Housewives and Heroes:

How High-Tech Viewing Patterns Drive the Deals for Entertainment Content

by LEIF W. REINSTEIN

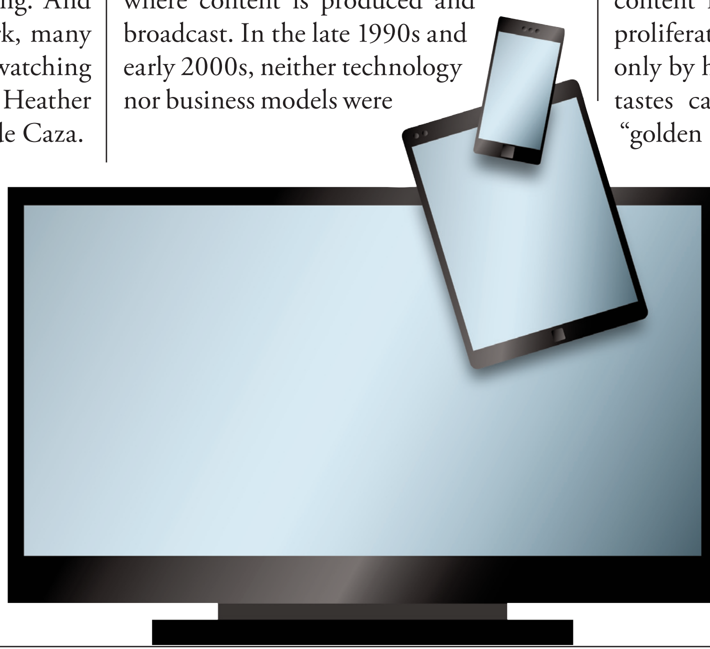
Some of Orange County's greatest exports are its real housewives. Well, at least the Bravo cable channel, and this writer, would make the argument. Bravo launched *The Real Housewives of Orange County* in 2006 right around the rise of social media, and it has spawned at least five spin-offs and inspired countless other docu-series from *Duck Dynasty* to the Kardashian conundrum. Seven years and eight seasons later, the OC ladies continue to tap into viewers' insatiable appetite for voyeuristic "real life" programming. And why not? After a hard day at work, many enjoy the guilty pleasure of watching Tamra Judge (née Barney) and Heather Dubrow gallivant through Coto de Caza.

But, of course, their audience watches at its own DVR-scheduled pace and skips commercials, while also instant-messaging on Facebook, tweeting, and photoshopping Instagram shots. As if viewers aren't already multi-tasking enough, for the show's recent 100th episode special, the vérité housewives interacted live with fans via zeebox, an interactive app which provided the episode with a concurrent second screen on tablets, smartphones, and laptops. Already re-running on Hulu, with this move, the *Housewives* brand continued its vanguard efforts to adapt to the quickly changing content and viewership landscape.

Consumer-Driven Tastes and Technology are Changing the Nature of Content

Emerging technologies, viewer consumption patterns, and audience expectations for entertainment are finally beginning to dictate how, when, and where content is produced and broadcast. In the late 1990s and early 2000s, neither technology nor business models were sufficiently advanced for content to be delivered in a high enough quality manner except on the big screen and television. With the rise of social media technology in the mid-2000s, which allows engagers to share and watch their own and friends' lives minute-by-minute, basic cable channels increasingly tapped into viewers' similar desire for "pull-back-the-curtain" non-scripted programming.

Now, as basic cable networks and Netflix flourish, and Amazon and Microsoft, among others, enter the original content fray, a new era of programming proliferation has begun. And it is limited only by how far technology and consumer tastes can go. Some have called it the "golden age of television," but it is bigger; call it the "new age of content," where high technology takes audiovisual product in continuously unfolding directions. This shift in entertainment production and distribution is obviously a boon for consumers as more and more providers vie for their attention with top-quality shows targeted to all niches and tastes in as immediate a manner as possible.



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of technology and content, entertainment lawyers need to be diversified and open-minded in their approach to deal structures, and in advising clients and interacting with companies. Whether for talent agreements or for business-to-business transactions, the "one-size-fits-all" approach to entertainment dealmaking no longer applies.

The Rise of the Small Screen

The current content boom has its roots in basic cable. Even as recently as five years ago, premiere programming was primarily reserved to the Big Four broadcast networks (ABC, CBS, NBC, and Fox), and pay cable stations HBO and Showtime, with all other cable networks' offerings limited generally to reality programming, syndication re-runs of broadcast network shows, movies, and lower budget series.

Determining that such kinds of content portfolios limited their viewership and bargaining power, basic cable outlets started to diversify their product. They began to provide higher quality scripted programming which was able to avoid FCC rules regarding sex, violence, and language and to target niche and/or genre consumer tastes such as horror and fantasy. Additionally, cable programmers have been able to produce edgy, darker material full of murky anti-heroes and themes which resonate with consumers facing a financially and culturally troubled world. These adult-oriented series have fueled rabid fan bases and garnered awards, which in turn have improved such networks' negotiating position with cable carriers and satellite providers. Fundamentally, though, it also helped new smaller networks to establish strong brand identities. One of the best examples of a cable network recently re-inventing itself into a pedigreed purveyor of top content is AMC with *Mad Men*, *Breaking Bad*, and *The Walking Dead*. There is a reason AMC's stock now trades at over 50% more per share than two years ago.

As basic cable companies have flourished, there also has been an influx of smaller, independent studios wishing to produce for them in the United States using various business models, and seeking to own all, or a substantial part, of shows in the process. Endemol USA, Gaumont International Television, and BBC Worldwide America have all recently entered the scripted television game with considerable success.

Digital companies have also sought to tap into the original programming zeitgeist. E-commerce and web portal companies like Amazon, Netflix, and Yahoo are leveraging their shoppers, rental subscribers, and homepage/search engine/email users, respectively, in an attempt to make them "audiences" for their original content. Microsoft is doing the same with its Xbox hardware purchasers, and just announced its first interactive original series, based on the immersive *Halo* game to be executive produced by Steven Spielberg. Netflix in particular has invested large sums in its shows and is reaping critical acclaim on par with the cable channels as seen with its recent fourteen Emmy Award nominations. Hopefully, Wall Street will be equally, if not more, impressed. Both cable and digital companies have realized that content is good business. By creating high-quality, successful shows, these media broadcasters are in the process of building libraries that provide them with long-term assets for monetization on multiple rights-based levels, including those yet to be invented.

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The Demise of the Big Screen?

Spielberg's foray into series programming with Microsoft represents another significant shift in the entertainment marketplace—the distinction between big and small screens is becoming irrelevant. Feature films and television are now on an equal playing field in the eyes of talent and consumers, with television and digital—call it non-theatrical content—having the advantage. Before the influx of so much top-shelf cable product, television was considered a somewhat embarrassing last resort for A-list performers. Similarly, FCC rules meant that broadcast network shows have had to be more family friendly, less artistic, and therefore not as attractive creatively to filmmakers. However, recently, there has also been a tendency by feature film studios to make fewer movies, and to focus only on brand-driven tent-poles with global appeal.

As a result of this trend and cable and digital companies' newfound cachet, an increasing number of actors and behind-the-camera talent are gravitating to non-theatrical content. Steven Soderbergh recently decried the state of cinema at the San Francisco Film Festival and subsequently stated he would be leaving the movie business to direct ten episodes of the television series *The Knick* for Cinemax, starring Clive Owen. Five years ago, Owen would never have considered starring on HBO's subsidiary channel. However, theatrical luminaries such as the Emmy Award-winning Claire Danes on Showtime's *Homeland* and Academy Award-winning and now Emmy-nominated Kevin Spacey on Netflix's *House of Cards* have paved the way for Owen's segue to an alternate screen.

This summer's big-budget flops like *After Earth*, *The Lone Ranger*, *R.I.P.D.*, *White House Down*, and *Pacific Rim* further solidify the media conglomerate-based studios' position that mainly proven brands sell movie tickets and improve market capitalization (think comic book heroes like Batman, Ironman, and, of course, Superman—an eighty-year old property). These recent failures also reflect the general decline of "A-list" talent as insurers of financial success for movies; the presences of Will Smith, Johnny Depp, Ryan Reynolds, and Channing Tatum in the foregoing films did not mitigate their respective studios' losses. As a symbol of this shift, at this summer's Comic-Con, *The Walking Dead* had a more prominent around-the-clock interactive display at the convention center (plus a separate offsite obstacle course called "The Escape," accessible for a fee, no less) compared with Marvel's quieter stage presentation for the next *Captain America* film. Another sign of the times is that Spike Lee is attempting to finance his next movie by—get this—crowdfunding on Kickstarter. Fewer movies mean more opportunities for television, digital, mobile, and other non-theatrical content where budgets are lower, distributors are eager to make a quick impact in the marketplace, and more creative risks are allowed.

Mixed Messages From the Big Four

Broadcast networks have been much slower to adapt to the digital revolution as there continues to be a strong demographic, albeit an aging one, for their once-a-week, autumn-to-spring seasonal fare. Even so, there have been some indications of their commitment to this space. For example, Disney/ABC and NBC recently announced that they would not sell Hulu and rather would infuse the distributor with $750 million in order to increase its subscriber base. Additionally, CBS recently extended its streaming deal with Netflix which includes more of the number one network's programming. Nevertheless, these are cautious, somewhat passive moves, which reflect a general network reticence to upset their tried and true advertiser-based model.

While not a broadcast network, Time Warner's HBO has realized the benefits of offering a streaming service for its shows with HBO GO. As the younger demographic ages, and new generations have even more demanding expectations for what and when they watch, the traditional broadcast networks will be forced to follow HBO's lead in making more drastic changes on the digital front to reconcile their businesses with consumer desires. Perhaps News Corporation's recent backing of streaming device company Roku's new round of funding is a glimpse of where Fox is headed. And as if the digital landscape weren't enough of a headache for these networks, they are also battling Barry Diller's Aereo service in the courts. Aereo takes over-the-air television signals *gratis* and streams them to private paying customers via the Internet, yet another example of networks' having to address and adapt to new technologies, and likely sooner than they want.

Representing Entertainment Clients Now Requires Broader Business and Legal Skill Sets

The synergies between technology and content, and the evolution of television viewing into a multi-media, personalized endeavor, mean that traditional dealmaking models for television have become increasingly beside-the-point. For example, director McG recently eschewed a typical overall television studio agreement to partner with a private equity-backed LD Entertainment, presumably so he could own more of his shows. Accordingly, with talent striking "outside-the-box" deals like these, successful entertainment lawyers need to be able to amass corporate and financing transactions experience.

On a smaller level, how content is produced will affect the nature and scope of creator and executive producer deals. The notion of "seasons" is becoming less relevant as broadcast networks' original programming is becoming year round, including the expensive summer series *Under the Dome* which CBS aired to compete with all of cable's popular product during the same period. Episodes on cable and digital networks are repeatedly re-broadcast to gain new viewers, to allow them to catch-up, and/or to "binge view" (*i.e.*, watch a full season of a series in succession as quickly as they wish). Netflix released all thirteen episodes of *House of Cards* at once, thereby encouraging binge viewing and hopefully increased subscriptions. Even social media companies are now experimenting with episodic programming, as Twitter is leveraging its immense social media user base and offering @EpicEDM. This immersive, electronic, dance music experiment links to Twitter-produced videos and also contemplates providing viewer-produced content so that its users can choose from multiple experiential perspectives.

These patterns mean that, rather than produce episode by episode, broadcasters may require executive producers to deliver a certain number of not necessarily linear minutes of content by a certain date with no concept of a production season or schedule. Moving away from once-a-week episodic programming for a finite seasonal duration and toward new viewing and distribution models will undoubtedly affect how talent attorneys negotiate certain deal points. They will need to reconsider issues such as the term of a deal, exclusivity during that term, how long and in what way talent is locked to a show, and how talent shares and vests in backend. This last issue of participation in a show's revenues is particularly thorny when one considers that the viewers, and not always the creator/talent, may also be co-producing or, at the very least, enhancing a show to the content owner's financial benefit for which there is no direct attribution to the original talent.

New Owners, New Models

With the end of the FCC's financial interest and syndication rules in 1993, thereby more easily allowing networks to own and syndicate programming, media conglomerates quickly realized that combining studios, networks, and distribution entities ensured their control and monetization of television programming. More recently, smaller cable networks have also come to the same realization; A&E Television Networks just formed A&E Television Studios, no doubt to produce and own more product in-house. Similarly, rather than license all of their content from third parties and have limited ownership, USA/SyFy co-produces some of its shows via its studio affiliate, Universal Cable Productions, with partners in order to own and control more of its properties. The next step in this evolution is with talent, like McG, who also want to own their shows, and will partner with co-financiers and hedge funds in order to do so. Another example is Brett Ratner who partnered with Australian billionaire James Packer to finance films with Dune, which just closed a slate financing deal with Warner Bros. Thus, typical talent overall deals and straight license agreements with networks

IN BRIEF
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may become less the norm as an increasing number of critical industry players seek to control more rights, and therefore revenue, in produced content. Going further, more parties' controlling or splitting these revenues also may mean a market adjustment downward in deals for more fungible talent, particularly with their backend participations. Entertainment lawyers would therefore benefit by gaining an in-depth knowledge of evolving marketplace business models, film financing structures, and domestic and foreign co-production rules, as well as an understanding of the value of the different types of content in various key foreign territories.

Similarly, digital distribution of content signals that typical syndication deal models are eroding. CBS's *The Good Wife* sold into off-network syndication using a reverse window strategy, meaning it would be run on Amazon and Hulu first before going to cable on the Hallmark Channel. Another example is *Scandal*, which ABC syndicated to BET after only twenty-nine episodes (rather than the more typical eighty-eight or more episodes) in order to increase viewership interest and offset production costs sooner. Attorneys can best serve their clients by becoming fluent in all digital rights and off-network and multi-media window issues, for example knowledge of the different streaming video-on-demand technologies, systems, and platforms. Nowadays, issues like which party controls these revenue streams and when they are exploited can make or break deals with co-production partners, studios, and networks.

Marketplace Predictions

As the distinctions between feature films, television, digital, and other non-theatrical content continue to fade away, some entertainment marketplace trends emerge. First, the lines between technology, entertainment, e-commerce, and hardware are blurring. There are no rules on who produces original audiovisual material anymore; any entertainment, leisure-related, or convenience-based technology or consumer product now has strong potential to produce or connect to content. Semi-conductor chip maker Intel just made a surprising announcement that it will offer its own set-top box and *à la carte* cable service to anyone with an Internet connection. Another example is British pay television provider BSkyB's recent commitment to 3D television and producing "event" television to match the technology's scope. Will we see a similar commitment to this technology by an American network? Or perhaps, conversely, a 3D or similar innovator like RealD or Imax may enter the original content fray in order to build their brand further.

Second, the communications, technology, and media companies will continue to diversify beyond their core businesses. Telecommunications conglomerate Comcast already bought content provider NBCUniversal. Now cable carriers like Time Warner Cable and satellite companies like DirecTV are trying to obtain "over-the-top" rights (broadband delivery of content without a multiple system provider; think Netflix) from broadcasters in order to enter the digital distribution realm. If these carriers are successful in making such inroads, a similar converse move by an Amazon or Yahoo may not be far behind, whether it is in cable or satellite, or simply by buying a lackluster studio operation unaffiliated with a network. It is also worth noting that DreamWorks just made a deal with Netflix, bypassing a traditional television network and thereby acquiring economies of scale on a new screen. And what to make of Apple? With its popular array of hardware, Apple TV, and slew of iTunes users, it is somewhat surprising that this technology pioneer has not yet made a significant content play to leverage its consumer base.

Due to high technology, global consumers now expect immediacy and unlimited personalization with their entertainment. A new breed of content provider is beginning to match these expectations with innovative ways of delivering compelling, targeted programming to audiences. The broadcast networks' lack of decisive digital moves and other signs of corporate culture clash between the tech and entertainment business segments indicate some industry recalcitrance. Nevertheless, consumers will exponentially demand timely multi-screen access to everything they watch. These marketplace symptoms, along with the rise of new technologies like cloud management systems, strongly suggest that, in the near future, most if not all commercial audiovisual works, including feature films, will be released by undelineated "content studios" on all revenue-producing screens at once. If the specific content is designed for multi-platform distribution, then it likely will be released on the smallest mobile to the largest four-dimensional theatrical experience at the same time. There would just be different price points depending upon the technology and value added by the applicable platform. It may not mean that Tamra and Heather will ever be at the local multiplex, but, rest assured, the walking dead will soon be coming to a theater near you.

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