

# Media, Entertainment and Technology Group – Fall 2020 Update

Client Alert | October 8, 2020

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While the COVID-19 pandemic has disrupted the practice of law in 2020, courts have continued to churn out important rulings impacting the media and entertainment industries. Here, Gibson Dunn's Media, Entertainment and Technology Practice Group highlights some of those key cases and trends: from politically charged First Amendment cases to copyright battles over rock anthems, fictional pirates, and real-life music piracy.

## I. Recent Litigation Highlights

### A. First Amendment Litigation

#### 1. President Trump's Failed Efforts to Block Publication of Critical Books.

This presidential election year saw two efforts by the federal government and President Trump to enjoin the publication of forthcoming books critical of the current president. Both efforts to obtain a prior restraint order failed and the books were released, though one of the cases is far from over.

On June 20, 2020, the District Court for the District of Columbia rejected the U.S. government's motion for a preliminary injunction and temporary restraining order to block former National Security Advisor John Bolton from publishing his memoir, *The Room Where it Happened*.<sup>[1]</sup> The United States filed its lawsuit on June 16, 2020, alleging that Bolton's book contains sensitive information that could compromise national security, that its publication breached non-disclosure agreements that bound Bolton, and that Bolton abandoned the prepublication review process.<sup>[2]</sup> In addition to an injunction, the government seeks as a remedy a constructive trust over Bolton's proceeds from the book. PEN American Center, Inc., Association of American Publishers, Inc., Dow Jones & Company, Inc., The New York Times Company, Reporters Committee on Freedom of the Press, The Washington Post, the ACLU and others filed amicus briefs opposing the government's effort to enjoin publication, arguing, among other things, that the First Amendment prohibits prior restraints for any duration of time.<sup>[3]</sup> Rejecting the government's motion, the district court held that, while the government is likely to succeed on the merits of its complaint, it did not establish that it would suffer irreparable injury absent an injunction.<sup>[4]</sup> Judge Lamberth had harsh words for Bolton, stating that—while not controlling as to that present motion—Bolton “has exposed his country to harm and himself to civil (and potentially criminal) liability.”<sup>[5]</sup> On July 30, 2020, the government filed a motion for summary judgment against Bolton.<sup>[6]</sup> On September 15, 2020, it was reported that the Justice Department had opened a criminal investigation into Bolton's alleged

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disclosure of classified information in connection with his book.<sup>[7]</sup> On October 1, 2020, the district court denied Bolton's motion to dismiss the government's civil case against him.<sup>[8]</sup> [Disclosure: Gibson Dunn represented amicus PEN American Center, Inc. in opposing the government's effort to enjoin publication.]

On July 13, 2020, the New York Supreme Court rejected a similar attempt by President Trump's brother, Robert S. Trump—brought shortly before his death—to enjoin publication of their niece Mary Trump's book, *Too Much and Never Enough*.<sup>[9]</sup> Robert Trump filed his motion for temporary restraining order and preliminary injunction against Mary Trump and her publisher, Simon and Schuster, on June 26, 2020, alleging that publication of Ms. Trump's book would breach a confidentiality clause in a nearly 20-year-old settlement agreement among the Trump family regarding the president's parents' estates.<sup>[10]</sup> Ms. Trump argued, among other things, that a prior restraint is not a constitutionally permissible method of enforcing a settlement agreement's confidentiality provision and that the contract Robert Trump invoked was not enforceable under the circumstances.<sup>[11]</sup> The Court agreed, finding that "in the vernacular of First year law students, 'Con. Law trumps Contracts.'"<sup>[12]</sup> Ms. Trump's book was released and became a best-seller. [Disclosure: Gibson Dunn represents Mary Trump in this lawsuit.]

## 2. Defamation Litigation

### a. A Barrage of Defamation Claims, Settlements, Trials, and Dismissals.

The past year has been particularly active in the defamation arena. While media defendants have won some high-profile victories over slander and libel claims, such claims remain a threat, and plaintiffs continue to file lawsuits with headline-grabbing damages requests. Sarah Palin's libel case against The New York Times Company—over a 2017 editorial that she alleges falsely tied her to a mass shooting—will proceed to trial in February 2021 after the judge denied dueling summary judgment motions and found that the case should be decided by a jury.<sup>[13]</sup> And this year, Nicholas Sandmann settled suits brought against The Washington Post and CNN over coverage of his viral-video encounter with a Native American activist at the 2019 March for Life rally in Washington D.C.<sup>[14]</sup> Sandmann still has pending suits against NBC, ABC News, CBS News, The New York Times, Gannett, and Rolling Stone.<sup>[15]</sup>

On the other hand, in December 2019, a Los Angeles jury determined that Elon Musk did not defame Vernon Unsworth when he called him a "pedo guy" during a name-calling spat on Twitter.<sup>[16]</sup> Moreover, over the past year, Congressman Devin Nunes has seen many of his defamation suits against media companies rebuffed, with courts recently dismissing his lawsuit against Esquire and journalist Ryan Lizza, and dismissing another suit against the political research firm Fusion GPS, though Nunes continues to pursue both actions.<sup>[17]</sup> Nunes also continues to try to sue Twitter and certain of its users for defamation, including a Republican political strategist and anonymous parody accounts belonging to a fake cow (Devin Nunes' cow @DevinCow) and to Nunes' "mother" (Devin Nunes' Alt-Mom @NunesAlt), even after Twitter was dismissed from the case.<sup>[18]</sup> Nunes has also filed suits against McClatchy, The Washington Post, and CNN.<sup>[19]</sup> [Disclosure: Gibson Dunn represents The McClatchy Company in the suit filed by Nunes.]

### b. Rachel Maddow Wins Dismissal of One America News Network Owner's Defamation Claim.

On May 22, 2020, Judge Cynthia A. Bashant of the Southern District of California granted Rachel Maddow, MSNBC, NBCUniversal, and Comcast's anti-SLAPP special motion to strike in response to a complaint filed by Herring Networks, Inc., owner of the conservative news outlet One America News ("OAN").<sup>[20]</sup> Herring Networks filed its lawsuit in September 2019 over comments Ms. Maddow made during a broadcast of *The Rachel*

*Maddow Show*. During that show, she commented on a *Daily Beast* article that reported how OAN employed an on-air reporter who also worked for Sputnik, a pro-Kremlin news organization funded by the Russian government. While reporting on the article, Ms. Maddow exclaimed, “the most obsequiously pro-Trump right wing news outlet in America really literally is paid Russian propaganda. Their on air U.S. politics reporter is paid by the Russian government to produce propaganda for that government.”<sup>[21]</sup> Herring Networks argued Ms. Maddow’s statement that the network “really literally is paid Russian propaganda” was false and defamatory.<sup>[22]</sup>

Ms. Maddow and the other defendants challenged Herring Networks’ suit via a motion to strike under California’s anti-SLAPP law, arguing that Ms. Maddow’s statement was fully protected opinion under the First Amendment and, in any event, was substantially true.<sup>[23]</sup> The court granted the defendants’ motion, explaining Ms. Maddow clearly outlined the basis for her opinions during the segment and “inserted her own colorful commentary” regarding the facts.<sup>[24]</sup> As such, the court found the statement was protected opinion as a matter of law and disagreed with Herring Networks’ argument that Ms. Maddow’s statement raised a factual issue for a jury. The court dismissed Herring Networks’ complaint with prejudice, and ordered the defendants to file a motion to recover their fees (as required by California’s anti-SLAPP law).<sup>[25]</sup> Herring Networks has filed a notice of appeal with the Ninth Circuit. [Disclosure: Gibson Dunn represents Ms. Maddow, MSNBC, NBCUniversal, and Comcast in this action.]

## c. “Wolf of Wall Street” Libel Claim Fails.

In June 2020, the Second Circuit rejected a libel lawsuit filed against Paramount Pictures over the film “The Wolf of Wall Street,” in which Wall Street brokerage-firm attorney Andrew Greene alleged he was defamed by a fictional character in the film who Greene claimed resembled him.<sup>[26]</sup> Greene, an ex-employee of the financial firm portrayed in the film, alleged that the film featured a character that is “recognizable as him” and “depicted as engaging in behavior that defames his character.”<sup>[27]</sup> The District Court for the Eastern District of New York granted the defendants’ motion for summary judgment, holding that Greene failed to raise a genuine issue of material fact as to whether Paramount Pictures acted with knowledge or reckless disregard in making defamatory statements “of and concerning” Greene.<sup>[28]</sup>

The Second Circuit affirmed, holding that Greene’s claims failed as a matter of law because a reasonable jury would not find that Paramount Pictures acted with actual malice.<sup>[29]</sup> First, the Second Circuit found that Paramount Pictures “took appropriate steps to ensure that no one would be defamed by the Film.”<sup>[30]</sup> Those steps included reading the book and news articles on which the film was based and assigning characters fictitious names with no “specific real life analogue.”<sup>[31]</sup> Second, the circuit court found that “no reasonable viewer” of “The Wolf of Wall Street” would believe that Paramount Pictures intended the character in the film as a depiction of Greene, as Paramount Pictures knew the film character was a fictitious, composite character.<sup>[32]</sup> Also, Greene worked as head of the corporate finance department at the financial firm portrayed in the film, while the character at issue worked as a broker on the trading floor.<sup>[33]</sup> Finally, the film included a disclaimer that characters in the film were fictionalized.<sup>[34]</sup>

## 3. Right of Publicity

### a. New York Considers New Right of Publicity Law.

In July 2020, both houses of the New York Legislature unanimously passed a much-anticipated proposed right of publicity bill, which awaits signature by Governor Andrew Cuomo.<sup>[35]</sup> The bill, Senate Bill S5959D/Assembly Bill No. A05605B, would replace New York Civil Rights Law § 50 and changes the right of publicity landscape in the state.<sup>[36]</sup> Significantly, the bill makes a person’s right of publicity an independent property right that is freely transferable and creates postmortem rights for forty years after the death of an

individual.<sup>[37]</sup> It further “protects a deceased performer’s digital replica in expressive works to protect against persons or corporations from misappropriating a professional performance.”<sup>[38]</sup>

Given the rise of pornographic deepfakes—“hyper-realistic manipulation of digital imagery that can alter images so effectively it’s largely impossible to tell real from fake”<sup>[39]</sup>—SAG-AFTRA called the bill’s passage “a remarkable step in the ongoing effort to protect our members, and all performers, from the exploitation of our images and voices – the very assets we use to make a living.”<sup>[40]</sup> But others, including the Motion Picture Association of America (“MPAA”) and the New York State Broadcasters Association, Inc., have voiced concerns about the bill’s implications, arguing it chills speech and presents First Amendment concerns.<sup>[41]</sup> Specifically, the MPAA argues that the bill’s language is vague and overbroad and interferes with the ability of filmmakers to tell stories inspired by real people and events.<sup>[42]</sup>

## B. Profit Participation & Royalties

### 1. AMC Prevails in First *The Walking Dead* Profits Trial in California.

On July 22, 2020, following a bench trial, Judge Daniel Buckley of the Superior Court for the County of Los Angeles issued a sweeping ruling in favor of AMC in a profit participation action regarding the hit AMC series *The Walking Dead*.<sup>[43]</sup> This California lawsuit, governed by New York contract law, was brought by various show participants, including Robert Kirkman, David Alpert, and Gale Anne Hurd. The case also involved issues pertaining to spin-offs *Fear the Walking Dead* and *Talking Dead*. The profit participants alleged that AMC failed to properly account to them under their agreements, and Judge Buckley ordered the eight-day trial to resolve key, gateway issues of contractual interpretation.

Those issues included (1) whether AMC’s standard modified adjusted gross receipts definition (“MAGR Definition”) governed the calculation, reporting, and payment of MAGR to the plaintiffs; and (2) whether the affiliate transaction provision in certain plaintiffs’ agreements applied to AMC Network’s exhibition of *The Walking Dead*.<sup>[44]</sup>

Judge Buckley found that AMC’s standard MAGR Definition governed the calculation, reporting, and payment of MAGR to the plaintiffs, even where the MAGR exhibit was supplied after the plaintiffs signed their agreements. The court looked at the plain text of the parties’ agreements, which stated that “MAGR shall be defined, computed, accounted for and paid in accordance” with AMC’s MAGR Definition, and explained that “New York courts routinely uphold the right of one party to a contract to fix a material price term in the future.”<sup>[45]</sup> The court also noted that the plaintiffs bargained for and received particular MAGR protections in the agreements themselves.<sup>[46]</sup> Though the court found looking to extrinsic evidence was unnecessary, it explained how years of post-performance conduct only confirmed AMC’s position that its MAGR Definition controlled, with certain plaintiffs waiting four years to object to the MAGR Definition after they received it, all the while accepting payments from AMC under that definition.<sup>[47]</sup>

One of the plaintiffs’ key arguments was that the license fee imputed for AMC Network’s exhibition of *The Walking Dead*, which appeared in the MAGR Definition, was too low and not in compliance with the affiliate transaction provisions in their agreements. Those provisions required “‘AMC’s transactions with Affiliated Companies [to] be on monetary terms comparable with the terms on which AMC enters into similar transactions with unrelated third party distributors for comparable programs after arms’ length negotiation.”<sup>[48]</sup> The court held AMC Network’s exhibition of *The Walking Dead* was governed by the imputed license fee in the MAGR Definition, and that the affiliate transaction provisions only applied to transactions where the participant “has no seat at the table to negotiate. . . .”<sup>[49]</sup> The court found the provision did not apply to the kind of

internal rights transfers the plaintiffs challenged.

Similar lawsuits over *The Walking Dead* were filed by CAA and Frank Darabont in New York.<sup>[50]</sup> The consolidated jury trial in these lawsuits is scheduled to begin in April 2021. [Disclosure: Gibson Dunn represents AMC in these actions.]

## C. #MeToo Litigation

### 1. Ninth Circuit Revives Ashley Judd's Harassment Claim against Harvey Weinstein.

On July 29, 2020, the Ninth Circuit ruled that the actor Ashley Judd could proceed with her sexual harassment claim against Harvey Weinstein. Ms. Judd filed her action alleging defamation, sexual harassment, intentional interference with prospective economic advantage, and unfair competition on April 30, 2018. Ms. Judd's claims stemmed from events occurring in and around 1997, at which time Ms. Judd alleges Mr. Weinstein invited her, a Hollywood newcomer, to a "general" industry meeting at the Peninsula Hotel in Beverly Hills, where she was to seek advice and guidance. When Ms. Judd arrived, she was directed to Mr. Weinstein's private hotel room, where Mr. Weinstein appeared in a bathrobe, asked to give Ms. Judd a massage, and asked her to watch him shower.

Judge Phillip Gutierrez of the Central District of California granted Mr. Weinstein's motion to dismiss Ms. Judd's sexual harassment claim, brought pursuant to California Civil Code section 51.9, finding Ms. Judd and Mr. Weinstein's relationship did not fall within the definition of a "business, service, or professional relationship" under the statute. The court nonetheless explained that "an appellate decision on these important issues could provide needed guidance to lower courts applying § 51.9." Ms. Judd appealed the dismissal of her sexual harassment claim to the Ninth Circuit.

Reversing the district court, the Ninth Circuit explained that "[Ms. Judd's and Mr. Weinstein's] relationship consisted of an inherent power imbalance wherein Weinstein was uniquely situated to exercise coercion or leverage over Judd by virtue of his professional position and influence as a top producer in Hollywood."<sup>[51]</sup> The court held that section 51.9 does, in fact, cover such business or professional relationships where there is an inherent power imbalance.<sup>[52]</sup> [Disclosure: Gibson Dunn represents Ashley Judd in this action.]

## D. Music Industry Litigation

### 1. Led Zeppelin Prevails in *En Banc* "Stairway" Ruling.

On March 9, 2020, the Ninth Circuit, sitting *en banc*, reinstated a Los Angeles jury's 2016 verdict clearing Led Zeppelin of infringing the band Spirit's song "Taurus."<sup>[53]</sup> Michael Skidmore, the trustee of for the estate of Spirit's founding member Randy Wolfe (pka Randy California), had alleged that the opening riff of "Stairway to Heaven" is substantially similar to "Taurus," and infringed Wolfe's copyright in the composition. In 2016, the jury found no substantial similarity between "Taurus" and the rock anthem under the extrinsic test for unlawful appropriation. But in September 2018, a Ninth Circuit three-judge panel vacated the verdict and remanded the case for a new trial.<sup>[54]</sup> The three-judge panel found that lack of an instruction explaining copyrights that cover the selection and arrangement of music, combined with an allegedly faulty instruction on the requisite element of originality prejudicially "undermined the heart of plaintiff's argument."<sup>[55]</sup>

The March 2020 *en banc* ruling overturned the panel in a detailed opinion, agreeing with U.S. District Judge R. Gary Klausner that the 1909 Copyright Act, not the 1976 Copyright Act, governed, and that only the bare-bones "deposit copy" of "Taurus" was properly introduced for comparison to "Stairway to Heaven."<sup>[56]</sup> The *en banc* panel held that "[b]ecause the 1909 Copyright Act did not offer protection for sound recordings, [Spirit]'s

one-page deposit copy defined the scope of the copyright at issue.”<sup>[57]</sup> Thus, it was not error for the district court to deny the plaintiff’s request to play for the jury sound recordings of “Taurus.”<sup>[58]</sup>

The *en banc* panel also rejected the “inverse ratio rule” previously adopted by the Ninth Circuit, under which it had “permitted a lower standard of proof of substantial similarity where there is a high degree of access.”<sup>[59]</sup> To preserve the inverse ratio rule, Judge McKeown wrote for the *en banc* panel, would “unfairly advantage[] those whose work is most accessible by lowering the standard of proof for similarity,” thereby benefitting “those with highly popular works.”<sup>[60]</sup> The “Stairway” case had been closely watched by the music industry and attracted numerous amicus at the court of appeals, including the U.S. Department of Justice supporting Led Zeppelin’s position on appeal. On October 5, 2020, the U.S. Supreme Court denied Skidmore’s petition for writ of certiorari.<sup>[61]</sup>

## 2. Labels’ and Publishers’ Billion-Dollar Verdict Against Cox Upheld.

On June 2, 2020, U.S. District Judge Liam O’Grady of the Eastern District of Virginia largely upheld a \$1B verdict against Cox Communications won by over 50 records labels and music publishers, including Sony Music Entertainment, Universal Music Group, and Warner Bros. Records.<sup>[62]</sup>

Judge O’Grady rejected Cox’s contention that the evidence at trial was insufficient, concluding that there was “overwhelming” and “strong” evidence that Cox’s users illegally reproduced the sound recordings and distributed them over Cox’s network.<sup>[63]</sup> Further, there was “ample” evidence for the jury to conclude that Cox gained some direct benefit from the infringement and find Cox liable for vicarious copyright infringement.<sup>[64]</sup> Judge O’Grady emphasized evidence showing that “Cox looked at customers’ monthly payments when considering whether to terminate them for infringement.”<sup>[65]</sup>

Judge O’Grady also rejected Cox’s argument that the award was “grossly excessive.”<sup>[66]</sup> He noted that the per-work damages of \$99,830.29 were more than \$50,000 below the statutory maximum under the Copyright Act,<sup>[67]</sup> but ordered additional briefing on the issue of the calculation of the number of infringed works.<sup>[68]</sup>

## 3. Music Publishers and Peloton Reach Settlement in Copyright Suit After Dismissal of Cycling Company’s Counterclaims.

In March 2019, more than a dozen music publishers filed suit in New York federal court alleging popular fitness tech company Peloton failed to license songs for its online classes, thereby violating the publishers’ copyrights.<sup>[69]</sup> The publishers claimed over \$150 million in damages for unlicensed uses of more than 1000 songs, with each use of an allegedly unlicensed song constituting a separate infringement because audiovisual “sync” licenses are issued on a per-video basis.<sup>[70]</sup> The publishers also alleged Peloton’s conduct was “deliberate and willful” because the company had obtained the necessary “sync” licenses from other music copyright owners.<sup>[71]</sup>

In response, Peloton counterclaimed against the publishers, alleging that any failure to obtain licenses was due to the National Music Publishers’ Association’s (“NMPA”) creation of a price fixing “cartel.”<sup>[72]</sup> Peloton alleged the NMPA both engaged in “horizontal collusion” to inflate prices in its own negotiations with the company and tortiously interfered with Peloton’s ability to negotiate with individual publishers.<sup>[73]</sup> On January 29, 2020, U.S. District Judge Denise Cote dismissed Peloton’s counterclaims without leave to amend, finding that Pelton failed define a “relevant market,” a necessary element to Peloton’s antitrust claim under Section 1 of the Sherman Act.<sup>[74]</sup> A month later, the case settled.



## 4. Second Circuit Upholds Copyright Win for Drake.

On February 3, 2020, the Second Circuit affirmed the Southern District of New York's ruling that Drake did not violate copyright law by incorporating a 35-second clip of the song "Jimmy Smith Rap" into his song "Pound Cake" without a license.<sup>[75]</sup> The lawsuit began in April 2014, when the estate of Jimmy Smith sued Drake and Drake's record labels and publishers for copyright infringement. The defendants moved for summary judgment, arguing that Drake's use of the song was protected by the fair use doctrine.<sup>[76]</sup>

The District Court granted the defendants' motion for summary judgment in May 2017.<sup>[77]</sup> In its 2020 ruling, the Second Circuit affirmed, finding Drake's use of the song was protected by the fair use doctrine, as the use was "transformative."<sup>[78]</sup> The Court stated that "'Pound Cake' criticizes the jazz-elitism that the 'Jimmy Smith Rap' espouses. By doing so, it uses the copyrighted work for a purpose, or imbues it with a character, different from that for which it was created."<sup>[79]</sup> In addition, the Court found "no evidence that 'Pound cake' usurps demand for 'Jimmy Smith Rap.'"<sup>[80]</sup> [Disclosure: Gibson Dunn represented one of the defendants in the action.]

## E. Copyright Litigation

### 1. Ninth Circuit Revives Screenwriter's *Pirates of the Caribbean* Copyright-Infringement Suit.

On July 22, 2020, the Ninth Circuit revived a screenwriter's copyright-infringement suit against The Walt Disney Company alleging that the film *Pirates of the Caribbean: Curse of the Black Pearl* is substantially similar to plaintiff's screenplay.<sup>[81]</sup> The district court had granted Disney's Rule 12(b)(6) motion to dismiss on the grounds that the two works were not substantially similar as a matter of law.<sup>[82]</sup> In reversing, the Ninth Circuit acknowledged "striking differences between the two works," but nonetheless found "the selection and arrangement of the similarities between them [to be] more than de minimis" and sufficient to warrant denial of Disney's motion.<sup>[83]</sup>

The district court had noted the similarities between the works but concluded that many of the shared elements were "unprotected generic, pirate-movie tropes."<sup>[84]</sup> The Ninth Circuit disagreed, explaining "it is difficult to know whether such elements are indeed unprotectible material" at the pleading stage, and further noting that additional evidence—including expert testimony—"would help inform the question of substantial similarity."<sup>[85]</sup> According to the court, such additional evidence would be "particularly useful" given that "the blockbuster *Pirates of the Caribbean* film franchise may itself have shaped what are now considered pirate-movie tropes."<sup>[86]</sup> Ultimately, because "[t]he district court erred by failing to compare the original selection and arrangement of the unprotectible elements between the two works," the Ninth Circuit reversed the dismissal and remanded for further proceedings.<sup>[87]</sup> And on August 31, 2020, the Ninth Circuit denied Disney's petition for panel rehearing and for rehearing *en banc*. Some commentators and practitioners have noted that the ruling appears to represent the latest in a shift away from the Ninth Circuit's prior precedents that had generally leaned toward upholding dismissals of substantial similarity suits, representing a cautionary ruling for industry defendants.<sup>[88]</sup>

### 2. Copyright Act Preempts Lyrics Site Genius's Claims Against Google.

On August 10, 2020, District Judge Margo Brodie dismissed Genius Media Group Inc.'s suit against Google. Genius Media had alleged in December 2019 that Google "misappropriated lyric transcriptions from its website."<sup>[89]</sup> According to its complaint, Genius Media earns revenue by, among other things, licensing its database of high-quality lyrics to companies and generating ad revenue via traffic to its website.<sup>[90]</sup> In its

complaint, Genius Media alleged that when users search for song lyrics, Google's "Information Box"—which appears above the search results—displays complete song lyrics obtained from Genius Media's website and thus reduces traffic to that site.<sup>[91]</sup> Genius Media sued Google for breach of contract, indemnification, unfair competition under New York and California law, and unjust enrichment.<sup>[92]</sup>

Judge Brodie determined, however, that Genius Media's state law claims were preempted by the Copyright Act.<sup>[93]</sup> As an initial matter, Judge Brodie found that the transcribed song lyrics were among the works protected by the Copyright Act, and because the subject of Plaintiff's claims was the transcribed lyrics, the subject-matter prong of the Copyright Act's preemption test was met.<sup>[94]</sup> Judge Brodie additionally determined that Genius Media's contract claims were "nothing more than claims seeking to enforce the *copyright owner's* exclusive rights to protection from unauthorized reproduction of the lyrics and are therefore preempted"; however, Genius Media licensed, but did not own, the relevant copyrights.<sup>[95]</sup> The court found that Genius Media's transcriptions are, in essence, derivative works, and held that "the case law is clear that only the original copyright owner has exclusive rights to authorize derivative works."<sup>[96]</sup> Accordingly, the Court dismissed Genius Media's complaint for failure to state a claim.<sup>[97]</sup>

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[1] *United States v. Bolton*, No. 20-cv-1580, Order Denying Plaintiff's Motion for Temporary Restraining Order and Preliminary Injunction (D. D.C. June 20, 2020).

[2] *See id.* at \*1.

[3] *See, e.g., United States v. Bolton*, No. 20-cv-1580, Brief of PEN American Center, Inc. as *Amicus Curiae* in Support of Defendant (D. D.C. June 19, 2020).

[4] *United States v. Bolton*, No. 20-cv-1580, Order Denying Plaintiff's Motion for Temporary Restraining Order and Preliminary Injunction, \*8 (D. D.C. June 20, 2020).

[5] *Id.* at \*10.

[6] *United States v. Bolton*, No. 20-cv-1580, Plaintiff's Motion for Summary Judgment (D. D.C. July 30, 2020).

[7] Katie Benner, "Justice Dept. Opens Criminal Inquiry Into John Bolton's Book," N.Y. Times (Sept. 15, 2020), <https://www.nytimes.com/2020/09/15/us/politics/john-bolton-book-criminal-investigation.html>.

[8] Charlie Savage, "Government Lawsuit Over John Bolton's Memoir May Proceed, Judge Rules," N.Y. Times (Oct. 5, 2020), <https://www.nytimes.com/2020/10/01/us/politics/john-bolton-book-proceeds-lawsuit.html>.

[9] *Trump v. Trump*, No. 22020-51585, 2020 WL 4212159 (N.Y. Sup. Ct. July 13, 2020).

[10] *Trump v. Trump*, No. 22020-51585, Motion for Temporary Restraining Order and Preliminary Injunction (N.Y. Sup. Ct. June 26, 2020).

[11] *Trump*, 2020 WL 4212159, \*14.

[12] *Id.* at \*16.

[13] *Palin v. The New York Times Co.*, No. 17-cv-4853, Opinion and Order on Motions for Summary Judgment (S.D.N.Y. Aug. 28, 2020).

[14] Ted Johnson, "Nick Sandmann, Student at Center of Viral Video, Settles Defamation



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Lawsuit Against Washington Post,” The Washington Post (July 24, 2020), <https://deadline.com/2020/07/nick-sandmann-washington-post-defamation-1202994384/>.

[15] Cameron Knight, “Sandmann files 5 more defamation lawsuits against media outlets,” Cincinnati Enquirer (Mar. 3, 2020), <https://www.cincinnati.com/story/news/2020/03/03/sandmann-files-5-more-defamation-lawsuits-against-media-outlets/4938142002/>.

[16] Lauren Berg, “Jury Says Elon Musk Didn’t Defame with ‘Pedo Guy’ Tweet,” Law360 (Dec. 6, 2019), <https://www.law360.com/articles/1226249/jury-says-elon-musk-didn-t-defame-with-pedo-guy-tweet>.

[17] Kate Irby, “Judge tells Devin Nunes for 3<sup>rd</sup> time he can’t sue Twitter over anonymous tweets,” The Fresno Bee (Aug. 14, 2020), <https://www.fresnobee.com/news/california/article244958665.html>.

[18] *Id.*

[19] *Id.*

[20] *Herring Networks, Inc. v. Maddow*, No. 19-cv-1713, Order Granting Defendants’ Special Motion to Strike (S.D. Cal. May 22, 2020).

[21] *Id.* at \*3 (internal quotations omitted).

[22] *Id.*

[23] *See id.* at \*7-16.

[24] *Id.* at \*15.

[25] *Id.* at \*17.

[26] *Greene v. Paramount Pictures Corp.*, 813 F. App’x 728 (2d Cir. 2020).

[27] *Id.* at 730.

[28] *Greene v. Paramount Pictures Corp.*, 340 F. Supp. 3d 161, 172 (E.D.N.Y. 2018).

[29] *Greene*, 813 F. App’x at 732.

[30] *Id.* at 731.

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] *Id.* at

[35] Senate Bill S5959D, 2019-2020 Legislative Session of The New York State Senate (last accessed Aug. 26, 2020), <https://www.nysenate.gov/legislation/bills/2019/s5959>.

[36] Jennifer E. Rothman, *New York Reintroduces Right of Publicity Bill with Dueling Versions*, Rothman’s Roadmap to the Right of Publicity (May 22, 2019), <https://www.rightofpublicityroadmap.com/news-commentary/new-york-reintroduces-right-publicity-bill-dueling-versions>.

[37] Senate Bill S5959D, Summary Memo, *supra* note 35.

[38] *Id.*

[39] Eriq Gardner, *Deepfakes Pose Increasing Legal and Ethical Issues for Hollywood*, The Hollywood Reporter (July 12, 2019), <https://www.hollywoodreporter.com/thr-esq/deepfakes-pose-increasing-legal-ethical-issues-hollywood-1222978>.

[40] David Robb, SAG-AFTRA Expects NY Gov. Andrew Cuomo To Sign Law Banning “Deepfake” Porn Face-Swapping, Deadline (July 28, 2020), <https://deadline.com/2020/07/deepfakes-sag-aftra-expects-andrew-cuomo-to-sign-law-banning-face-swapping-porn-1202997577/>.

[41] Ben Sheffner, *New York vs. biopics? The state Legislature is poised to crack down on fact-inspired works of art*, New York Daily News (June 18, 2019), <https://www.nydailynews.com/opinion/ny-oped-stop-this-threat-to-free-speech-20190618-evesugulizgspk4reelegxiazu-story.html>.

[42] *Id.*

[43] *Kirkman v. AMC Film Holdings, LLC*, No. BC672124, 2020 WL 4364279 (Cal. Super. Ct. July 22, 2020).

[44] *Id.* at \*4-5, \*18-19.

[45] *Id.* at \*5.

[46] *Id.* at \*6.

[47] *Id.* at \*11-13.

[48] *Id.* at \*19.

[49] *Id.* at \*20.

[50] *Darabont v. AMC Network Entertainment LLC*, No. 654328/2013 (N.Y. Sup. Ct.); *Darabont v. AMC Network Entertainment LLC*, No. 650251/2018 (N.Y. Sup. Ct.).

[51] *Judd v. Weinstein*, 967 F.3d 952, 959 (9th Cir. 2020).

[52] *Id.*

[53] *Skidmore v. Led Zeppelin*, 952 F.3d 1051 (9th Cir. 2020) (“*Skidmore II*”).

[54] *Skidmore v. Led Zeppelin*, 905 F.3d 1116 (9th Cir. 2018) (“*Skidmore I*”).

[55] *Id.* at 1127–28.

[56] *Skidmore II*, 952 F.3d at 1079.

[57] *Id.*

[58] *Id.* at 1063–64.

[59] *Id.* at 1079.

[60] *Id.* at 1068.

[61] Bill Donahue, “Supreme Court Won’t Hear Led Zeppelin Copyright Fight,” Law360 (Oct. 5, 2020), <https://www.law360.com/california/articles/1308109/supreme-court-won-t-hear-led-zeppelin-copyright-fight>.

[62] *Sony Music Entm't v. Cox Commc'ns, Inc.*, No. 1:18-CV-950-LO-JFA (E.D. Va. June 2, 2020).

[63] *Id.* at 4–8.

[64] *Id.* at 10.

[65] *Id.*

[66] *Id.* at 29–35.

[67] *Id.* at 31.

[68] *Id.* at 26.

[69] Complaint, *Downtown Music Publishing LLC, et al v. Peloton Interactive, Inc.*, No. 1:19-cv-02426 (S.D.N.Y. Mar. 19, 2019).

[70] *Id.* at 8.

[71] *Id.* at 18.

[72] Answer to Complaint and Counterclaims Against National Music Publishers' Association, Inc. and Plaintiff Publishers, *Downtown Music Publishing LLC, et al v. Peloton Interactive, Inc.*, No. 1:19-cv-02426-DLC, at 35–37 (S.D.N.Y. Apr. 30, 2019).

[73] *Id.* at 40–43.

[74] Opinion & Order, *Downtown Music Publishing LLC, et al v. Peloton Interactive, Inc.*, No. 1:19-cv-02426 (S.D.N.Y. Jan. 29, 2020).

[75] *Smith v. Graham*, No. 19-28, 799 F. App'x 36 (2d Cir. Feb. 3, 2020).

[76] *Smith v. Cash Money Records, Inc.*, 253 F. Supp. 3d 737 (S.D.N.Y. 2017).

[77] *Id.*

[78] *Smith v. Graham*, No. 19-28, 799 F. App'x. 36, 78 (2d Cir. Feb. 3, 2020).

[79] *Id.* at 38.

[80] *Id.* at 39.

[81] *Alfred v. Walt Disney Co.*, --- F. App'x ---, 2020 WL 4207584 (9th Cir. July 22, 2020).

[82] *Id.* at \*1.

[83] *Id.*

[84] *Id.* at \*2.

[85] *Id.*

[86] *Id.*

[87] *Id.*

[88] See Bill Donahue, "9th Circ. Making It Harder for Studios To Beat Copyright Suits," Law360 (July 29, 2020), <https://www.law360.com/articles/1296112/9th-circ-making-it->

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harder-for-studios-to-beat-copyright-suits.

[89] *Genius Media Grp. Inc. v. Google LLC*, Case No. 1:19-cv-07279-MKB-VMS, Dkt. No. 22 at 1 (E.D.N.Y. Aug. 10, 2020).

[90] *Id.* at 2.

[91] *Id.* at 2–4.

[92] *Id.* at 6.

[93] *Id.* at 7.

[94] *Id.* at 11.

[95] *Id.* at 16; *see also id.* at 23, 29 (similarly finding the unjust enrichment and state-law unfair-competition claims preempted by the Copyright Act).

[96] *Id.* at 18.

[97] *Id.* at 36 (also denying Genius Media’s motion to remand to state court).

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