OnAir with Akin Gump

Akin Gump
STRAUSS HAUER & FELD LLP

Ep. 37: The Entertainment Industry During COVID-19

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Jose Garriga: Hello, and welcome to *OnAir with Akin Gump*. I'm your host, Jose Garriga.

Whether you've not been able to go to the movies or have spent the last five months diving deep into Netflix, HBO Max and Disney+, COVID-19 has had an impact on the way you consume entertainment.

And it has had an even greater impact on the industry that produces films and television programs, upending production and release schedules and fostering the growth of new platforms, even as it pulls the rug out from under others.

We have with us today Akin Gump entertainment practice head Chris Spicer and partner Alissa Miller. They'll be speaking about the impact the pandemic has had on production, financing and other aspects of the entertainment industry and how it affects what—and where—you'll be enjoying your next movie.

Welcome to the podcast.

Chris, Alissa, thank you both for appearing on the show today. This is a big topic, so let's dive right in.

To start, COVID has unprecedentedly affected many sectors of the economy, the entertainment industry, of course, among them. Let me start by asking, what has the big-picture impact been? Chris, if you would.

Chris Spicer: Of course. Thanks for having us on the show and happy to be here. I mean, it's a broad question, right? The decimation of various sectors in the entertainment industry has been no exception and has, in many ways, been hit harder than most. I would like to start on a more positive front when we have these conversations, before diving into all of the effects of the capital inflows and shutdowns of various different companies that are in the business of delivering entertainment to people.

First off, when we frame this conversation, we're talking about the investment in content, generally, and that's what we'll speak about today. Alissa and I will both speak about more of the specifics in that regard. Separately, it's been an effect on broader segment when we call traditional entertainment, everything from live events to, as you mentioned in your intro, being able to go to the movies.

As I said, on the positive front, what we've noticed in the various clients and industry colleagues that we've been working with for the last five to six months now, in trying to get production started and figure out various ways to produce the content that employs many people in our country and in other countries and delivers the content to various people to view, there's been a lot of creativity and a lot of new ways of trying to experience and trying to figure out both how to give people content that's already existing and how people view that and consume that, whether that's in their home, on their mobile device or through a drive-through theater.

Additionally, in terms of how the production of content has been happening for the last six months, there has been a tremendous amount of creativity from changing the way that films or television programs are shot to introducing protocols for safety and keeping all of the various people on sets for films and television shows, which can really be like small communities or even towns, but at the same time, allowing people to come back to work. That piece of this has been pretty tremendous to see. On that note, so, big picture, what's happened is anyone that's read the news knows a lot of this, right?

Virtually every live event venue has been shut down from sports, to concerts, to film, to you name it. You can't go do that anymore. That's had a broad sweeping impact on the entertainment industry and what we do day to day. It's also accelerated the already preexisting massive shift to in-home viewing, whether that's of stuff that traditionally people viewed in-home, like episodes of 30-minute comedy series, to huge, what used to be, or still are, large live event-type films or television shows. That's shifted all in-house.

Obviously, another thing that COVID's done is it's shut down the production of film and television and digital projects worldwide, at least temporarily. Different countries, which we'll get into, I think later in our talk, have had mixed success getting productions back and going in a safe environment. That's all what has happened that's led to liquidity crunches for many companies that produce content for people, both on a massive scale, so traditional major studios such as Disney, to lower, all the way down to two- or three-person independent production companies that produce one or two films a year, and everyone that is in between.

That's the current state of where we are from the onset of the COVID epidemic, both in the United States and globally.

Jose Garriga: Thank you. Let's look at the working level a bit. You provided the big picture. Looking, then, at it on a project level, what impact has the pandemic had on projects that are halfway to completion and then, stepping it back, on the financing of traditional entertainment projects? Alissa, if you would, please.

Alissa Miller: Sure. Let's go back to March. Basically, globally, every production shut down. Complete halt, and cast and crew were, basically, furloughed. Productions had to completely shut down with the lockdown. There was definitely a lot of uncertainty as to when those productions could resume. The good thing was, during that time, producers really had to dig in to figure out what kind of precautions they were going to take once productions could resume.

They spent a lot of time working on those protocols with the guilds and with other production companies and with local and federal organizations so that they were actually prepared for once production could resume. We've seen, probably in the last month, a lot of productions have been able to resume, and the good news was they were ready. They had everything in place so that production could really resume on a meaningful level. Just talking about productions that had already started pre-COVID; I'm not talking about new productions right now.

Those productions had adequate insurance in place pre-COVID that they were able to move forward with productions once again, I would say depending on what kind of production it was, as far as when they could resume and how long it was going to take. For example, if you had a production that had a lot of dialogue and not a lot of action, that didn't require a lot of extras to be on set, that was certainly much easier to resume production on and finish because they didn't need to have so many people on set.

Having 20 people on set is a lot different than having 100. It just really depended on the type of project that it was. Many have resumed; some have not. However, the budget that producers were having to work with at inception, say it was a $10 million production, all those extra protocols and PPE and testing, all of that has really added on to the budget. That was unexpected for producers, and they've had to come up with ways to cover that extra budget.

All producers do have what they call a “contingency” in the budget that does cover unexpected amounts. Probably not enough to cover the unexpected COVID costs, just because those extra costs are not just PPE and testing, but having a hall monitor on set that is making sure everybody's standing six feet apart, a shoot that normally would be 10 days might be 20 now because you can't have everybody on set at the same time. Really exorbitant costs that they wouldn't have known at the outset.

I would say, for the most part, the good news is that producers were really ready to go. They were ready to go in July. Several of our clients and producers that we know were able to resume at that time.

Getting into the second part of your question on financing of traditional entertainment projects, going into new projects, that's really where the issues have arisen. We'll get further into it in the next few questions, but, basically, the big difference post-COVID is that producers require insurance policies to be in place that cover things, without getting into too many specifics, cover things like delays in production due to things like COVID, and also cover if an actor gets sick or injured from COVID and anything else, breaking their leg, anything like that going forward. Financiers and investors in the film project want an insurance policy in order to give financing. Post-COVID, insurers are excluding all claims related to COVID. You have gotten into this issue of there's an exclusion in the insurance policy, so financiers are trying to have to figure out other ways to finance the projects the way that they traditionally have been, because there just is not insurance for it.

At first, when we were looking at this, the result was nothing can go forward. Some financiers and producers have been able to figure out costly ways around it, such as maybe there's a parent guarantee where the producer's ultimate parent is having to cover any of those costs related to COVID that the insurance policy does not cover.

Financiers are having to look at other ways to cover off those costs and the potential for another lockdown. I think people are equally as concerned with, is there going to be another lockdown?, or is our lead actor going to get sick and production is going to have to shut down for a month?

The way that productions work is the distributor that's going to buy the production, if Brad Pitt is the person that's supposed to play the lead role, if he gets sick and is out and has to be replaced, the distributor doesn't want the project anymore. I mean, they bought a Brad Pitt project. They didn't buy a Chris Spicer project. That's something that…

Chris Spicer: Easy, easy. [*laughter*]

Alissa Miller: That's something that we're having to deal with. Another thing is, we thought that it's not just an issue of having the COVID exclusion on insurance. It is definitely getting excluded from the normal insurance policies. I don't think we all anticipated that the cost of insurance, even with a COVID exclusion, would go up, but because insurers have just, across the board, had to have payouts related to COVID not even necessarily related to entertainment, insurance policies are ... those costs have increased. That's just yet another thing that producers are having to deal with as they move forward in their financing.

It's just another extra cost. People understand from the insurance company's point of view. They're just taking the position that COVID is an uninsurable event. We're just trying to come up with ways to cover that off without putting the insurance company in a worse place, but in order to make the producer and the financier whole.

Jose Garriga: Interesting.

Chris Spicer: And just stepping back on that, just we've tried to work with both producers of content who are our clients, as well as people in the capital stack of a lot of these projects and companies. Everyone just wants certainty, right? When a senior financier at a financial institution that's a large commercial financial bank wants to invest in a project, they want a certain level of knowing that if they're willing to take risks, A, B and C, but not D through Z.

At some of the projects that we've been helping to set up, many of which have gone into production, the producers who are the primary people responsible for organizing the financing of a film, whether that's a billionaire financing it, the whole thing, or seven different capital sources, what's happened is anyone who's willing to take on the COVID risk, whether that's not covered by insurance or anything else, is going to be compensated for taking that risk.

That's where there's an opportunity for certain funds or equity investors on particular films and particular television shows that during the physical production of the film, meaning when actors and actresses are on set behind camera, and they get compensated really, really well for that risk. That's an opportunity for those individuals, and it does cost the producer a higher premium to get the money to do that filming. Then the gamble that they're making, which I think we'll get into what we're going to talk about later on in the podcast is, the demand for content has increased, I mean, maybe not quite exponentially, but close to exponentially in a time when the ability to produce content has decreased exponentially. The producers in the projects who we're working with, their bet is, "Look, we're okay paying our higher cost of capital right now to get this show moving or this film done. We've minimized the amount of time we need to be on set behind camera. We've set up safety protocols, and we know that's going to cost us more."

But they're hoping when they have a finished film or finished miniseries or whatever it may be, that that's going to be more valuable than it otherwise would have been and make up for the extra cost that it took to produce the show.

Jose Garriga: Thank you. One thing that I wanted to follow up on is something that Chris had mentioned, which was U.S. and overseas entertainment industries. Alissa, let me ask you this: To what extent are these two industries faring differently? Are overseas companies closer to resuming their accustomed production schedules and, going back to the idea of financing an investment, how is this affecting the flow globally of financing and investment monies if, say, overseas industries are opening more quickly than those here in the United States?

Alissa Miller: Right. That's a really good question. At the onset of the lockdown, pretty much all countries were in the same position, but, as we've seen, Europe had a much more stringent lockdown than we had in the U.S., as did Asia and Australia, New Zealand. Their numbers got to a better place. They were really bad in the beginning, worse than the U.S. but as we all know, they got much better and now they're spiking on and off. However, a lot of those countries were in a position, especially Asia, Australia, New Zealand, to resume production probably a bit quicker than was able to be done in the U.S.

However, the U.S. is the biggest production hub in the world, so their level of production is much smaller than ours. I would say, though, the governments, some European countries and Canada, Australia, New Zealand realized this insurance issue, the same issue in those countries as in the U.S., and the governments there have provided some vehicles for coverage. Basically government backstops where the government, once certain requirements are met, are paying out to producers for new productions, some of the losses that would have been covered by traditional insurance.

The U.K. is the most significant one. I think the program is at about $650 million and. to the extent something resumes production, and there's a loss that insurance wouldn't cover, the government basically acts as a backstop and pays that out, pays out a certain amount, but it's capped at a not particularly high amount. Productions in the U.K., which is probably the second largest after the U.S., are, most of the time, much lower budget than we have in the U.S.

This is something that when we start talking about the American Coalition for Independent Content Production in a bit, we can talk about it, because we are proposing a similar program in the U.S.. Going back to it, productions were able to take advantage of some of those programs. Older productions that had been halted during COVID, I think we could say went back quicker in Australia and New Zealand, even Canada, some places in Europe and in Asia. But it's such a small fraction of the amount that we've seen in the U.S. so I'd say it's a bit easier.

A lot of those countries where shooting occurs, it’s much more spread out than a lot of the places in the U.S. like in California, Los Angeles, New York, Georgia, Louisiana. I think they were able to, basically, have a more meaningful production without having so many concerns. There is a concern in the U.S. about producers moving overseas because it's just easier. There's a lot of regulations in the U.S., but, as I said before, producers have basically gone above and beyond all the regulations and protocols that are required.

The guilds here, WGA, [*Writers Guild of America*] DGA [*Directors Guild of America*], are very strict in what's required and, instead of fighting any of those regulations and protocols, producers here are going above and beyond.

Jose Garriga: Thank you. A reminder, listeners, we're here today with Akin Gump entertainment partners Chris Spicer and Alissa Miller discussing the impact of COVID-19 on the entertainment industry.

Something that we've mentioned/alluded to earlier in this episode has been streaming services. One of the few segments of the industry, at least from the man-on-the-street's perspective, that have perhaps been helped by the pandemic has been the streamers. To what extent have the streaming services received a boost from so many people at home bingeing shows? And is this growth sustainable? Chris, what do you think?

Chris Spicer: That's a great question, and, right, one only needs to look at the stock price of Facebook and Apple and Netflix and Google and see a common denominator of the all-time highs that seem to be happening every day despite the fact that we're in a global pandemic. For differing and varying reasons, a large part of that is due to the consumption of consumers at home and the increased viewership. What we've noticed, and again, for anyone that follows the industry closely this is no surprise or secret or nothing earth-shattering, but there's a type of movie that gets released in theaters, and everyone wants to see The Avengers in a movie theater.

Then there's been a shift both in terms of the technology that allows excellent viewership from home to younger generations wanting to view content on iPads and phones and watches as opposed to sitting in a movie theater to view it. That shift has been happening over the last five years, and there's been now an obvious huge push in that direction for something that was happening in any event. Then in terms of, so if insiders in the industry talk about an arms race for content, and then what's happened is, it's almost to the point where it's been overwhelming for the consumers.

Previously, it started with Netflix, and then now there's probably about a dozen different over-the-top streaming services to choose from to the point where cord-cutting, which is a term that I think is in everyone's vernacular now, it used to be, "Oh I'm saving costs by cord-cutting. All I really need is ... I have Netflix and Hulu and then, whatever, I get Major League baseball on demand because I'm a baseball fanatic." It's gotten to the point where the cord-cutting, and now it's more expensive if you need to have all 12 or so streaming services to where you're having to pick and choose what streaming service you want to sign up for.

I think that we talk about there will end up being winners and losers in that war for eyeballs. The growth being sustainable is I think that no one thinks that in-home viewing and streaming is going to go away. My personal view is that the most stark example that we've seen, and Alissa can bring up another one if she has it later, is *Mulan*, which is one of these huge multiple hundreds of millions of dollar-budgeted movies for Disney. The live-action remake is now going on to Disney+ streaming as opposed to being in the theater.

If that really represents a seismic shift away from big-budget tentpole films going to the theater or not, my personal view is people are still going to want to go to theaters for that type of movie. The reasoning that that one, again, is happenstance that *Mulan*'s going straight to Disney+, but the growth, it's hard, right? Because Netflix's growth was very, very prolific in the U.S., and now most of their growth and, for a long time, their stock price and what happened was dependent on their international growth. I think that, again, Netflix right now primarily is people pay a monthly price for their service, right?

Amazon, who we work a lot with on the other side of content deals, their goals aren't exactly the same as Netflix. Disney's goals are slightly different, and all of them are. You can see that in the Apple+ streaming service. They priced it low enough that it's not really that much out of pocket for someone, but then also as long as you keep buying Apple products, you'll keep getting their streaming service for free. Just the extra incentive to maintain yourself in the Apple ecosystem.

The one thing it has done for producers of content, it's changed the way productions are made. It's changed the way the economics are looking at it, but there is a massively increased demand for content. For companies that we work with who've been able to creatively figure out how to get their films and shows finished during COVID, this has been an incredible advantage. I mean, we have one client that had something that they thought they were going to be able to sell the particular product for X. When they finished it, they were fortunate enough to only have three days of shooting left when COVID shut down the world and were able to do a little bit of the fudging around from stuff in postproduction—which, for non-insiders, is just the period of time where you're not actually filming actors behind camera, but in a back bay room editing footage—and had one more day of reshoots when they would be able to do so. They ended up being able to sell it to a streamer for a multiplier of what they thought they were going to sell it for.

That's the real opportunity for producers of content. Alissa, we'd love to hear if you have any similar or different experiences from mine.

Alissa Miller: I do not have any different experiences. I think definitely I'm right on the same page with you. I think there, hopefully, won't be a lack of content in the future. I mean, there's going to be so many productions that should have been finished this year, that now will not. There may be a bit of a lack of content in 2021, but, hopefully, there's so much out there that it catches up, but I don't think that will have a significant impact on the streaming services.

Jose Garriga: Thank you. Alissa, let me stay with you just to follow up on something that you had mentioned earlier, which is the American Coalition for Independent Content Production. You spearheaded this organization's creation. What can you tell us about the ACICP's aims and work?

Alissa Miller: Sure. The ACICP came up and came together, probably I think it was in May, and after the shutdown and halt on production, we started talking to our clients and our clients' clients and realized that there were going to be significant issues really with new productions, putting aside ones that had already started and were on hiatus. There were several issues that we were focused on, but, really, the insurance issue is probably what's become the biggest one. We started talking to, as I said, our clients and our clients' clients to try to figure out what we could do—we, meaning Akin Gump, between our entertainment group and our policy group in D.C.—to try to lobby for protections and benefits for production companies to get production back going and get cast and crew and all the industries that entertainment productions employ up to speed and rehired. Because if you think about it, it's not just the actors and the cameraman and the executives and employees of the production companies that were being affected. It's also really every other industry related to production, whether it's hospitality, hotels, restaurants, lighting companies, accounting firms.

I mean, it really has such a significant impact. The entertainment industry provides about $180 billion in revenues in the U.S. on a normal year. We started talking with our different groups that were involved in production, not just producers, but distributors, sales agents, bond companies, even some financiers. We put together a group of about 35, right now, different people in the independent content production space to lobby for different...I'll talk about what we're pushing right now in DC. Just to be clear, these are really independent producers. It's not the major studios like Universal, Paramount, Disney, Fox, sorry, Disney and Fox are combined. We didn't really target those because even though those companies have had significant issues with COVID, they're part of large media conglomerates that generally have more cash on hand that were less affected. They don't usually rely on production financing like independent producers do. We are now focused on, I would say, three main initiatives in Washington. The biggest one is related to the insurance issue that I described before.

We're trying to lobby the government, D.C., on a federal level, not state level at this point, to provide a backstop similar to what has happened in the U.K. and France and Australia and other countries, where to the extent that the producer has a loss related to COVID that is excluded from their insurance policy, the government would pay out a certain amount on a production related to that loss. That is the most meaningful thing to the members of the group because it's what is preventing them from going back to production in a meaningful way. We're working on that.

Then, the second part of the equation is figuring out if we can push for federal tax incentives that cover off some of these content producers' increased costs related to COVID. It could be providing coverage for all those extra COVID costs like we described before, PPE and testing. This is not unique to just the production world. Every other industry has those same costs and expenses. There are several initiatives that are being discussed in D.C. right now.

We just want to make sure that the group, our lobbyists, push for those incentives and make sure that they'll apply to the production industry, because most of the items that are being proposed, whether it's a payroll tax credit or COVID-related coverage related to employees, are for W-2 employees. In the production industry, a lot of the cast and crew, it just depends; they're not always treated as independent contractors. Sometimes they are, sometimes they aren't. We want to make sure that cast and crew are covered.

We're also talking about some things related to PPP [Paycheck Protection Program] loans because a lot of our members of the coalition and entertainment space generally weren't able to apply for them, the PPP loans, because of the affiliation requirement. That's something that we're looking into as well. Again, the most important thing for the members of this coalition is figuring out a way around the insurance issue. We've had several meetings with both Democrat and Republican Hill members, and we're just pushing forward and trying to figure out something that will bridge the gap.

Chris Spicer: Now, Jose-

Alissa Miller: We're not ... Yes, go ahead, Chris.

Chris Spicer: Akin Gump is uniquely suited for the ties between the entertainment media industry in Hollywood and Washington, D.C. As a law firm, we are a uniquely suited to navigate this particular situation in this context.

Jose Garriga: That's a good point. Pulling back a bit from this. And thank you, Alissa. It sounds like the ACICP is doing terrific work in this space. To wrap up, we've covered a lot of ground, for listeners, people in sectors outside of the entertainment industry, what should they expect in terms of the near- and mid-term prospects for companies in entertainment and media that we've been discussing? Chris, if you would, please.

Chris Spicer: Well, look, for the average viewer, just looking at the entertainment and media industry, I mean, I would expect for the at least not-too-distant future, to get most of your premium viewing from a streamer in the comfort of your own home. Although, personally I, myself am looking forward to seeing the Christopher Nolan movie *Tenet* in the theaters whenever I'm able to.

In terms of the near- and mid-term prospects, again, since we are primarily involved in the financing and investment in content and companies that are in the entertainment and media space, you're going to have some bumps and bruises in the near-term future if you're looking to invest in an entertainment company, or if you're in the capital stack of one of the companies, whether it's a publicly traded company or a small company. That, I think, is going to continue for the short-term, foreseeable future as we are living in a COVID-19 world.

I think the positive or the opportunity, on that note, is if it's something that you can go into that situation, whether it's an investor or an investor in a peripheral industry that's related to media and entertainment, with eyes wide open, long-term, there's a real opportunity for long-term success once the—again, I hate to say, once COVID-19 is behind us, because I know we may not live in the exact world that we lived in before COVID-19—but where we're emerged from whatever this being the new norm is. I think a lot of those companies and people who make the right decisions and invest in the right decisions will do very well and be successful. The fact of the matter is, the demand for premium content and high-quality content, whether that's a two-hour film, a five-minute short clip, a 47-minute serial television show or a four-part mini-documentary docuseries, the demand for that has never been higher and is going to continue to be higher.

Again, just because someone may not be seeing that piece of content in a traditional brick-and-mortar movie theater, or watching it on a traditional network at 8:00 p.m. Pacific Standard Time, like in the past, it doesn't mean there's not still a huge demand for that. Short term and near term, I think that there'll continue to be some challenges and difficulties, but long term generally, I think we're going to be in a very good place.

Jose Garriga: Thank you, Chris. Listeners, you've been listening to Akin Gump entertainment partners Chris Spicer and Alissa Miller. As a cord-cutter with multiple streaming subscriptions, I felt very seen, so thank you for making the time to explain just how this pandemic is affecting this industry that touches everyone's lives on a daily basis, either as participants in the work or as consumers of these terrific products.

Thank you, listeners, as always for your time and attention. Please make sure to subscribe to *OnAir with Akin Gump* at your favorite podcast provider to ensure you do not miss an episode. We're on, among others, iTunes, YouTube and Spotify.

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Until next time.