiting the jurisdiction.”66

Only time and the ever-changing trajectory of technological change will tell whether SAG/AFTRA made intelligent concessions to secure a jurisdictional foothold in cyberspace. Nevertheless, these e-arrangements clearly break new ground and do not simply return the parties to the status quo ante. It seems reasonably clear that the unions have moved the Internet to center stage of their overall labor strategy in this sector. Indeed, one could perhaps have inferred the great level of importance SAG/AFTRA now attach to the Internet from the way in which they effectively used the Internet to articulate their positions during the strike.67

62. Friedman & Linnett, supra note 56, at 26 (quoting Dan Jaffe, Executive Vice President of the ANA).
63. SAG, AFTRA Members Vote to Ratify Contract with Commercial Advertisers, 234 DLR A-10 (Dec. 5, 2000).
64. See id.
65. See id.
66. Id.
67. See generally, Screen Actors Guild, SAG/AFTRA, Commercial Strike 2000 Website, at http://www.sag.org/strike; cf. AAAA, Strike Website, at http://www.aaaa.org. Interestingly, during the recent strike, the 4A’s website was hacked into, presumably by members of SAG, because SAG propaganda was posted to the 4A’s website during the strike. SAG/AFTRA later posted a notice to its members not to engage in similar tactics. See American Association of Advertising Agencies, at http://www.aaaa.org/downloads/negotiations00/strike/status7-24.html (“We are also distressed that on Wednesday of last week the AAAA website was hacked into and SAG propaganda from the SAG website was posted for viewing. AAAA strike-related matter was altered. This is a very serious violation of federal law.”).
The Internet will likely continue to play an important role in future collective bargaining as the parties deal with outstanding issues such as the monitoring of residuals and the payment formulas for commercials made exclusively for Internet usage. Web developers have no difficulty installing “webtickers” on websites that make it easy to track the number of visitors to a particular website. From a technological standpoint, therefore, the Internet may be the medium most amenable to systematic tracking of residual payments based on viewership of on-line commercials. Moreover, as SAG’s Gordon Drake has pointed out, the convergence of television and the Internet may “aid monitoring [of] cable” as a result of certain technology embedded within typical broadband cable boxes. In any event, given the importance of the Internet to the future economic welfare of the advertising industry, the JPC and SAG/AFTRA would be well-advised to examine the Internet’s potential as a tool for resolving the residual-monitoring issue.

V. CONCLUSIONS: THE SAG/AFTRA STRIKE, TECHNOLOGY AND COLLECTIVE BARGAINING

From the experience of the 2000 SAG/AFTRA strike, we can draw three related conclusions about the nature of technological change and collective bargaining in the entertainment industry.

First, collective bargaining strategy appears to be motivated in large part by current (often incomplete or incorrect) views about the nature of future technological trends in the industry. Both SAG/AFTRA and the JPC entered into negotiations armed with their own “forecasts” on where technology will lead the industry and how it will effect their pocket-books. SAG/AFTRA seems to have commenced negotiations with an almost religious belief in the centrality of the Internet to their future viability. As a result, SAG/AFTRA made compromises to obtain a foothold in the Internet world. It is fascinating to note that critical strategic decisions — for example, SAG/AFTRA’s decision to accept a flat-rate fee for “move-over” commercials — were apparently made on nothing more than logical guesses about the future significance of Internet advertising.

68. It remains to be seen which revenue model will be appropriate for on-line commercials. For a useful summary of the relevant possibilities, including per use content, per page view, flat fee, revenue share, barter and other models, see Rasenberger & Ford, supra note 43 at 20. The television model — commercials spliced into online video content — as the “price” of a download may prove to be the most viable method of revenue generation.

69. See Armbrust, supra note 12.
Second, the collective bargaining process may be effected by institutional memories of past failures to capitalize on new technology, even though bargaining strategy-by-analogy may be imprecise at best. Here, SAG/AFTRA clearly did not want to miss the Internet boat in the same way that they arguably erred with respect to cable residuals. As SAG/AFTRA’s prior experience with cable demonstrates, collective bargaining in the absence of a thorough understanding of the nature of technological change may force a party onto a negotiating treadmill where it has to run fast just to stay in the same place.

Finally, it is likely that the amazingly rapid pace of technological change itself will pose general difficulties to all collective bargaining processes in the entertainment and advertising industries by forcing parties to negotiate “in the dark.” The lack of vital information can lead to negotiating break-downs as neither side can afford to make strategic compromises without risking large-scale errors. In this case, both SAG and AFTRA have attempted to get ahead of the Internet curve, but the positions to which they ultimately acceded in the 2000 strike settlement presuppose a certain movement of the advertising industry to commercials made exclusively for the Internet. If on-line commercials in the future all simply migrate from television to the Internet, SAG/AFTRA will have made the exact same mistake that they previously made with cable – that is, they will have allowed the advertisers to pay residuals pursuant to a flat fee regime for the majority of the commercials running in the new media.

These tentative conclusions suggest that it may be worthwhile for entertainment unions to invest in sophisticated technological analyses of the state of the industry prior to commencement of future negotiations on existing collective bargaining agreements.