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Media & Entertainment – Review and Outlook 2024

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As we wrap up the first quarter of 2024, Gibson Dunn's Media, Entertainment and Technology Practice Group highlights some of the notable rulings, developments, deals, and trends from 2023 forward that will inform the industry this year and beyond. **TABLE OF CONTENTS**

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1. COPYRIGHT

Fourth Circuit Sets Aside $1 Billion Jury Verdict and Orders New Trial on Damages for Contributory Copyright Infringement by Cox Communications On February 20, 2024, the Fourth Circuit set aside a $1 billion jury verdict against Cox Communications, Inc. for contributory and vicarious copyright infringement in a suit brought by more than 50 record labels and music publishers.[1] The plaintiffs, including Sony Music Entertainment, Warner Music Group, and Universal Music Group, alleged that users of Cox's internet service downloaded or distributed music over the internet without permission, resulting in the infringement of over 10,000 copyrighted works.[2] After the Fourth Circuit previously held that the Digital Millennium Copyright Act (DMCA)'s safe harbor defense—which protects internet service providers from monetary liability resulting from copyright infringement by their users—did not apply to Cox because of its failure to reasonably implement an anti-piracy policy, the case proceeded to trial.[3] The jury found Cox liable for both willful contributory infringement and vicarious infringement, and awarded $1 billion in statutory damages.[4] On appeal, the Fourth Circuit affirmed the jury's willful contributory infringement verdict, holding that sufficient evidence was presented to the jury that Cox "knew of specific instances" of infringement, "traced those instances to specific users," and "chose" to continue providing internet service to those users in order to preserve its revenue stream.[5] However, the court reversed the vicarious infringement verdict, because the plaintiffs failed to show (a) that infringing users subscribed to Cox's services, as opposed to a competitor's, because it gave them a better ability to infringe due to Cox's more lenient policies, and (b) that users paid more for faster internet so as to engage in infringement.[6] Instead, the court concluded that Cox received the same monthly fees from subscribers, regardless of whether those subscribers engaged in infringing activity.[7] Because the jury's damages award was a "global figure" for liability under both claims, the Fourth Circuit remanded for a new damages trial to determine damages for solely the willful contributory infringement claim.[8] In doing so, the Fourth Circuit rejected arguments by Cox that certain works should be excluded from the damages calculation because they were being double-counted.[9] Specifically, Cox argued that individual sound recordings compiled in a single album should be counted as one work, and that a music composition and its derivative sound recording should also be counted as one work.[10] The Fourth Circuit, without deciding the merits of Cox's theories, held that Cox had failed to present evidence that would have allowed the jury to determine which works were derivative or part of a compilation, and declined to reduce the number of copyrighted works at issue.[11]

Supreme Court Holds New Meaning Alone Is Not Sufficient for the Fair Use Defense

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On May 18, 2023, the Supreme Court ruled that the Andy Warhol Foundation for the Visual Arts's ("AWF's") licensing of an Andy Warhol-created illustration of a photograph of Prince to a magazine was not a fair use of the underlying photograph of Prince under copyright law.[12] In 1981, professional photographer Lynn Goldsmith was commissioned to photograph the musician Prince.[13] Years later, she licensed her photo to Vanity Fair for a one-time use as an artist's reference.[14] Warhol created a purple silkscreen portrait of Prince to appear in Vanity Fair.[15] In total, Warhol created 16 silkscreen portraits, now known as the Prince Series, that he derived from Goldsmith's original copyrighted photograph of Prince.[16] In 2016, Condé Nast, Vanity Fair's parent company, purchased a license from AWF to publish another Warhol work from the series, Orange Prince, for a commemorative issue on Prince.[17] After Goldsmith notified AWF of her belief that Orange Prince infringed on her original photo's copyright, AWF sued Goldsmith for a declaratory judgment of noninfringement or, alternatively, fair use.[18] Goldsmith counterclaimed for infringement.[19] The sole question presented to the Court was whether the first fair use factor, "the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes," 17 U.S.C. § 107(1), weighed in favor of AWF's recent commercial licensing to Condé Nast.[20] The Court rejected AWF's transformative use argument, finding that Goldsmith's original photograph and Warhol's illustration shared the substantially same purpose, i.e., both were portraits of Prince used in magazine stories about him.[21] Although the Court acknowledged that a derivative work might add a new expression, that alone does not equate to a transformative use that dispenses with the need for licensing.[22] Moreover, AWF's use of the photograph was commercial, also weighing against a finding of fair use.[23] As such, the Court affirmed the Second Circuit's decision that the first fair use factor favored Goldsmith.[24] **Ninth Circuit Concludes That Epic Games' Dance Animations Share Substantial Similarities with Copyrighted Choreographic Works** On November 1, 2023, the United States Court of Appeals for the Ninth Circuit reversed the dismissal of choreographer Kyle Hanagami's copyright claim against Epic Games, finding that Hanagami had plausibly alleged that the company released a virtual animation, or "emote," that was "substantially similar" to Hanagami's copyrighted choreographic material.[25] In 2022, Hanagami alleged that the emote, released for purchase on Epic Games' *Fortnite* in August 2020, included four "counts of movement" that copied the most recognized portion of a five-minute choreographic work that Hanagami created.[26] The United States District Court for the Central District of California found that Hanagami's dance steps were not protectable under copyright laws on their own, because the "individual poses" at issue were only a "small component" of the work.[27] The court found that copyright law protected Hanagami's work "only for the way the Steps are expressed in his registered choreography."[28] Because "[t]he two works contain[ed] a series of different poses performed in different settings and by different types of performers," the district court reasoned that the works were not "substantially similar as a matter of law" and dismissed Hanagami's copyright claims.[29] The Ninth Circuit disagreed, rejecting the district court's contention that choreography can be analyzed by breaking down a routine into "individual poses."[30] The Ninth Circuit stated that copyright protects the "[o]riginal selection, coordination, and arrangement" of individual dance movements in a manner akin to an analysis of the original elements inherent in music or photography.[31] Consequently, the Ninth Circuit concluded that the proper analysis for the original elements in a choreographic work centers less on analyzing "poses" in isolation and instead evaluates them alongside myriad elements including "body position, body shape, body actions, [and] use of space."[32] By applying this analysis, the court found that the copied portion of Hanagami's work was "the most recognizable and distinctive portion of his work, similar to the chorus of a song."[33] Because the copied portion "ha[d] substantial qualitative significance to the overall Registered Choreography" and was a "complex, fast-paced series of patterns and movements," it could receive the benefit of copyright protections.[34] Accordingly, the Ninth Circuit reversed the district court's dismissal and remanded the case for further proceedings. The parties ultimately entered into an agreement settling the dispute on February 12, 2024. **Supreme Court Takes Up Question of Time Limit On Copyright Infringement Damages** On September 29, 2023, the Supreme Court granted certiorari in *Warner Chappell Music, Inc. v. Nealy*, a long-running music copyright dispute, to address the limited question of whether the discovery

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accrual rule and the Copyright Act allow a copyright plaintiff to recover damages for acts that allegedly occurred more than three years before the filing of a lawsuit.[35] In the underlying case, the United States Court of Appeals for the Eleventh Circuit held that in certain cases a copyright plaintiff "may recover retrospective relief for infringement that occurred more than three years prior to the filing of the lawsuit."[36] As the Eleventh Circuit acknowledged, the federal Copyright Act establishes a three-year statute of limitations, stating that that "[n]o civil action shall be maintained . . . unless it is commenced within three years after the claim accrued."[37] Under the Eleventh Circuit's "discovery rule," however, "a copyright ownership claim accrues, and therefore the limitations period starts, when the plaintiff learns, or should as a reasonable person have learned, that the defendant was violating his ownership rights."[38] The Eleventh Circuit held that neither imposes a bar on retrospective relief for an otherwise timely copyright claim.[39] In holding that a copyright plaintiff may in certain cases recover for infringement occurring more than three years before a lawsuit's filing, the Eleventh Circuit has entered an ongoing circuit split, as various appellate courts around the country disagree on the relevance of the discovery rule to a plaintiff's ability to recover retrospective relief for copyright claims.[40] The Supreme Court held oral argument on February 21, 2024 and may soon provide clarity on this long-disputed issue. **Southern District of New York Holds That Scanning and Lending Print Books for Free Infringes Publishers' Copyrights** On March 24, 2023, the United States District Court for the Southern District of New York, on a motion for summary judgment, held that scanning lawfully acquired books and lending them out like a library violates the copyright of the books' publishers.[41] The lawsuit concerned Internet Archive's ("IA") "controlled digital lending" ("CDL") practice for sharing books. Under this practice, IA would electronically lend out fully scanned copies of books that it had lawfully acquired through purchase or subscription.[42] In June 2020, the publishers of 127 books challenged IA's CDL practices, stating that the publishers possessed the exclusive right to publish the works in print and digital form.[43] In response, IA argued that its lending of the books was protected under copyright's fair use doctrine. *Id.* Both parties cross-moved for summary judgment. District Judge John Koeltl found in favor of the publishers, concluding that a straightforward application of copyright law's four-factor fair use text compelled summary judgment. Focusing on the first prong of the test, the court found that "[t]here is nothing transformative about IA's copying and unauthorized lending of the Works in Suit." In doing so, the court rejected IA's argument that its CDL practice was inherently transformative by "making the delivery of library books more efficient and convenient."[44] The court distinguished IA's CDL practice from other utility expanding transformative uses of copyrighted works, because lending ebooks in full "merely replace[s]" the original print books and does not "provid[e] information" about the books in a novel or interesting way.[45] Similarly, the court rejected IA's argument that IA did not lend the books for a commercial use, both because the company did not charge patrons to borrow books and also because private reading is noncommercial in nature.[46] In so finding, the court noted that IA's lending practices would help the company by "attract[ing] new members, solicit[ing] donations, and bolster[ing] its standing in the library community."[47] In assessing the fourth fair use factor—"the effect of the [copying] use on the potential market for or value of the copyrighted work,"—the court noted that IA's offer of "complete ebook editions of the Works in Suit" without paying a licensing fee to Publishers for those books would "'bring[ ] to the marketplace a competing substitute' for library ebook editions of the Works in Suit, 'usurp[ing] a market that properly belongs to the copyright holder.'"[48] Following the March 2023 opinion, the court approved and entered a negotiated consent judgment that declared IA's CDL practices to constitute copyright infringement, and further permanently enjoined IA from lending scanned copyrighted works that are available digitally.[49] IA appealed the district court's ruling to the Second Circuit and submitted its opening brief in December 2023;[50] Hachette filed its answering brief on March 15, 2024.[51] The case has not been set for oral argument.

2. ARTIFICIAL INTELLIGENCE

Getty Images Sues Stability AI In February 2023, Getty Images (US) sued Stability AI in federal district court in Delaware for allegedly infringing more than 12 million of Getty's

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photographs and their associated captions and metadata, in connection with two of Stability AI's products—Stable Diffusion and DreamStudio—which generate images in response to text prompts. Getty Images also brought trademark and unfair competition claims, alleging the generative output of Stability AI's products have included Getty Images watermarks.[52] The copyright claims are based on Stability AI having allegedly reproduced images from Getty's collection without authorization and by using a version of the Getty watermark in Stable Diffusion output.[53] The Lanham Act claims and the state law claims allege Stability AI's products are causing the public to mistakenly believe that Getty has authorized Stability AI to use and alter its images, resulting in lower quality products.[54] Stability AI has challenged the lawsuit on personal jurisdiction grounds, and the case is currently in jurisdictional discovery.[55] **Artists File Class Action Against Stability AI, Midjourney, and DeviantArt** In January 2023, artists Sarah Andersen, Kelly McKernan, and Karla Ortiz, along with a proposed class of "at least thousands" of other artists, filed a class action complaint against Stability AI, Midjourney, and DeviantArt. The complaint alleges direct and vicarious copyright infringement, DMCA violations and right of publicity violations, and unfair competition based on the creation and functionality of the defendants' generative AI products.[56] The named plaintiffs, all artists, allege the defendants allegedly used their art to train their artificial intelligence models. The complaint also seeks to certify a class of individuals whose work was used to train any of the defendants' artificial intelligence products.[57] Plaintiffs' copyright, DMCA, and state law claims assert that the defendants used plaintiffs' art in their products for training and other commercial purposes without licensing or in violation of existing contracts.[58] The defendants have moved to dismiss under Rule 12(b)(6). **District of Columbia District Court Holds AI-Generated Art Is Not Copyrightable** On August 18, 2023, the D.C. District Court affirmed the Copyright Office's denial of the plaintiff's application to register visual artwork generated by the "Creativity Machine"—an artificial intelligence system owned by Stephen Thaler.[59] The court agreed with the Copyright Office's determination that a work generated autonomously by a machine, without human input, is not copyrightable because it lacks the requisite "authorship" under the Copyright Act.[60] In holding that the Register of Copyrights did not err in denying Thaler's application, the court determined that the Copyright Act's plain text—conferring protection to "original works of authorship"—requires protectable works to have an "author," and that authorship is necessarily "human creation."[61] Because the administrative record reflected Mr. Thaler's admissions that the Creativity Machine "autonomously" created the work, the court rejected Mr. Thaler's new arguments before the district court that he provided instructions to and directed the AI system to create such work.[62] The court acknowledged, however, that "[t]he increased attenuation of human creativity from the actual generation of the final work will prompt challenging questions regarding how much human input is necessary to qualify the user of an AI system as an 'author.'"[63] **New York Times Files Lawsuit against AI Companies, Alleging Copyright Infringement** On December 27, 2023, the New York Times filed a lawsuit against Microsoft and its partner OpenAI, accusing the companies of copyright infringement and other related claims.[64] The Times alleges that Microsoft and OpenAI "directly infringed The Times's exclusive rights in its copyrighted works" by using the newspaper's registered, copyrighted works to train artificial intelligence models like ChatGPT.[65] According to the Complaint, Microsoft and OpenAI "seek to free-ride on The Times's massive investment in its journalism by using it to build substitutive products without permission or payment" by essentially providing Times content directly to consumers.[66] In response to the lawsuit, OpenAI published a statement on its website addressing the allegations, calling The Times' claims "without merit."[67] According to the OpenAI statement, "[t]raining AI models using publicly available internet materials is fair use," but regardless, OpenAI still has "led the AI industry in providing a simple opt-out process for publishers," including the New York Times.[68] According to OpenAI, the Times "intentionally manipulated prompts, often including lengthy excerpts of articles, in order to get [ChatGPT] to regurgitate" information, which forms the basis of the lawsuit.[69] OpenAI also highlighted its collaboration with various prominent news organizations, noting that one of the company's goals is "to support a healthy news ecosystem."[70] The Times is seeking damages and injunctive relief.[71] Both OpenAI and Microsoft have filed motions to dismiss the lawsuit.[72] The Times reported that its lawsuit "could test the emerging legal contours of generative A.I.

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technologies . . . and could carry major implications for the news industry."[73]

3. TRADEMARK

The Supreme Court Holds That Source-Identifying Uses of Trademarks Are Not Afforded First Amendment Protection against Infringement Claims In June 2023, the Supreme Court unanimously held that VIP, a dog toy maker that made chewable dog toys designed to look like a bottle of Jack Daniel's whiskey, could not rely on the First Amendment as a shield against Jack Daniel's trademark claims. VIP had originally sought a declaratory judgment that its toy neither infringed nor diluted Jack Daniel's trademarks. Jack Daniel's counterclaimed for infringement and dilution. VIP conceded that while its "Bad Spaniels" mark was meant to communicate a humorous message, it also used its "Bad Spaniels" trademark and trade dress as source identifiers.[74] The defendant sought to rely on the Second Circuit's *Rogers* test, which affords limited First Amendment protections to the use of trademarks in "expressive works."[75] The Court held the test does not apply when a trademark is used to indicate the source of a product, as it was here, and remanded the case to the district court to assess Jack Daniel's claim on the merits. The Court also held that the Lanham Act's exclusion from liability for dilution for "non-commercial" uses of a mark does not apply to parody, criticism, or commentary when the alleged infringer uses a mark to designate the source of its own goods.[76] **The Supreme Court Clarifies the Lanham Act's Extraterritorial Reach** On June 29, 2023, the Supreme Court harmonized the extraterritoriality framework of trademark law with recent developments in the Court's presumption against extraterritoriality jurisprudence. Hetronic International, a domestic manufacturer of radio remote controls for construction equipment, sued six foreign parties (collectively Abitron) for trademark infringement under the Lanham Act.[77] As one of Hetronic's authorized distributors, Abitron claimed it held the rights to much of Hetronic's intellectual property, including the marks at issue, in connection with selling its own Hetronic-branded products—mostly in Europe, but some in the United States.[78] Hetronic sought damages for Abitron's alleged infringement worldwide, while Abitron countered that Hetronic's claims required an impermissible extraterritorial application of the Lanham Act.[79] In applying the presumption against extraterritoriality, the Court held that the two provisions of the Lanham Act that prohibit trademark infringement through the unauthorized use in commerce of a protected trademark that is likely to cause confusion (15 U.S.C. § 1114(1)(a) and § 1125(a)(1)) are not extraterritorial, and apply only to claims where the infringing "use in commerce" is domestic.[80] "Use in commerce" means the legitimate use of a mark in the ordinary course of trade where the mark has a source-identifying function, serving to identify and distinguish the goods.[81] The Court held that the location in which the infringing "use in commerce" of a trademark occurs dictates whether the Lanham Act provisions at issue may apply extraterritorially.[82] The Court remanded the case for fact-finding on that issue.[83]

4. MUSIC

Ed Sheeran Successfully Defends against Copyright Claim in New York In May 2023, following a jury trial in the Southern District of New York, singer Ed Sheeran won a copyright lawsuit over the hit song "Thinking Out Loud," which Plaintiff Ed Townsend alleged infringed on Marvin Gaye's "Let's Get It On."[84] Subsequently, U.S. District Judge Louis Stanton dismissed Structured Asset Sales, LLC's closely related complaint on a motion for reconsideration of a prior verdict, finding that the parts of "Let's Get It On" that Sheeran was accused of infringing—namely, the chord progression and harmonic rhythm—were too common for copyright protection.[85] The court concluded that protecting the combination of these musical elements in "Let's Get It On" would give the song an "impermissible monopoly over a basic musical building block."[86] If such a "selection and arrangement" were "protected and not freely available to songwriters," the court noted, "the goal of copyright law . . . would be thwarted."[87] **Plaintiffs Claim That over 1,600 Songs by Reggaeton Artists, Like Bad Bunny and Pitbull, Infringe a 1989 Work** Popular artists Bad Bunny, Pitbull, and Daddy Yankee found themselves among hundreds of artists targeted in a lawsuit that threatens the entire genre of "Reggaeton"

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music—a blend of reggae music with Latin American dance hall music, with hip-hop influences.[88] This litigation, which began in 2021 in the Central District of California, will address the extent to which rhythm is deemed protectable under Copyright Law. Specifically, Plaintiffs Cleveland Browne and the estate of Wycliffe Johnson, who performed under the name Steely & Clevie, allege that the 100-plus artists named in the litigation infringed on the rhythm of the 1989 song "Fish Market."[89] In June 2023, Bad Bunny moved to dismiss Plaintiffs' Second Consolidated Amended Complaint. Bad Bunny argued Plaintiffs were seeking to protect the "basic building block(s)" of the genre, which belong in the public domain.[90] The parties are awaiting a decision.

5. FASHION & ENTERTAINMENT

Hermès Prevails in Request for Permanent Ban on US "MetaBirkin" NFT Sales In June 2023, in *Hermes International v. Rothschild*, U.S. District Judge Jed Rakoff permanently blocked Mason Rothschild and his associates from selling or minting MetaBirkin non-fungible tokens (NFTs).[91] This ruling was made pursuant to Hermès's request to block Rothschild's sales of "MetaBirkin" NFTs following a jury verdict that the NFTs violated Hermès's trademark rights in its popular Birkin bags.[92] That jury had found Rothschild liable on all three counts of trademark violations in February 2023, and awarded Hermès damages in the amount of $133,000 for Rothschild's use of the Birkin mark in his "MetaBirkin" NFTs.[93] The court found Hermès satisfied the four threshold requirements for a permanent injunction articulated by the Supreme Court in *eBay Inc. v. MercExchange, L.L.C.*, specifically that (i) Hermès suffered an irreparable injury, (ii) the remedies available at law are inadequate, (iii) a remedy in equity is warranted due to the balance of hardships between Hermès and Rothschild, and (iv) the public interest would not be disrupted by a permanent injunction.[94] The court ordered Rothschild to transfer the metabirkins.com domain name and relevant materials to Hermès; however, the court refused to order the transfer of the NFTs and smart contracts out of an abundance of caution related to First Amendment concerns, as the court reasoned that "MetaBirkins NFTs are at least in some respects works of art."[95] **Historic Strike Ends following SAG-AFTRA's Approval of Agreement** In November 2023, SAG-AFTRA's negotiating committee unanimously voted to approve a tentative three-year agreement that ended a 118-day strike—the longest actors' strike against the television and film studios in Hollywood history. Union leadership voted to ratify the deal shortly thereafter.[96] The deal included historic protections for actors against artificial intelligence, increases in health and pension contributions, a "streaming participation bonus," and an unprecedented pay increase.[97] The deal resulted in a 7% pay increase effective immediately after it was approved, another 4% increase in July 2023, and another 3.5% increase set to take effect in July 2024.[98] **Chanel Prevails in Trademark Dispute against Luxury Reseller** On February 6, 2024, a New York federal jury found luxury reseller What Goes Around Comes Around ("WGACA") liable on all four of Chanel's claims for trademark infringement, false advertising, unfair competition, and counterfeiting.[99] Chanel brought the action in 2018, accusing WGACA of, among other allegations, (1) selling counterfeit Chanel bags, including bags bearing serial numbers tied to stolen bags and bags made from materials not used by Chanel's factories; and (2) creating consumer confusion by using Chanel's marks in advertising and consumer communications in violation of the Lanham Act.[100] On July 26, 2021, both parties moved for summary judgment.[101] Chanel sought findings of liability for the trademark infringement and false association claims, and WGACA sought summary judgment in its favor with respect to all claims. The court granted Chanel's motion in part, finding WGACA liable for trademark infringement for selling handbags loaned to retailers for display that were never authorized for sale, and several handbags bearing serial numbers associated with those reported as stolen or pirated. The court emphasized Chanel's rights to control the quality of its marks.[102] By selling handbags that were never authorized for sale or whose serial numbers confirm they never went through Chanel's quality control procedures, WGACA sold non-genuine products in violation of the Lanham Act.[103] The court also granted WGACA's motion for summary judgment in part, but only with respect to Chanel's New York state law claims because it determined issues of material fact existed as to the remaining federal claims.[104] The case proceeded to a

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jury trial, after which the jury returned a verdict in favor of Chanel for all surviving claims, awarding the company $4 million in statutory damages.[105]

6. SPORTS

N.Y. Knicks Say Former Employee Took Trade Secrets to the Toronto Raptors In August 2023, the New York Knicks filed a lawsuit in federal district court against Maple Leaf Sports & Entertainment, the parent company of the Toronto Raptors, Darko Rajakovi, Noah Lewis, and Ikechukwu Azotam (together "Raptors"), over an alleged theft of the Knicks' trade secrets, seeking damages over $10 million.[106] The Knicks claim that a former team employee, Ikechukwu Azotam, stole proprietary information from the Knicks franchise, and took the information with him to the Toronto Raptors, where he assumed the role of assistant coach.[107] The alleged stolen proprietary information includes scouting files, season preparation books, play reports, and other materials.[108] The Knicks further allege that Azotam stole this information under the instruction of the Toronto Raptors, including head coach Darko Rajakovic.[109] On October 16, 2023, the Raptors filed a motion to dismiss, denying all allegations and arguing that the alleged stolen proprietary information is not a protected trade secret because the information was not unique to the Knicks and contained data on all NBA teams that could be gathered by watching televised games.[110] The motion further argued that federal court was the improper forum for commencing the action and that, per the NBA Constitution, the Knicks and Raptors were to arbitrate their dispute.[111] On November 20, 2023, the Knicks filed their response to the Raptors' motion to dismiss, arguing the dispute is not governed by the NBA Constitution because it is not a dispute about "basketball operations," but rather a dispute over "the theft of trade secrets by a disloyal employee."[112] The parties are awaiting a decision.[113]

7. TRANSACTIONS/DEALS

Lionsgate Acquires eOne On December 27, 2023, Lionsgate announced its acquisition of studio Entertainment One (eOne) from toy company Hasbro for $375 million.[114] The acquisition added 6,500 film and television titles to Lionsgate's library. ***Artémis Acquires Majority Stake in CAA*** On October 2, 2023, Artémis, an investment company run by French billionaire Francois-Henri Pinault, agreed to acquire a majority stake in Creative Artists Agency (CAA) that was previously held by global investment firm TPG.[115] Although an exact figure has not been disclosed, the sale has been reported to be for around $7 billion. ***AMC Entertainment Executes Distribution Agreements with Beyoncé and Taylor Swift*** In mid-2023, AMC Entertainment struck deals with Beyoncé and Taylor Swift to distribute the artists' concert films: "Taylor Swift: The Eras Tour" and "Renaissance: A Film by Beyoncé."[116] The films represented the first ever movies distributed by AMC, and bypassed the usual protocol where studios distribute the films to theaters.[117] The deals also included minimum ticket prices for both films: starting at $19.89 for Eras and $22 for Renaissance.[118] The deals boosted AMC's earnings, with AMC's CEO attributing AMC's 2023 fourth quarter revenue and EBITDA increases entirely to the two films, which collectively earned more than $115 million at the domestic box office on their opening weekends.[119] According to reports, AMC shared in 43% of the profits from the Eras film with Taylor Swift taking home the remaining 57%, whereas Beyoncé split box office earnings from the Renaissance film roughly 50% with exhibitors while AMC accepted a small distribution fee.[120] **Music Catalog Acquisitions** The market for music catalog acquisitions—which includes master recordings, music publishing, and other trademark and IP—cooled in 2023 due to rising interest rates.[121] Catalog acquisitions had become extremely lucrative revenue streams for investors, who use the songs in licensing deals, film and television, and advertisements, but became less attractive in the past year given rising borrowing costs.[122] Nonetheless, the year still saw major acquisitions by companies like Sony Music Group, Universal Music Group, Litmus Music, and Hipgnosis. Some highlights from the past year include: ***Universal Music Group and Shamrock Capital Acquire Dr. Dre's Music Catalog*** In January 2023, Universal Music Group and Shamrock Capital purchased various passive income streams from Dr. Dre's catalog, including producer royalties, his share of N.W.A artist

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royalties, and the writer's share of the song catalog where he does not own the publishing.[123] Reported to be at around $200 million, the deal was the largest-ever hip-hop catalog deal for a single artist. ***Litmus Music Acquires Katy Perry's Music Catalog*** On September 18, 2023, Litmus Music announced its $225 million purchase of Katy Perry's master rights royalties and publishing income from her five albums released between 2008 and 2020.[124] Litmus Music is a music rights company founded in 2022, backed by private equity company Carlyle Group LLC. The deal marked the year's largest artist catalog transaction. ***Hipgnosis Acquires Justin Bieber's Music Catalog*** On January 24, 2023, Hipgnosis Songs Capital announced that it had reached a deal to purchase all of Justin Bieber's publishing royalties, artist royalties from his master recordings, and neighboring rights.[125] The catalog included 290 titles, covering songs released through the end of 2021. The deal was reported to be valued at around $200 million. ***Sony Music Group Acquires Half of Michael Jackson's Music Catalog*** On February 9, 2024, Sony Music Group announced that it had reached a deal to acquire half of Michael Jackson's publishing and recorded masters catalog in a transaction that reportedly valued the total catalog at over $1.2 billion, which could be the highest-ever valuation of a single artist's work.[126] Sony reportedly paid at least $600 million for its stake. The deal also included assets from Jackson's Mijac publishing catalog, including songs by Sly & the Family Stone and Ray Charles. ***Vice Media Group Acquired by Consortium of Lenders*** Gibson Dunn represented Fortress Investment Group and a consortium of lenders, including Soros Fund Management and Monroe Capital, in the debtor-in-possession financing and acquisition of Vice Media Group in its chapter 11 filing. With its secured lenders' support, Vice Media filed for Chapter 11 on May 15, 2023.[127] On July 31, 2023, the lenders, represented by Gibson Dunn, closed on the sale of substantially all of Vice Media's assets, including its international next-gen media and entertainment platform for a purchase price of $350 million, plus the assumption of certain liabilities.[128] In a joint statement, the lender group said, "We are very pleased to complete the acquisition of Vice and we are excited to build upon the achievements of one of the most iconic brands in news and entertainment. We look forward to growing a strong business that is committed to serving audiences, brands and partners with award-winning content."[129] ***RedBird IMI Takes Stake in Media Res*** Gibson Dunn advised RedBird Capital Partners in RedBird IMI's investment in Media Res, the production studio behind Apple TV+ shows *The Morning Show* and *Pachinko*.[130] The investment, announced in January 2024, is RedBird IMI's first investment in scripted entertainment.[131] Jeff Zucker, CEO of RedBird IMI, said, "Media Res was a natural partnership for us as we continue to expand our presence across all forms of scripted, unscripted and children's entertainment as well as news and information."[132] The studio, founded by former HBO executive Michael Ellenberg, will use the investment to "strike new strategic partnerships" and continue "championing artists' original ideas and sourcing projects from exceptional IP."[133] ***NFL and Skydance Media Partner to Form Skydance Sports*** Gibson Dunn represented the NFL in its joint venture with Skydance Media to form Skydance Sports, a premier global multi-sports production studio.[134] NFL Films Senior Executive Ross Ketover said, "Through this new venture, we will be able to expand our storytelling acumen into different areas of content by tapping into the expertise and creativity of a highly accomplished media company in Skydance."[135] Via the partnership, the studio will produce both scripted and unscripted sports media content.[136] In May 2023, the studio announced the first project to come from the joint venture, which is a docuseries chronicling Dallas Cowboys owner Jerry Jones and the Cowboys franchise.[137] The series is currently in development and will feature never-before-seen content from the NFL Films archive.[138] ***Investment Partnership Led by Josh Harris Acquires the Washington Commanders*** On July 21, 2023, a partnership led by Josh Harris, founder of Apollo Global Management, announced the closing of its acquisition of the Washington Commanders.[139] The Harris group includes 20 limited partners, including NBA legend Magic Johnson.[140] The acquisition closed for a North American sports franchise record $6.05 billion.[141] Dan Snyder, the former Commanders owner, bought the franchise in 1999 for $800 million.[142] ***WWE and UFC Merge to Create TKO Group*** On April 3, 2023, Endeavor Group Holdings, UFC's parent company, announced the closing of its merger with WWE and the formation of the new publicly listed TKO Group.[143] The newly merged TKO Group has a valuation of $21.4 billion.[144] Former WWE majority

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shareholder and chairman Vince McMahon will serve as executive chairman of TKO, while Dana White, former UFC president, is named as UFC CEO.[145] Shares in TKO began trading on September 12, 2023, pegged to WWE's stock price, which closed at $100.65/share on its final day of trading.[146] ***Microsoft's Acquisition of Activision Blizzard*** In October 2023, Microsoft closed its $69 billion acquisition of the gaming firm Activision Blizzard, the largest deal in Microsoft's 48-year history.[147] The deal, which was announced in January 2022, underwent a lengthy and robust review from regulators, including the U.K.'s Competition and Markets Authority, before finally being cleared nearly two years later.[148] ***Disney's Acquisition of Comcast's Stake in Hulu*** On November 1, 2023, the Walt Disney Company ("Disney") announced its intention to acquire the 33% stake in Hulu, LLC held by Comcast Corp.'s NBCUniversal ("NBCU") by December for an anticipated $8.6 billion.[149] The deal has a $27.5 billion guaranteed floor value but will be subject to an appraisal process by which Hulu's equity fair value will be assessed as of September 30, 2023.[150] Under this process, "if the value is ultimately determined to be greater than the guaranteed floor value, Disney will pay NBCU its percentage of the difference between the equity fair value and the guaranteed floor value."[151] According to a company press release, the acquisition is anticipated to "further Disney's streaming objectives."[152] **Production Company M&A** ***Blumhouse Productions and James Wan's Atomic Monster Merge*** On January 2, 2024, Jason Blum's Blumhouse Productions and James Wan's Atomic Monster, two of the world's leading horror film production houses, merged in a deal that resulted in a three-way ownership structure split amongst Blum, Wan, and Universal Pictures.[153] Blumhouse and Atomic Monster will continue to operate as separate labels, but Blum and Wan look forward to increased content output as a result of their collaboration.[154] The merged company retains and expands Blumhouse's long-standing first-look deal with Universal Pictures, which Gibson Dunn represented in connection with the merger. ***The North Road Company Expands with Key Acquisitions*** On November 7, 2023, Peter Chernin's production studio, North Road, acquired an undisclosed stake in Questlove's production house, Two One Five Entertainment.[155] The purchase is the latest in a series of acquisitions by North Road in 2023, including the Turkish film and television studio, Karga Seven Pictures on June 6, 2023.[156] North Road also received $150 million capital investment from the Qatar Government Investment Fund back in January, 2023, adding to the capital base of $300 million from Apollo and up to $500 million from Providence Equity Partners that North Road secured at its launch in July 2022.[157] _____ [1] [ ] *Sony Music Ent. v. Cox Commc'ns, Inc.*, 93 F.4th 222 (4th Cir. 2024).
[2] *Id.* at 229.

[3] *Id.* at 227-28.

[4] *Id.* at 229.

[5] *Id.* at 236.

[6] *Id.* at 232-33.

[7] *Id.* at 232.

[8] *Id.* at 237.

[9] *Id.* at 238.

[10] *Id.*

[11] *Id.* at 239-41. [12] *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508, 508-09 (2023).
[13] *Id.* at 508. [14] *Id.* [15] *Id.* [16] *Id.* [17] *Id.* [7] *Id.* [18] *Id.* [19] *Id.* at 508-09. [20] *Id.* at 535-36. [21] *Id.* at 541. [22] *Id.* at 537. [23] *Id.* at 551. [24] *Hanagami v. Epic Games*, 85 F.4th 931, 935 (9th Cir. 2023). [25] *Id.* [26] *Id.* [27] *Id.* at 938. [28] *Id.* [29] *Id.* at 943. [30] *Id.* [31] *Id.* [32] *Id.* at 946. [33] *Id.* at 947. [34] *Warner Chappell Music, Inc. v. Nealy*, 216 L.

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