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Media, Entertainment & Technology Highlights and Trends – April 2023

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As we wrap up the first quarter of 2023, Gibson Dunn's Media, Entertainment and Technology Practice Group highlights some of the notable rulings, developments, deals, and trends since the start of 2022 that will inform the industry in years to come.

A. Music and Television Litigation

1. **AMC Successfully Defends Lawsuit From Creators and Producers of *The Walking Dead* Series Yet Again**

In 2020, AMC Film Holdings, LLC, AMC Network Entertainment, LLC, and AMC Networks Inc. ("AMC") won a phase-one trial on all contract interpretation issues raised by certain creators and producers of *The Walking Dead* in the multi-hundred-million-dollar lawsuit brought by Robert Kirkman, David Alpert, Charles Eglee, Glen Mazzara, and Gale Anne Hurd.[1] The plaintiffs alleged that AMC breached their agreements by failing to properly account to them for backend compensation they were allegedly due in connection with the series *The Walking Dead*, *Fear The Walking Dead*, and *Talking Dead*. Following that trial, which was resolved entirely in favor of AMC, the court ordered the case to proceed on the merits "based on the contract interpretations so decided in th[at] trial."[2]

Following amended complaints, two demurrers, and additional discovery, in April 2022, AMC successfully won summary adjudication on the plaintiffs' remaining "big ticket" claims for breach of the implied covenant and fair dealing and inducing breach of contract. The court found there were no triable issues of material fact concerning AMC's alleged lack of good faith in setting its Modified Adjusted Gross Receipts definition and the contested imputed license fee for AMC's broadcast of *The Walking Dead* and *Fear The Walking Dead* on its own services.[3] The court further concluded that, because agents cannot be liable for interference with the contracts of their principals, and because AMC Film Holdings LLC's employees were acting as agents for their company, there was no triable issue of material fact as to whether AMC Networks Inc. induced AMC Film Holdings LLC to breach its contracts with Plaintiffs.[4]

Following the court's ruling, the parties agreed to resolve the remaining breach of profit participation audit claims in arbitration. As a result, in January 2023, the plaintiffs dismissed their remaining claims with prejudice.[5] [Disclosure: Gibson Dunn represents AMC in this action.]

2. **Katy Perry Prevails in Long-Running Copyright Dispute Over Song "Dark Horse"**

On March 10, 2022, the Ninth Circuit ruled for Katy Perry in a long-running copyright dispute involving her song "Dark Horse" and a Christian hip-hop song called "Joyful Noise." The suit began in 2014, when the creators of Joyful Noise sued Perry and other Defendants associated with the production of "Dark Horse," alleging that an eight-note ostinato from "Dark Horse" copied key elements of an eight-note ostinato in "Joyful Noise."[6] At a month-long trial, the Plaintiffs relied on the testimony of an expert

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musicologist, who testified that the Joyful Noise ostinato had several "elements" that Perry's song copied—including "length," "rhythm," "melodic content," and "the timbre or the quality and color of the sound."[7] On September 11, 2019, a Los Angeles jury found for the Plaintiffs, concluding that "Dark Hose" infringed their copyright and awarding them $2.8 million in damages.[8] But on March 16, 2020, the district court granted the Defendants' post-trial motion for judgment notwithstanding the verdict, holding that: (1) none of the individual "elements" Plaintiffs' expert identified were copyrightable; (2) even when considered as a whole, the ostinato used a pitch combination that was "not a particularly unique or rare combination," and nothing else about the ostinato rendered it "so exceptionally original as to warrant protection"; and (3) in any event, the Dark Horse ostinato used different "pitches, … keys, tempos, harmonies, and rhythms" than the Joyful Noise ostinato, so there was no actionable copying.[9]

Last year, the Ninth Circuit affirmed the trial court's decision—holding in a published opinion that the fact that two ostinatos share basic similarities like "employ[ing] the pitch progression 3-3-3-3-2-2 played in a completely flat rhythm" is insufficient to state a copyright claim.[10] The Ninth Circuit concluded that "allowing a copyright over this material would essentially amount to allowing an improper monopoly over two-note pitch sequences or even the minor scale itself, especially in light of the limited number of expressive choices available when it comes to an eight-note repeated musical figure."[11] This ruling brings the eight-year litigation to an end.

3. **Ninth Circuit Taylor Swift Dismissal Leaves Open Questions About Copyrighting Lyrical Concepts**

Last year also saw the resolution of a long-running copyright suit alleging that Taylor Swift's hit song "Shake It Off" illegally copied from an earlier work. But unlike Perry's definitive victory in the "Dark Horse" case, the resolution of the "Shake It Off" ligation leaves open questions about whether certain lyrical concepts—like references to "player hating"—are copyrightable.

In *Hall v. Swift*, the Plaintiffs—songwriters Sean Hall and Nathan Butler—alleged that Swift and others stole the central lyrics of their song, "Playas Gon' Play" ["Playas they gonna play / And haters, they gonna hate"] and using these lyrics in the chorus of "Shake It Off" ["Cause the players gonna play, play, play, play, play/ And the haters gonna hate, hate, hate, hate, hate"].[12] On February 13, 2018, the district court granted Defendants' motion to dismiss Plaintiffs' claim, finding that the complaint did not show originality in the pertinent portions of Plaintiffs' work, as American popular culture had been "heavily steeped in the concepts of players, haters, and player haters" in 2001 when Plaintiffs' song was written.[13] But Swift and the other Defendants were not as successful on appeal; on December 5, 2019, the Ninth Circuit reversed the dismissal, finding in a brief, unpublished decision that the Plaintiffs' complaint did enough to "plausibly allege[] originality" to survive a motion to dismiss.[14]

On December 9, 2021, Defendants once again moved to dismiss Plaintiffs claims. But this time the district court denied the Defendants' motion, finding that "even though there are some noticeable differences between the works, there are also significant similarities in word usage and sequence/structure…Although Defendants' experts strongly refute the implication that there are substantial similarities, the Court is not inclined to overly credit their opinions here."[15] The ruling set the stage for a highly contentious jury trial in late 2022 with potential ramifications on future music copyright decisions.[16] But on December 12, 2022, weeks before the trial to determine whether Plaintiffs' lyrics were copyright protectable, a judge dismissed the matter after a joint request by Plaintiffs and Defendants, which provided no details regarding the apparent settlement.[17]

4. **Live Nation Faces Investigation**

In November 2022, the U.S. Department of Justice ("DOJ") opened an investigation into Live Nation Entertainment and its wholly owned subsidiary Ticketmaster for purported

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antitrust violations by the concert promotion and ticket sales company.[18] Live Nation Entertainment was formed in 2010 as a result of the merger between Ticketmaster Entertainment, a ticket sales distribution company, and Live Nation, an events promoter and venue operator.[19] News of the investigation followed issues that arose during the presale of Taylor Swift's highly anticipated Eras Tour, which prompted the filing of a federal class action lawsuit in California.[20] Results of the DOJ's investigation are expected to be released by the end of the year. [Disclosure: Gibson Dunn represented Ticketmaster Entertainment in the merger.]

B. Copyright Litigation

1. **Supreme Court Hears Arguments on Andy Warhol Fair Use Case**

On October 20, 2022 the Supreme Court heard oral argument on a highly anticipated fair use case concerning Andy Warhol's famous Prince Series.[21] The case focuses on photographer Lynn Goldsmith's claim that the Prince Series inappropriately copied her 1981 portrait of Prince.[22] Warhol's Prince Series indisputably uses Goldsmith's photo, but the Warhol Foundation has argued that Warhol's use of the photo is protected "fair use" because Warhol used various coloring and shading techniques to create new, transformative works that conveyed a different message than the original picture. The Second Circuit disagreed, holding that "the imposition of another artist's style on [a] primary work" was insufficient to qualify for fair use protection.[23]

At the Supreme Court, oral argument focused on the first factor of the multi-factor fair use test—assessing the "purpose and character of the use" of the copyrighted work and whether the new work is "transformative."[24] Roman Martinez, on behalf of the Warhol Foundation, argued that any analysis of whether a work is transformative must consider the artist's meaning and message of the work.[25] Martinez argued that Warhol's depiction of Prince commented on the musician's rise to fame and status as a "celebrity icon," in contrast to Goldsmith's "vulnerable" portrait of Prince.[26] A majority of the Justices pushed Martinez to define how much a work's meaning would have to diverge from the original in order to be transformative; Justice Kagan asked whether a movie adaptation of a book would be transformative enough to support a fair use defense, to which Martinez responded that a change in form would not inherently change the meaning or message of the secondary work.[27]

Lisa Blatt, arguing on behalf of Goldsmith, countered that the Warhol Foundation's emphasis on new meaning was "too easy to manipulate," and that secondary works would always provide an opportunity to argue new meaning.[28] Yaira Dubin, arguing for the U.S. in support of Goldsmith, emphasized that a secondary work should not be entitled to fair use protection unless its use of the earlier work was *necessary*, as in the case of parody or commentary.[29] Dubin noted that the Warhol Foundation had not shown that Warhol's use of Goldsmith's portrait—as opposed to any other image of Prince—was necessary to create his work.[30]

The Supreme Court's ruling is expected in the next few months. This will be the Court's first fair use ruling in art since *Campbell v. Acuff-Rose Music, Inc.* in 1994, and it should have significant ramifications on whether and to what degree artists can use prior works in their own creations.[31]

2. **Ninth Circuit Rejects Three-Year Limit to Copyright Infringement Damages**

On July 14, 2022, the Ninth Circuit held that application of the "discovery rule" can allow a copyright plaintiff to recover damages occurring more than three years prior to suit, potentially exposing defendants to damages awards for infringements that occurred decades ago.[32] Affirming the lower court's denial of a motion to dismiss, the Ninth Circuit held that Starz Entertainment could sue MGM Domestic Television Distribution for damages for alleged infringement that occurred well before the three-year limitations

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period.[33]

Starz brought the case in 2020, alleging that it had entered into two licensing deals with MGM that gave Starz the exclusive right to distribute certain MGM films and TV series, each for a specified license window, in the United States for certain specified formats.[34] According to Starz, MGM breached these agreements and infringed Starz's alleged copyrights by licensing certain of the titles to other outlets during Starz's window of exclusivity.[35] Although Starz brought suit in 2020, many of MGM's purported violations of Starz's exclusivity rights were alleged to have occurred years earlier.[36] MGM moved to dismiss all of Starz's copyright claims that were alleged to have occurred more than three years before Starz filed its lawsuit, arguing that the plain language of the Copyright Act as interpreted by the Supreme Court in *Petrella v. Metro-Goldwyn-Mayer, Inc.* (2014) allowed a plaintiff to "gain retrospective relief only three years back from the time of suit" and that "[no] recovery may be had for infringement in earlier years."[37] Because Starz's licenses in the films and TV series at issue in MGM's motion to dismiss had already expired and any purported claims for damages were barred by the Copyright Act's three-year limit on retrospective relief, MGM argued that there was no relief the court could grant.[38] The district court denied MGM's motion to dismiss, finding that Starz could seek damages outside of the three-year lookback period if its claims were timely under the discovery rule, an issue that the court declined to adjudicate at the pleadings stage.[39]

The district court certified its ruling for an interlocutory appeal, and the Ninth Circuit took up the case—recognizing that language in *Petrella* appeared to limit recovery on copyright claims to just three years before the filing of the lawsuit regardless of when they were discovered.[40] Courts, including the Second Circuit, which was the first appellate court to consider the issue, held that *Petrella*'s interpretation of the plain language of the Copyright Act did bar a copyright plaintiff from recovering damages that occurred more than three years before the plaintiff brought suit.[41] The Second Circuit, in particular, recognized that the discovery rule continues to apply and that the rule may render timely some claims that would otherwise be barred.[42] Regardless, even with the application of the discovery rule, a plaintiff's recovery of monetary damages must be limited to three-years prior to suit under *Petrella*'s interpretation of the Copyright Act.[43]

The Ninth Circuit, however, rejected the Second Circuit's approach, asserting that because *Petrella* arose in a factual context where the discovery rule was not at issue, *Petrella* cannot be read to curtail the discovery rule in any way.[44] Concluding that Petrella "did not change any law in the Ninth Circuit pertaining to the discovery rule," the Ninth Circuit held that its prior discovery rule cases remained good law—and that, under those cases, Starz could recover damages for otherwise time-barred infringement if it could not reasonably have discovered that infringement earlier.[45] The Ninth Circuit thus held that *Petrella* did not impose any separate "damages bar" on copyright claims that would otherwise be viable under the discovery rule, thereby creating a significant circuit split between it and the Second Circuit.[46] [Disclosure: Gibson Dunn represents the defendants in this action.]

3. **Northern District of California Holds Digital Service Provider's Reliance on Content Providers' Contractual Representations Can Preclude Willful Infringement**

On March 21, 2022, the Northern District of California held, on summary judgment, that Apple's alleged infringement of musical compositions through the iTunes Store was not willful because Apple reasonably relied on the contractual representations of its content providers.[47] The plaintiffs, heirs of famous Hollywood composers, brought three separate actions against Apple alleging it willfully infringed the plaintiffs' copyrights in 101 musical compositions embodied in over 1,200 sound recordings sold in the iTunes Store.[48] The sound recordings at issue were delivered to Apple by digital distributors, co-defendants in these actions, who represented and warranted they had all necessary authorizations to license the sound recordings and underlying musical compositions to Apple.[49] The plaintiffs also filed numerous other actions against other major digital

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distributors which were settled. The cases against Apple were consolidated for summary judgment purposes before the Honorable William H. Orrick III in the Northern District of California.[50] The parties filed cross-motions on whether Apple's alleged infringement was willful such that the plaintiffs could be entitled to enhanced damages under the Copyright Act.[51] The court denied the plaintiffs' motion and, in a reversal of the court's prior tentative, granted Apple's motion.[52] Reflecting one of the rare instances in which courts grant summary judgment on willfulness damages—a notoriously fact-dependent inquiry—the decision also marks the first time a court has held on summary judgment that a digital service provider's reliance on contractual representations from its content providers can preclude a finding of willful infringement. [Disclosure: Gibson Dunn represented Apple in these actions.]

4. **Central District of California Holds Dance Moves Are Not Copyrightable**

On August 24, 2022, the Central District of California held that Epic Games did not violate a dancer's copyright when it created a Fortnite dance that used choreography from the dancer's performance.[53] In issuing its decision, the court found that dance moves, by themselves, were not subject to copyright protection.[54] The case began when celebrity choreographer Kyle Hanagami brought copyright infringement and unfair competition claims against Epic Games, the creators of the online game Fortnite. Hanagami alleged that Epic copied choreography used in a 2017 Hanagami video when it created an animated dance for players to perform within the game.[55] Epic Games filed a motion to dismiss all claims, which was granted by the district court.[56]

Although the court determined that the Fortnite dance contained some "steps" that were identical to the "steps" used in Hanagami's dance, it concluded that the limited number of dance steps used in the game were not protected by copyright.[57] The court drew on guidance from the U.S. Copyright Office and the Copyright Act's legislative history to suggest that choreographic works do not include simple steps or routines.[58] While accepting that Hanagami's full five-minute video is copyrightable, the court held that the particular "steps" at issue in the Fornite dance were not protectable. Hanagami's appeal to the Ninth Circuit is pending.

5. **Only Known Errors on a Copyright Registration Can Be Penalized**

On February 24, 2022, the Supreme Court issued an opinion offering new guidance on when works are properly "registered" with the Copyright Office—a key (but often overlooked) issue in copyright infringement suits.[59] In *Unicolors Inc. v. H&M Hennes & Mauritz*, the Court held that a copyright holder cannot be penalized for legal errors in its copyright registration unless it *knew* about the errors.

The underlying case began when Unicolors sued H&M for allegedly infringing several of Unicolors's fabric designs.[60] After a jury found in Unicolors's favor at trial, H&M asked the trial court to grant it a judgment as a matter of law, arguing that Unicolors's copyright registration for the designs was invalid. More specifically, H&M said that Unicolors filed for registration of 31 separate designs in a single registration, but the Copyright Office's regulations require that each design be included in a separate registration unless they were all published as a single unit.[61] Because the fabric designs were indisputably distributed separately (and thus not published as part of the same unit), H&M argued that Unicolors had violated the Copyright Office's regulations and its registration was invalid. But the District Court denied H&M's motion, holding that a registration could not be invalidated under the Copyright Act unless the copyright holder *knew* of the inaccuracy in the registration application—and finding that Unicolors did not know of the single unit of publication requirement when it applied for registration.[62] The Ninth Circuit disagreed, concluding that a registration applicant's *factual* errors can be excused if the applicant does not know about them, but that a *legal* error—such as failure to follow the single publication regulation—cannot be excused based on the applicant's lack of knowledge.[63]

The Supreme Court reversed the Ninth Circuit, holding that a registration applicant's lack

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of knowledge of a legal requirement is a valid excuse for the applicant's violation of a registration requirement. Holding that "[l]ack of knowledge of either fact or law can excuse an inaccuracy in a copyright registration," the Court decided that Unicolors's violation of the single publication regulation could be excused by the fact that it did not know about the regulation—saving Unicolors's copyright registration.[64]

6. **Ninth Circuit Finds Vietnamese Music Streamer Subject to Personal Jurisdiction in U.S. Copyright Suit**

On July 21, 2022, the Ninth Circuit decided *Lang Van, Inc. v. VNG Corporation*.[65] In 2014, Plaintiff Lang Van, a music distributor specializing in Vietnamese music, filed a copyright infringement suit against VNG, a Vietnam-based company that runs a music website and app, Zing MP3, that VNG makes available in the U.S.[66] Lang Van brought claims for copyright infringement, alleging that VNG made Lang Van's copyrighted music available on Zing without compensating Lang Van.[67] VNG moved to dismiss the suit for lack of personal jurisdiction on the basis that it is based in Vietnam and primarily serves a Vietnam audience.[68]

The district court agreed with VNG and dismissed the lawsuit.[69] On appeal, the Ninth Circuit vacated the district court ruling, finding that the district court failed to apply the Ninth Circuit's "purposeful direction" test.[70] The Ninth Circuit remanded to the district court for jurisdictional discovery.[71]

On remand, VNG renewed its motion to dismiss arguing lack of personal jurisdiction, and the district court granted the motion.[72] This time, the Ninth Circuit reversed and remanded.[73] The court found that jurisdiction was reasonable given VNG's contacts with the United States, specifically that VNG purposefully targeted American companies and their intellectual property and targeted the U.S. market by making its app available in English and on app stores in the United States.[74] The court also found that VNG contracted with U.S. businesses in connection with Zing MP3, and that it did not attempt to geoblock Lang Van's content to Vietnam only.[75] Finally, the court rejected VNG's forum non conveniens argument, finding that venue was proper in California, not in Vietnam, as the underlying dispute involved infringing activities in the United States.[76]

7. **Tenth Circuit Affirms Constitutionality of DMCA's Anti-Circumvention and Anti-Trafficking Provisions**

On December 6, 2022, the D.C. Circuit decided *Green v. United States Department of Justice*.**[77]** *Green*, a lawsuit brought by the Electronic Frontier Foundation ("EFF"), challenged the Digital Millennium Copyright Act's (DMCA) anti-circumvention and anti-trafficking provisions on First Amendment grounds.[78] The anti-circumvention provision prohibits the circumvention of any encryptions—or technological measures that control access to a protected work—that the copyright holder does not allow, and the anti-trafficking provision prohibits any person from manufacturing or offering to the public any technology designed to circumvent such technological measures.[79] The EFF challenged the provisions on three grounds: the provisions are facially overbroad First Amendment violations; unconstitutional prior restraints; and First Amendment violations as applied to the Plaintiffs.[80] The district court dismissed the first two challenges, but ruled that the as-applied challenge was properly pled.[81]

Three months later, the Plaintiffs filed a motion for preliminary injunction.[82] Relying on the "likelihood of success on the merits" element, Judge Sullivan held that both plaintiffs were likely to fail on the merits.[83] Plaintiffs appealed.

On appeal, the D.C. Circuit affirmed the district court's decision.[84] Writing for the majority, Judge Tatel first held that one of the plaintiffs, Green, lacked standing because there was no credible threat of prosecution against him.[85] Green planned to publish a book on how to circumvent technological protection measures and believed that the book would likely violate the provisions. But during oral arguments, the government conceded

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that it would be "legal for Green to publish his book even if the book includes enough code to allow someone to piece together a circumvention technology."[86] Next, the court held that the DMCA's provisions do not target the "expressive content of computer code, but rather the act of circumvention and the provision of circumvention-enabling tools."[87] Citing to *City of Austin v. Reagan National Advertising of Austin, LLC*,[88] the court held that reading computer code to determine if it is technology-circumventing is content neutral, just like reading a sign to determine whether it advertises products located near the sign (which was permissible) or not (which was prohibited) is content-neutral.[89] In both cases, the substantive message of the sign or code was irrelevant, and reading the sign or code was only required to determine whether its *function* was prohibited.[90] The court remanded the case back to the district court for further proceedings consistent with the opinion.[91]

8. **Comic Artist Sues Image-Generating AI Companies for Copyright Infringement**

On January 13, 2023, artist Sarah Andersen filed a class action lawsuit in the Northern District of California against Stability AI, MidJourney Inc., and DeviantArt Inc.[92] Each of these companies utilizes an AI program created by Stability AI called Stable Diffusion that creates visuals based on users' text prompts.[93] Stable Diffusion works by scraping five billion public images on the internet and training the AI to diffuse these public images into newly generated images.[94] The process works by taking a training image, reducing it to a field of random noise, and then reversing the process to recreate the training image. With enough training, the AI program can generate and combine different images to create new images responsive to users' text prompts.[95]

Ms. Andersen is a cartoonist and an illustrator of a semiautobiographical comic strip called "Sarah's Scribbles."[96] In October of 2023, Ms. Andersen received, via Twitter, an image generated by an AI that attempted to copy her art style.[97] This sparked her class action lawsuit against Stability AI, MidJourney Inc., and DeviantArt Inc.[98]

The lawsuit alleges violations of the DMCA, direct copyright infringement, and right of publicity violations, among other claims.[99] With respect to direct copyright infringement, Andersen alleged that the method Defendants used to train their AI to generate images violated her and the Class's copyrights in their original works.[100] Programs like Stable Diffusion work by scraping the internet for images and training their AI to recreate the images.[101] Andersen's direct copyright claim argues that, while Stability AI had access to their images, it did not have the rights to download, store, and distribute copies of their works for use in training.[102] Stability Diffusion also works by pulling images that it trained on and combining them with other images.[103] Andersen claims that by using her images to combine with others or to satisfy a prompt, Stability Diffusion violates her copyright.[104]

With respect to her DMCA claim in particular, Andersen alleged that defendants violated the DMCA by "removing copyright management information ('CMI') from the Works and/or causing their respective AI Image Products to omit CMI from their output images."[105] In essence, Andersen asserts that because these programs recreate copyrighted images without recreating the CMI, they run afoul of the DMCA.[106] This case has the potential to answer a key question that has emerged alongside widespread AI use: What, if any, copyright liability do AI companies and users face?

C. Right of Publicity Litigation

1. ***Melendez v. Sirius XM Radio, Inc.*: Illustrating the Copyright Act's Preemption of State Right of Publicity Claims**

On October 4, 2022, the Second Circuit affirmed the district court's grant of Defendant Sirius XM's motion to dismiss Plaintiff John Melendez's right of publicity claims, holding that Melendez's claims were preempted by the Copyright Act.[107] Melendez was a writer

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and on-air contributor for the Howard Stern Show until 2004.[108] Two years after Melendez left the show, Sirius XM acquired a license to air new episodes and rebroadcast complete and partial archived episodes of the program, excerpts of which Sirius XM uses in its online and on-air advertisements to promote the show.[109] Melendez claimed that the advertisements featuring his voice violated his right of publicity under California common and statutory law because his name and likeness had been exploited for Sirius XM's commercial gain without his permission.[110] Sirius XM moved to dismiss Melendez's claims with prejudice, arguing that they were preempted by the Copyright Act, and the district court agreed because the claims were "effectively claims for the wrongful rebroadcasting of copyrightable sound recordings" and any amendment would be futile.[111]

The Second Circuit agreed that Melendez's claims were preempted by the Copyright Act, based on its application of a two-pronged test that asks whether (1) the plaintiff's claim concerns a work coming within the scope of copyrightable subject matter, and (2) the right asserted is equivalent to any exclusive right granted under the Copyright Act.[112] The Second Circuit held that both prongs were satisfied, and thus affirmed the district court's dismissal of Melendez's claims with prejudice.[113]

As to the first prong, the Second Circuit rejected Melendez's argument that his vocal attributes, not the underlying sound recordings in which they were embodied, were the proper focus of his claims.[114] According to the Second Circuit, Melendez's claims focused on the alleged unauthorized distribution and republication of archived sound recordings of the show, which are copyrightable works under the Copyright Act.[115] Melendez did not allege that Sirius XM used his name or likeness apart from rebroadcasting excerpts from archival episodes that contained Melendez's voice.[116] Nor did Melendez allege that Sirius XM "usurped" his identity to sell a product or service that bore no connection to Melendez.[117] As a result, the court concluded that the subject matter of the litigation was segments of copyrightable works, and not Melendez's name or likeness.[118]

As to the second prong, the Second Circuit held that Melendez's common and statutory law claims "are aimed at stopping the reproduction of copyrightable works that embody [Melendez's] identity—the excerpts of the archival episodes of the HS Show—not the independent use of his identity to sell unrelated goods or services without his permission."[119] Although Melendez's statutory claim included the extra element of commercial purpose, the court concluded the claim is not qualitatively different from a copyright infringement claim since commercial interests have always played an enormous role in copyright law.[120] Because both prongs were satisfied, and Melendez failed to identify any additional allegations he could plead to overcome preemption, the Second Circuit affirmed the dismissal of Melendez's right of publicity claims with prejudice.[121]

2. **Emerging Right of Publicity Issues Implicating NFTs**

In the wake of the Supreme Court's decision in *NCAA v. Alston*,[122] student-athletes have sought to cash in on NIL deals in a variety of markets, including the NFT space. The NIL-NFT nexus has produced two broad categories of deals.[123] In the first category of deals, a college athlete sells NFTs that are linked to what are essentially digital trading cards featuring that athlete's name, image, or likeness.[124] In the second category of deals, so-called "NIL collectives"—which tend to consist primarily of alumni boosters and businesses, and which operate independently of any university—pool money together to help student-athletes leverage NIL opportunities.[125] In some cases, a NIL collective may launch an NFT collection that features a school mascot or other iconography but not any particular athlete's name, image, or likeness.[126] In such cases, the proceeds from the sale of the NFT collection are then distributed among current student athletes affiliated with the school.[127]

A recent non-NCAA case, *Notorious B.I.G. LLC v. Yes. Snowboards*, demonstrates that courts' level of understanding of the concept of NFTs may dictate whether a right of

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publicity claim implicating an allegedly infringing NFT is preempted by the Copyright Act.[128] In that case, Plaintiff—an LLC that controls the IP rights that belonged to the estate of rapper Christopher Wallace, professionally known as "Notorious B.I.G." or "Biggie"—alleged that Defendant's sale of artwork (*e.g.*, posters and prints) and merchandise (*e.g.*, shower curtains and snowboards) bearing Wallace's likeness infringed Plaintiff's right of publicity.[129] Plaintiff sought a preliminary injunction.[130] In ruling on Plaintiff's preliminary injunction motion, the court held that the claims involving the sale of the artwork were preempted by the Copyright Act, while the claims involving the merchandise were not.[131] The Defendant also sold Biggie NFTs, which the court categorized as "artwork" rather than "merchandise," because "an NFT is a digital representation of the underlying asset, *i.e.*, the photographs at issue."[132] As a result, the court "assumed that the NFTs fall within the subject matter of the Copyright Act."[133] Of course, technically speaking, an NFT is a transferrable certificate of ownership attached to an asset, which can be digital or tangible; it is not a "digital representation" of an underlying asset.[134] Thus, one could perhaps persuasively argue that the NFTs at issue in the *Notorious B.I.G.* case should have been categorized as "merchandise," thereby allowing the associated claims to evade preemption.

D. First Amendment Litigation

1. **Supreme Court Hears Jack Daniel's / Dog Toy Case**

On March 22, 2023, the Supreme Court heard oral argument in a trademark dispute between whiskey manufacturer Jack Daniel's and dog toy manufacturer VIP Products. The case centers around VIP Products' "Bad Spaniels Silly Squeaker"—a dog toy resembling a bottle of Jack Daniel's Old No. 7 Black Label Tennessee Whiskey with "light-hearted, dog-related alterations."[135] Jack Daniel's sued VIP Products for trademark infringement and dilution. The U.S. Court for the District of Arizona ruled in favor of Jack Daniel's, finding a likelihood that consumers would be confused between the "Bad Spaniels" toy and authentic Jack Daniel's products, and ruling that VIP Products could no longer manufacture the toy. In 2020, the U.S. Court of Appeals for the Ninth Circuit reversed the district court decision and ruled in favor of VIP Products. As to the claim by Jack Daniel's of trademark infringement, the Ninth Circuit held that the district court should have applied the test articulated by the U.S. Court of Appeals for the Second Circuit in *Rogers v. Grimaldi*, 875 F.2d 994 (2d Cir. 1989), which protects "expressive works" from claims of trademark infringement unless the trademark holder can establish that the alleged infringer's use of the mark in question is either "(1) not artistically relevant to the underlying work or (2) explicitly misleads consumers as to the source or content of the work."[136] The Ninth Circuit concluded that the *Rogers* test should apply to the "Bad Spaniels" toy because it "communicate[d] a humorous message . . . by juxtaposing the irreverent representation of the trademark with the idealized image created by the mark's owner."[137] And as to the claim by Jack Daniel's of trademark dilution, the Ninth Circuit found that VIP Products' use of the Jack Daniel's mark was "noncommercial" because it was "used to convey a humorous message," and so the First Amendment protected VIP from trademark dilution liability.[138] The Ninth Circuit remanded for the district court to apply the *Rogers* test in evaluating the trademark infringement claim by Jack Daniel's.[139] On remand, the district court applied the *Rogers* test and granted summary judgment to VIP Products, finding that Jack Daniel's could not satisfy either *Rogers* prong and that therefore "the Bad Spaniels Toy is entitled to First Amendment protection and [the] claim [by Jack Daniel's] for trademark infringement must fail."[140] The Ninth Circuit summarily affirmed.[141]

Jack Daniel's filed a petition for a writ of certiorari with the U.S. Supreme Court. The Court granted certiorari and held oral argument on March 23, 2023. A decision is expected by summer 2023.

2. **Palin Argues *New York Times v. Sullivan* Is Obsolete in Appeal Over Defamation Suit**

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The U.S. Court of Appeals for the Second Circuit is currently considering an appeal from a February 2022 ruling from the U.S. District Court of the Southern District of New York against former Alaska Governor Sarah Palin in her libel suit against *The New York Times*. The dispute between Palin and the newspaper arose from a June 2017 editorial published by *The New York Times* that, Palin argued, defamed her by linking the 2011 shooting of former U.S. Representative Gabby Giffords to a political advertisement issued by SarahPAC, a political action committee associated with former Governor Palin.[142] Palin filed a defamation suit in the Southern District of New York against *The New York Times*, later amending her suit to add the paper's then-opinion editor, James Bennet, as a defendant. [143]

The district court originally granted *The New York Times*'s motion to dismiss in August 2017 after holding an evidentiary hearing at which the parties examined witnesses.[144] The Second Circuit reversed that ruling in August 2019 and held that Palin could plausibly plead a claim for defamation that would survive a motion to dismiss.[145] The case proceeded to a jury trial in February 2022. At the close of the jury trial and while the jury was in deliberations, the district court granted *The New York Times*'s motion for judgment as a matter of law under Federal Rule of Civil Procedure 50. In evaluating Palin's libel claim, the court found that under both federal constitutional law as articulated by the U.S. Supreme Court in the seminal *New York Times v. Sullivan* decision, as well as under New York state statutory law, Palin could only establish liability if she could show that Bennet and *The New York Times* acted with "actual malice"—that the newspaper published the editorial in question "with knowledge that it was false or with reckless disregard of whether it was false or not."[146] The district court found that Palin had failed to do so at trial: Palin had adduced no evidence at trial, the district court held, that a jury could rely on to find that Bennet or *The New York Times* had known or recklessly disregarded the possibility that the statements at issue were false. The district court ruled that Palin had not offered any evidence undermining Bennet's trial testimony that he did not know or recklessly disregard the possibility that those statements were false. And the district court concluded that other evidence, including the process by which the editorial was written and revised, Bennet's post-publication correspondence with other *Times* employees, and his expression of regret and attempt to apologize to Palin, "weighs heavily and uniformly against finding" that Bennet or the *Times* knew the statements at issue were false or recklessly disregarded the possibility that they might be false.[147]

After the district court issued judgment as a matter of law in favor of Bennet and the *Times* under Rule 50, the jury also returned a verdict in favor of the defendants.

Palin has since appealed the district court's decision and the jury verdict to the Second Circuit. Among other things, Palin has argued to the Second Circuit that the actual malice standard articulated in *New York Times v. Sullivan* "is obsolete in the modern speech landscape."[148] Gibson, Dunn & Crutcher filed an amicus brief in support of Bennet and *The New York Times* on behalf of the Reporters Committee for Freedom of the Press and a coalition of 52 other media organizations, explaining in detail why "[t]he actual malice standard remains as vital today as it was in 1964."[149]

E. Trademark Litigation

1. **Federal Circuit Finds for "TRUMP TOO SMALL" Trademark**

In February 2022, the Federal Circuit reversed a decision from the U.S. Patent and Trademark Office (USPTO) Trademark Trial and Appeal Board (TTAB), holding the TTAB had violated the First Amendment when it refused to register the trademark "TRUMP TOO SMALL."[150] In *In re Elster*, the Federal Circuit reviewed the TTAB's refusal to grant Steve Elster a trademark for shirts bearing the phrase "TRUMP TOO SMALL"—an acknowledged criticism of former President Donald Trump.[151] The TTAB found that Elster's proposed trademark was proscribed under section 2(c) of the Lanham Act, which prohibits granting a trademark that "[c]onsists of or comprises a name, portrait, or

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signature identifying a particular living individual except by his written consent."[152]

Reversing the decision, the Federal Circuit held that, as applied to Elster's trademark, "section 2(c) involves content-based discrimination that is not justified by either a compelling or substantial government interest."[153] The court found that the First Amendment interests in the dispute "are undoubtedly substantial" because "the First Amendment 'has its fullest and most urgent application' to speech concerning public officials"—here, former President Trump.[154] Analyzing the government's interests under both privacy and publicity torts, the Federal Circuit found that "the government does not have a privacy or publicity interest in restricting speech critical of government officials or public figures in the trademark context."[155]

Notably, the Federal Circuit did not decide whether the statute was unconstitutional, noting that Elster had only challenged the statute as applied to his trademark application.[156] The court did state, however, that "section 2(c) raises concerns regarding overbreadth" and "reserve[d] the overbreadth issue for another day."[157]

2. **Federal Circuit Reverses Coca-Cola's Win Over India-Registered Trademarks**

On June 29, 2022, the U.S. Court of Appeals for the Federal Circuit rejected Coca-Cola's bid to cancel two trademarks owned by Meenaxi Enterprise, Inc. for Meenaxi's products Thums Up cola and Limca lemon-lime soda.[158] The USPTO TTAB had previously granted Coca-Cola's application to cancel Meenaxi's marks.[159] The Federal Circuit reversed and held that Coca-Cola did not establish lost sales or reputational injury from Meenaxi's sale of the two beverages.[160]

In 1993, Coca-Cola purchased Parle (Exports), the maker of Thums Up cola and Limca lemon-lime soda, two "well known" soft drinks in India.[161] Coca-Cola does not directly sell either beverage in the United States, although its products are imported and sold in the United States by third parties.[162] Since 2008, Meenaxi has been selling its own Thums Up and Limca soda products to Indian grocers in the United States.[163] Meenaxi registered marks for its soda drinks in the United States in 2012.[164] In 2016, Coca-Cola brought a claim under § 14(3) of the Lanham Act to cancel Meenaxi's registrations, arguing that Meenaxi's marks misrepresented the source of those products.[165] The TTAB found that Coca-Cola was entitled to bring a claim against Meenaxi under the Lanham Act because Coca-Cola held an interest falling with the zone of interests protected by the Lanham Act and could show an injury proximately caused by a violation of the Act.[166] Specifically, the Board found that Coca-Cola had an interest falling within the zone of interests protected by the Lanham Act because Coca-Cola's India-registered Thums Up and Limca marks "are well known in India" and "the reputation of [the marks] would extend to the United States, at least among the significant population of Indian-American consumers" because the marks "likely would be familiar to much of the substantial Indian-American population in the United States."[167] The Board also found that Coca-Cola could show an injury proximately caused by a violation of the Act because Meenaxi's use of the marks in question "could cause a harm 'stemming from the upset expectations of consumers'" and that Meenaxi had used its registrations to block importation of Coca-Cola's Thums Up and Limca beverages by third parties into the United States .[168]

The Federal Circuit reversed the TTAB decision, finding that Coca-Cola could not show that it was harmed by Meenaxi's use of the marks at issue in the United States and therefore could not bring a cancellation claim under the Lanham Act against Meenaxi.[169] Coca-Cola could not show lost sales in the United States because it did not sell the products under its India-registered marks in the United States and could not rely on sales generated by third parties, who are not authorized U.S. distributors.[170] The Federal Circuit also held that Coca-Cola could not show any reputational injury arising from Meenaxi's use of the marks at issue in the United States because Coca-Cola had not established the reputation of its India-registered marks within the Indian-American community in the United States.[171] The Federal Circuit explained that the TTAB's

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decision below "appear[ed] to rest in part on an assumption that Indian Americans would necessarily be aware of the marks' reputations in India," but Coca-Cola had provided "no basis to assume that an American of Indian descent is aware of brands in India."[172] Instead, the Federal Circuit observed, the Board's conclusion "relie[d] at least in part on stereotyped speculation."[173]

3. **District Court Grants Starz, Lions Gate, and 50 Cent Motion to Dismiss Under *Rogers* Test Over "BMF" Trademark**

On June 17, 2022, the District Judge Fred Slaughter of the U.S. District Court for the Central District of California ruled in favor of Starz Entertainment, Lions Gate Entertainment, and Curtis Jackson, also known as 50 Cent, in a dispute involving the use of the acronym "BMF" in reference to the television series "BMF: Black Mafia Family."[174] Plaintiff Byron Belin, the registered owner of a mark for "BMF" used to market and promote media services, including the production of television programming, sued Starz, Lions Gate, and Jackson, alleging that the defendants' use of the term "BMF" constituted trademark infringement, unfair competition, and false designation of origin under the Lanham Act.[175]

The court held that because the "BMF: Black Mafia Family" series was "an expressive work," the "*Rogers* test" of *Rogers v. Grimaldi*, 875 F.2d 994 (2d Cir. 1989) applied to its use of "BMF."[176] Under the *Rogers* test, Belin was required to show either that (1) defendants' use of the BMF mark is not "artistically relevant" to the underlying work or (2) the defendants' use of the BMF mark is "explicitly misleading" as to the source of the work.[177] The court found that the defendants' use of the BMF mark to abbreviate the show's title "Black Mafia Family" was "the centerpiece of the [Series]" and clearly qualified as artistically relevant.[178] Likewise, the court found "no explicit statements or claims suggesting" Belin's involvement in the series that would be misleading to consumers.[179] Accordingly, the court granted the defendants' motion to dismiss Belin's claim.

4. **Hermes Wins Trademark Trial Over "Metabirkin" NFTs**

On February 8, 2023, a federal jury in Manhattan found designer Mason Rothschild liable for trademark infringement, trademark dilution, and cybersquatting for his promotion and sale of non-fungible tokens ("NFTs") Rothschild referred to as "MetaBirkins."[180] Hermes International filed the lawsuit in 2022, claiming Rothschild's NFTs infringe its trademarks protecting its Birkin handbags, which sell for as much as $200,000, and that Rothschild has interfered with Hermes's ability to market its products online.[181] Rothschild, who sold 100 of the MetaBirkins in 2021 for $450 each, argued that the First Amendment protected his right to produce and market his art, regardless of the fact that it emulates Hermes's trademarked Birkin handbags. Rothschild moved to dismiss Hermes's claims in March 2022, arguing that the use of the term "MetaBirkin" was protected expression under the U.S. Court of Appeals for the Second Circuit's seminal case *Rogers v. Grimaldi*, 875 F.2d 994 (2d Cir. 1989), which held that use of a famous trademark (in that case, a trademark composed of a celebrity name) in connection with a work of art does not infringe trademark rights so long as (1) the name is "minimally artistically relevant" to the product, and (2) the use does not "explicitly mislead" as to content, authorship, sponsorship, or endorsement.[182] The district court denied Rothschild's motion to dismiss, holding that the *Rogers* test should apply but leaving for the jury to decide whether Rothschild's use of the term "MetaBirkin" qualified as artistically relevant or had explicitly misled consumers.[183] The case proceeded to a jury trial. The jury ruled in favor of Hermes, awarding Hermes $110,000 in profit and resale commissions Rothschild received from selling the MetaBirkins, and $23,000 in damages for cybersquatting.[184] On March 3, 2023, Hermes moved for a permanent injunction against Rothschild, claiming that Rothschild continues to promote NFTs that resemble Hermes's Birkin handbags, despite the jury verdict.[185] On March 14, 2023, Rothschild moved for judgment as a matter of law in his favor or for a new trial, arguing that the jury had not properly been instructed on, and did not properly apply, the Second Circuit's *Rogers* test.[186]

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5. **Cult Gaia Trademark Appeal Underscores High Bar for Trade Dress Protection in Fashion**

In 2017, Cult Gaia filed an application in the United States Patent and Trademark Office (USPTO) to register company founder Jasmin Larian's bamboo "Ark Bag" design as trade dress. Three years later, the USPTO Examiner issued a final decision rejecting the trademark application. Last year, the U.S. Patent and Trademark Office's Trademark Trial and Appeal Board (TTAB) affirmed the Examiner's refusal to register the handbag design in a 51-page precedential opinion, providing detailed analysis to support its ultimate conclusion that the design is either too generic or not distinctive enough to warrant trademark protection—despite the significant media attention that had been garnered by the design.[187]

In its discussion of genericness, TTAB relied on evidence that "handbags embodying the proposed mark are so common in the industry," ultimately concluding that "such product design is not capable of indicating source and that [Larian's] proposed mark is at best a minor variation thereof."[188] TTAB also affirmed the refusal on non-distinctiveness grounds, noting the "record does not support a finding that consumers perceive the design … as an indicator of source."[189]

Despite the vast amount of social media coverage of the bag, there were multiple third-party handbags available both before and after Cult Gaia's bag came onto the market. Further, Cult Gaia tagged the bag "CULT GAIA" in its social media posts, thereby indicating the brand name was still necessary to connect the design to the brand. This decision highlights the high bar to clear in order to achieve a trade dress registration, including the need to achieve true distinctiveness in order to do so.

6. **TTAB Refuses to Protect Curse Words**

Erik Brunetti, founder of streetwear brand "FUCT," was the respondent in the 2019 U.S. Supreme Court decision*, Iancu v. Brunetti*, 204 L. Ed. 2d 714, 139 S. Ct. 2294 (2019), where Justice Kagan held in Brunetti's favor that the Lanham Act's bar on the registration of "immoral" or "scandalous" trademarks discriminates on the basis of viewpoint and thus violates the First Amendment.[190]

Two years after his successful appeal to the Supreme Court, Brunetti has lost a related appeal before the Trademark Trial and Appeal Board, which refused to let the streetwear designer register the F-word as a trademark.[191] The decision sheds light on how the recent Supreme Court decision interacts with existing trademark law.

In explaining its refusal to trademark the term, the Board explained that the F-word "is commonly used on the types of goods as to which applicant wants exclusive rights to the term."[192] Because the F-word "expresses well-recognized familiar sentiments and the relevant consumers are accustomed to seeing it in widespread use," the Board found that "it does not create the commercial impression of a source indicator, and does not function as a trademark to distinguish Applicant's goods and services in commerce and indicate their source."[193] For these reasons, the Board affirmed the refusal to register the F-word for failure to function as a mark under the Trademark Act.

7. **TikTok Inc. and ByteDance Ltd. Defeat $350 Million Trademark Infringement Lawsuit From London-Based Video-Editing Company**

On March 9, 2023, a federal jury in Los Angeles agreed with TikTok Inc. and ByteDance Ltd. that TikTok's "Stitch" video-editing tool does not infringe any trademarks belonging to Stitch Editing Ltd., a London-based video-editing house.[194] TikTok's Stitch tool allows users to combine up to five seconds of another user's video with their own video. Stitch Editing claimed that TikTok's use of the word "stitch" infringed Stitch Editing's registered service mark in "Stitch Editing" and unregistered service mark in "Stitch," and sought $350 million in compensatory damages for the alleged infringement.[195] Stitch Editing

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also sought punitive damages on its claim for unfair competition under California common law. TikTok responded that Stitch Editing did not have any rights in the asserted marks, and that TikTok's use of "stitch" was unlikely to cause any consumer confusion and constitutes fair use.

Before trial, TikTok persuaded the district court to exclude Stitch Editing's damages expert's opinion that the company was entitled to $50 million in corrective advertising,[196] and to preclude Stitch Editing from seeking any damages for alleged infringement occurring outside the United States.[197] TikTok also convinced the district court to trifurcate the trial, so that Stitch Editing's claim for more than $200 million in disgorgement damages would be tried by the court and that its claim for punitive damages would be tried only if the jury found liability and actual damages.[198] And at trial, TikTok persuaded the jury that its use of "stitch" was unlikely to cause any consumer confusion, that Stitch Editing did not have any common law rights in "stitch," and that Stitch Editing was not entitled to any actual or punitive damages.[199] [Disclosure: Gibson Dunn represents TikTok Inc. and ByteDance Ltd. in this action.]

F. Legislation and Regulation

1. **California Enacts Statute Limiting Evidentiary Use of Rap Lyrics in Criminal Cases**

A first-of-its kind state statute, California's "Decriminalizing Artistic Expression Act," seeks to limit the ways in which forms of creative expression, most notably rap lyrics, can be used for evidentiary purposes in criminal cases.[200] California Governor Gavin Newsom signed the bill, AB 2799, into law in September 2022 following its unanimous passage by the California Senate and Assembly.[201] The Act, which defines "creative expression" broadly, requires courts to consider specified factors in balancing the probative value of the "creative expression" evidence against the substantial danger of undue prejudice.[202] The Act creates a presumption that the "creative expression" evidence is of "minimal" probative value unless it was "created near in time to charged crime or crimes, bears a sufficient level of similarity to the charged crime or crimes, or includes factual detail not otherwise publicly available."[203] In analyzing undue prejudice, courts must now also consider among other factors outlined by California's evidence code, the possibility that the jury will treat the "creative expression" as evidence of the defendant's "propensity for violence or general criminal disposition," as well as the possibility it will "inject racial bias into the proceedings."[204] In making this determination, California courts will be required to consider any additional relevant evidence offered by the parties as to the genre of creative expression at issue, as well as any experimental or social science research on how the introduction of a particular type of expression can introduce racial bias into the proceeding.[205]

A California appeals court already cited the Act in overturning the murder conviction of Travon Rashan Venable Sr., ruling in part that the use of a rap video during Venable's trial violated the Act.[206] The California law has been praised by federal lawmakers who introduced similar federal legislation—Restoring Artistic Protection—this summer.[207]

2. **Generative AI Updates**

With OpenAI's ChatGPT and DALL-E, generative AI—or algorithms that can be used to create new text, images, code, or other content—has garnered significant attention in recent months, including among copyright lawyers. Broadly speaking, generative AI raises novel copyright questions both with respect to the inputs—*e.g.*, whether owners of copyrighted works used to train an AI have any legal claim over the model or the content it creates—and the outputs—*e.g.*, whether content created by generative AI is copyrightable and, if so, by whom.

Inputs. On January 13, 2023, a proposed class action lawsuit was filed in the Northern

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District of California against Stability AI, Midjourney, and DeviantArt, creators of AI art tool Stable Diffusion, on behalf of artists alleging their works were downloaded and used without consent to create the LAION data set that powers Stable Diffusion.[208] In January 2023, Getty Images announced it had "commenced legal proceedings in the High Court of Justice in London" against Stability AI, on the basis that "Stability AI unlawfully copied and processed millions of images" whose copyright is owned or represented by Getty Images.[209] And on February 3, 2023, Getty Images filed suit against Stability AI in the District of Delaware, asserting claims under the Copyright Act, the Lanham Act, and Delaware trademark and unfair competition laws.[210] Similar lawsuits have been filed over other generative AI tools. For example, in November 2022, a proposed class action lawsuit on behalf of GitHub users was filed in the Northern District of California against GitHub, Microsoft, and OpenAI, alleging the defendants violated the terms of open-source licenses under which many GitHub users posted code used to train the GitHub Copilot tool. The U.S. Copyright Office has said it "is developing registration guidance for works created in part using material generated by artificial intelligence technology."[211]

Outputs. In February, the U.S. Copyright Office finalized its refusal to uphold a copyright registration for a graphic novel containing elements created through generative AI.[212] Kristina Kashtanova initially applied for and obtained copyright registration for her graphic novel *Zarya of the Dawn* in September 2022, without disclosing her use of artificial intelligence. After the Copyright Office became aware of statements Ms. Kashtanova had made on social media indicating she had created the comic book using Midjourney artificial intelligence, it notified her that it intended to cancel the registration. Ms. Kashtanova's response letter argued that she had authored the work using Midjourney only as an assistive tool or, alternatively, that her creative selection, coordination, and arrangement of the text and images was copyrightable as a compilation. Citing its policy not to register copyright "if it determines that a human being did not create the work," the Copyright Office concluded that material generated by artificial intelligence technology was not copyrightable; it agreed to issue a new registration covering the selection and arrangement but explicitly excluding "artwork generated by artificial intelligence."[213] The Copyright Office's position is poised to be tested in the courts in another case. Computer scientist Stephen Thaler filed suit against the Copyright Office in 2022, asking the United States District Court for the District of Columbia to overturn the Copyright Office's decision denying copyright to a visual artwork, "A Recent Entrance to Paradise," made autonomously by his Creativity Machine AI system and stating that only creative works made by humans are entitled to copyright protection.[214] The parties' cross-motions for summary judgment will be fully briefed in April 2023.

3. **Copyright Claims Board Updates**

The Copyright Claims Board (CCB), a three-member tribunal established by the Copyright Alternative in Small-Claims Enforcement (CASE) Act of 2020, was launched on June 16, 2022. The CCB serves as a voluntary alternative to federal court and was designed to offer a cheaper and more efficient path to resolving copyright disputes involving claims for no more than $30,000.[215] After the claimant files a compliant claim with the CCB and serves the respondent, the respondent has 60 days in which to opt out of CCB review, leaving the claimant with the option to bring suit in federal court.[216] The CCB—which conducts all hearings remotely through video conference—is intended to be accessible to unrepresented litigants (though parties may be represented by counsel if they choose) and to minimize the burdens of discovery. The CCB's jurisdiction is limited to claims of copyright infringement, claims seeking declarations of non-infringement, and claims of "misrepresentation" in take-down notices or counter notices sent under the Digital Millennium Copyright Act.

Since the CCB began accepting cases in 2022, over 375 cases have been filed.[217] Early analysis indicates that the vast majority of claims filed were infringement claims, with claims over pictorial, graphic, and sculptural works representing the largest segment, followed by claims involving motion picture and audiovisual works and literary works.[218]

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On February 28, 2023, the CCB issued its first decision, in a case referred to the Board by the United States District Court for the Northern District of California with the consent of the parties.[219] The claimant, David Oppenheimer, a professional photographer, discovered that an aerial photograph he took of the Ronald V. Dellums Federal Building and U.S. Courthouse in Oakland, California appeared on the website of attorney Douglas Prutton, to illustrate a "Where We Work" subpage. Prutton admitted that he used the image without permission but asserted affirmative defenses of fair use and unclean hands. The CCB rejected both defenses. With respect to fair use, the CCB held that Prutton's use on his website promoting his law firm was commercial and not transformative, Oppenheimer's photograph was creative, Prutton used the entire photograph, and, although Oppenheimer admitted he had never sold or licensed the photo at issue, Oppenheimer had at least some minimal licensing history such that cognizable market harm was presumed to exist and had not been refuted by Prutton. The CCB also rejected Prutton's unclean hands defense based on his contention that Oppenheimer was a copyright troll whose primary revenue stream from his photographs is litigation, rather than sales or licensing; it held that being a litigious copyright holder was not a basis for an unclean hands defense. Ultimately, the CCB awarded $1000 in statutory damages, near the bottom of the permissible range. Like all CCB decisions, the *Oppenheimer* decision is public, but is not precedential.

G. Media, Entertainment, and Technology Deals

1. **Private Equity and Hollywood**

Despite market uncertainty, private equity investments in Hollywood proved the show must go on. In January 2022 alone, there were multiple major private equity funded content acquisition deals announced,[220] including Candle Media's acquisition of Faraway Road Productions, the creators of *Fauda*,[221] and private equity giant Apollo's $760 million investment in Legendary Entertainment, which produced the film *Dune*.[222]

The boom in deal-making activity came as private equity firms looked to cash in on highly desirable IP and fund the creation of new content by investing in production companies, financing content acquisition vehicles, and purchasing soundstages and physical studios.[223] Co-founder and co-CEO of Candle Media, Kevin Mayer, explained that "[w]e have a thesis, and that thesis is content, community and commerce. We feel that high-quality content with high-quality creators at the right brands create great connections in social media with large audiences."[224] In May 2022, Candle Media announced its acquisition of Spanish-language production powerhouse Exile Content Studio, which creates content for more than 550 million Spanish speakers globally,[225] and in July 2022, Exile Content Studio announced its majority investment in Lil' Heroes NFT Franchise.[226]

Candle Media initially acquired Reese Witherspoon's Hello Sunshine, a deal reported to be worth $900 million,[227] and Moonbug Entertainment, the company behind *CoComelon*.[228] [Disclosure: Gibson Dunn advised Kevin Mayer in the formation of Candle Media and subsequently represented Candle Media in its acquisition of Hello Sunshine, its acquisition of Faraway Road Productions, its acquisition of Exile Content Studios, and the investment in Lil' Heroes.]

The golden age of streaming created new opportunities for private equity firms looking to invest in the content-creation business. Shamrock Capital Partner, Andy Howard, noted that "[u]nlike TV or cable, today's streaming platforms do not have slots or limitations on how much content they can hold. Therefore, content is king, and especially premium content."[229]

In July 2022, Peter Chernin launched The North Road Company, a global, multi-genre studio, backed by up to $800 million in financing from Apollo and Providence Equity

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Partners.[230] The North Road Company owns Chernin Entertainment, Words + Pictures, and ventures in other production companies such as the U.S. assets of Red Arrow Studios.[231] [Disclosure: Gibson Dunn represented affiliates of Chernin Entertainment in the formation of The North Road Company and subsequently represented The North Road in its acquisition of Red Arrow Studios International, Inc., its acquisition of Words + Pictures, the investment by Providence Equity Partners of up to $500 million in equity in North Road, and the provision by Apollo of $300 million in debt financing.]

With the demand for more premium content comes the need for real estate to house production of these new projects. To meet the need, many private equity firms invested in the acquisition, construction, and expansion of soundstages.[232] In June 2022, Silver Lake invested $500 million in Shadowbox Studios, a production facility company with stages in Atlanta, London, and Los Angeles.[233]

2. **Private Equity Conglomerate Acquires Nielsen Holdings**

Gibson Dunn represented Elliott Investment Management, which together with a consortium of other investors, including Brookfield, acquired Nielsen Holdings plc for $16 billion, the second largest leveraged buyout in 2022.[234]

3. **Sony Music Publishing Signs Deal With Muddy Waters's Estate**

Sony Music Publishing agreed to administer the estate of McKinley "Muddy Waters" Morganfield, known as the father of Chicago blues and an influential figure in rock & roll.[235] Chairman and CEO, Jon Platt, stated that "[Sony] look[s] forward to partnering with the Muddy Waters Estate on exciting new ways to invigorate the catalogue."[236]

4. **Music Catalog Acquisitions**

The market for music catalogue acquisitions—which includes master recordings, music publishing, and other trademark and IP—continued to boom in 2022, with companies like Primary Wave, Warner, Hipgnosis, Concord, and Universal announcing major acquisitions.[237] Catalog acquisitions have become extremely lucrative revenue streams for investors, who are able to capitalize on numerous opportunities to use the songs in licensing deals, film and television, and advertisements. Some highlights from the past year include:

Warner Chappell Acquires David Bowie's Music Catalog

On January 3, 2022, Warner Chappell Music, a subsidiary of Warner Music Group, announced its acquisition of the global music publishing rights to David Bowie's song catalogue from his estate after months of negotiations.[238] The acquisition closed for a price upwards of $250 million.[239] The catalogue includes songs from Bowie's 26 studio albums, including the posthumous studio album release, "Toy."[240]

Universal Music Acquires Sting's and Neil Diamond's Music Catalogs

On February 10, 2022, Universal Music Publishing Group (UMPG) announced its agreement to acquire Sting's entire song catalog for a price north of $300 million.[241] The agreement marks one of biggest acquisitions by UMPG and continues its acquisition record that started when it acquired Bob Dylan's songwriting catalog in 2020.[242] Just a few weeks later, on February 28, 2022, UMPG announced it had acquired Neil Diamond's song catalog and the rights to all of his master recordings, including any future recordings from Diamond.[243] The price of the deal was not disclosed.[244]

Hipgnosis Acquires Leonard Cohen's and Justin Timberlake's

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Song Catalogs

On March 5, 2022, Hipgnosis Song Management announced its acquisition of the song catalog of Leonard Cohen through his estate.[245] Cohen was one of the most influential song writers of the past several decades and was inducted into both the Songwriters Hall of Fame and the Rock & Rock Hall of Fame.[246] The agreement included the rights to all 278 songs and derivatives written by Cohen, including "Hallelujah."[247] Hipgnosis also acquired Cohen's royalty interests from his Stranger Music catalog and the entirety of his copyright interests and share of royalties in the Old Ideas catalog.[248] The price of the deal was not disclosed.[249]

On May 26, 2022, Hipgnosis announced its acquisition of Justin Timberlake's copyright interests in his song catalog and his authored musical compositions.[250] The price of the deal was not disclosed, although unnamed sources believe it to be valued "just above $100 million."[251] The deal does not include rights to any future Timberlake works.[252]

Influence Media Partners Acquire Future's Song Publishing Catalog

On September 20, 2022, Influence Media Partners, an entertainment investment company, announced its acquisition of the music publishing catalog of Future.[253] The catalog includes 612 songs, including collaborations with Drake, The Weeknd, and Kendrick Lamar.[254] The agreement represents an eight-figure acquisition, although the terms of the deal are not disclosed.[255]

Concord Acquires Music Catalog of Genesis Band Members Phil Collins, Mike Rutherford, and Tony Banks

On September 29, 2022, Concord announced its acquisition of the publishing and recorded music catalogs of Tony Banks, Phil Collins, and Mike Rutherford, including the master recordings and publishing catalogs from their years in the band Genesis.[256] Although the terms of the deal are undisclosed, sources close to the deal have valued it at north of $300 million.[257]

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[34] *Id.* at 1239.

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[36] *Id.*

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[105] *Id.* at 10.

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[188] *Id.* at 37.

[189] *Id.* at 51. ("Overall, this record does not support a finding that consumers perceive the design of Applicant's handbag as an indicator of source. Based on a consideration of the all the evidence in the record, we find that Applicant has failed to establish that its handbag design embodying the proposed mark has acquired distinctiveness within the meaning of Section 2(f) of the Trademark Act.").

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