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Cardozo AELJ Author Interview Series: Raven Berzal

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Cardozo AELJ **Author** Interview Series

Raven Berzal

Associate Editor, *Cardozo Arts & Entertainment Law Journal*

Interviewed by Ivana Petani, Staff Editor, Vol. 41

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Accelerating Toward the Inevitable: How Covid-19 Helped Alter Traditional Models of Talent Compensation in the Film Industry

CARDOZO AELJ
Arts & Entertainment Law Journal

The Cardozo AELJ Author Interview Series seeks to give our readers further insight into the Articles and Notes published in the Cardozo Arts & Entertainment Law Journal. In this interview, Raven Berzal discusses her Note, [Accelerating Toward the Inevitable: How Covid-19 Helped Alter Traditional Models of Talent Compensation in the Film Industry](#), which was published in Volume 41, Issue 1.

Raven Berzal is a third-year law student at the Benjamin N. Cardozo School of Law and an Associate Editor of Volume 41 of the Cardozo Arts & Entertainment Law Journal. Prior to law school, Raven graduated from Syracuse University with a degree in Public Relations and Music Business, and worked at United Talent Agency and Cowan DeBaets Abrahams & Sheppard LLP in Los Angeles. At Cardozo, Raven has participated in the Filmmakers Legal Clinic and is currently the President of the Entertainment Law Society. Raven's legal internship/externship experiences include Entertainment One, Concord Music, FilmNation, AMC Networks, Cowan DeBaets Abrahams & Sheppard LLP, and currently, Granderson Des Rochers LLP.

Our interview was conducted by Ivana Petani. Ivana is a second-year law student at the Benjamin N. Cardozo School of Law and the Online Editor on Vol. 42 of the *Cardozo Arts & Entertainment Law Journal*. Ivana is interested in trademark, copyright, and privacy law.

IP: What initially drew you to this topic?

RB: I came to law school with the goal of working in the field of transactional entertainment law after graduation. My interests, both personally and professionally, lie primarily within the film and television sub-sector of the industry. I—like many others—was deeply saddened by the negative effects that the pandemic, paired with the rise of at-home streaming, had on movie theater attendance and fascinated by the ways that the industry adapted, including the many new problems that resulted from this adaptation. When I read about Scarlett Johansson’s “Black Widow” lawsuit against Disney,¹ I knew it was the perfect catalyst to address the changing landscape of the film industry in my Note.

IP: Can you summarize the problems that arose regarding the way film actors are paid as a result of the industry’s shift to predominantly streaming?

RB: Traditionally, in the recent Hollywood landscape, actors were compensated with an upfront fee, which is typically determined by their name recognition, prior roles, and box office draw. This upfront fee was then coupled with backend profit participation, which means, in its simplest form, that actors were guaranteed a percentage of the net profits accrued by a film. These net profits are accrued through a multi-window distribution schedule, beginning with a wide theater release and including pay-per-view, syndication, redistribution, release on DVD, and ultimately, purchase by a streaming service. Additionally, actors often negotiated bonuses if the film hits certain box office benchmarks or award nominations. During the pandemic, the opportunity to garner net profits—i.e., the extent of profit windows—was greatly reduced when this traditional schedule was truncated and movies were immediately released to streaming services. In the past, box office hits like “Black Widow” garnered massive net profits, so actors would often agree to smaller upfront fees (which is helpful for studios with smaller budgets) in exchange for a larger percentage of the profits. When profit windows were suddenly and greatly reduced, actors were essentially robbed of the pay-outs that they expected from their percentage of the profits. Clearly, with no box office run, the potential to earn these bonuses was also eliminated.

IP: If the Screen Actors Guild sets minimum pay standards for actors, would it be able to also set up a new compensation model standard that better addresses streaming to encourage contracts with clearer deal terms?

RB: The Screen Actors Guild (SAG) does set minimum upfront rates for actors (typically daily/weekly rates for performers). These minimums are mostly paid at

face value on smaller productions. Productions like "Black Widow" pay actors like Scarlett Johansson one hundred times over the required SAG minimum for the project. The issue is moreover that a percentage of the net profits guarantees an actor potentially endless revenue from the performance of the film and this can be a goldmine for successful films. Eliminating or reducing this potential profit is problematic for actors who may accept a smaller upfront fee in hopes of a split of this goldmine and for actors who are used to being compensated in this way of unlimited potential profit, which has become custom in the industry.

IP: Would it be feasible for streaming providers to figure out some kind of pay per stream model for films released on their platforms kind of like how music streaming services pay artists per stream or would it pass too large of a cost burden onto consumers?

RB: Actors receive residuals, which can be compared to royalties in the music industry, when their projects are streamed. Currently, residuals are calculated based on the amount that a performer was originally paid and how many subscribers the streaming platform has. The percentage rate declines year after year until it reaches a minimal percentage to be applied in perpetuity. Traditional residuals have been replaced on streaming services with lower, less frequent fees, and not all streamers are completely transparent about their viewership numbers. The lack of residuals and payment toward on-screen talent and crew members allows streamers to potentially exploit talent while underpaying them. While established stars get paid well for their performances, many lesser-known actors struggle to survive financially in the industry under this structure. The question of solving this problem is quite prominent; most actors and their advocates agree that performers should be paid higher fees based on views, which requires streaming services to be more transparent with their viewership and related data.

IP: If there's no uniform industry payment standard established just yet, does this run the risk of actors with more star power favoring the first studio to get these deals right more over others if they come up with a better compensation plan?

RB: Studios have already begun to enact new compensation models to their talent in order to adapt to the changing landscape of the industry. For example, in television, Disney has minted a "per-point" model, which simplifies the way profit participation fees are paid off. Each point of an upcoming project's backend is assigned a numerical value that is uniform across the portfolio of films/shows. In exchange, the studio gets the right to exploit the show on any platform without having to make a separate deal for profit participants. The "per-

point” model is widely used in television deals and certainly provides a reference point for studios. With the post-pandemic industry push to prioritize the traditional distribution schedule—beginning with wide theatrical release—we are not certain how studios will structure their deals moving forward. However, it largely will depend on access to streaming data to tie payouts for artists to a project’s performance.

IP: Can you expand more on why you think that there won’t be a case of the same magnitude as *U.S. v. Paramount*² to limit self-dealing in the streaming context?

RB: In *U.S. v. Paramount*, the Court ordered the divestment of major studios from their movie theaters and established a landmark antitrust decision for the motion picture industry. With the landscape of the film industry changed so much since then, we cannot know if theater ownership would even be a profitable venture for studios to reacquire as it once was. Further, while the monopolies that studios with streaming arms seemingly possess are comparable to the studios possessing physical movie theaters in *Paramount*, this modern-day “self-dealing,” as it has been proclaimed, has essentially already been addressed. In the highly publicized lawsuit by “The Walking Dead” original showrunner, Frank Darabont, against television studio and network, AMC, Darabont accused AMC of self-dealing by setting an unrealistically low license fee for the “The Walking Dead” and employing questionable accounting practices, thus depriving profit participants of compensation. This issues is at the center of several other cases, including the 2015 litigation surrounding the Fox hit television show “Bones.” In general, the industry seems much more accepting of this new form of vertical integration today. Further, as of March of this year, Amazon and Apple are reportedly expanding operations into the movie theater space, either through funding films for theatrical release or purchasing movie theater chains.

1. Erich Schwartzel & Joe Flint, How Disney and Scarlett Johansson Reached the Point of No Return, Wall St. J. (Sept. 3, 2021, 1:06 PM), <https://www.wsj.com/articles/how-disney-and-scarlett-johansson-reached-the-point-of-no-return-11630688765> [<https://perma.cc/W2PR-SHBG>].
2. United States v. Paramount Pictures, 334 U.S. 131 (1948).