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MEDIA, ENTERTAINMENT AND TECHNOLOGY GROUP - 2017 YEAR-END UPDATE

To Our Clients and Friends:

2017 was a banner year in the media, entertainment, and technology industries, chock full of deals, regulatory changes, and important copyright, trademark, and First Amendment rulings. From Disney to DMCA; television royalties to mechanical royalties; fair use to the FCC; pink slime to piracy; and monkey selfies to Dr. Seuss. It was also the year of the Weinstein scandal, and the ensuing #MeToo and Time's Up movements, which have already upended the Hollywood order.

In our Media, Entertainment & Technology practice group's 2017 Year-End Update, we have identified those deals, trends, and rulings that are likely to shape an equally active 2018. And building off our prior semi-annual updates, we continue to follow the arc of developments in the global streaming video industry, the pace of Chinese investment in Hollywood, and eSports, all of which continue to merit a close watch.

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I. Transaction & Regulatory Overview

A. M&A Watch

The second half of 2017 continued the wave of activity in entertainment and media-related mergers and acquisitions, with a number of newly announced deals and others to keep a close eye on as they proceed through regulatory approval.

1. Disney Announces Purchase of 21st Century Fox

On December 14, 2017, The Walt Disney Company announced its acquisition of 21st Century Fox's film and television studio businesses in an all-stock deal for $52.4 billion. The transaction, which Disney anticipates will close in 12 to 18 months, values the purchased Fox assets at $66.1 billion.[1] Disney will not acquire Fox's news and sports networks, which will be spun off into a newly listed business.[2]

The transaction comes at the end of a particularly active year for media deals, including Discovery's purchase of Scripps, Meredith's purchase of Time, and the previously announced AT&T-Time Warner merger, marking a distinct trend of consolidation.

2. Discovery Purchasing Scripps

On July 31, 2017, Discovery Communications announced that it would be purchasing Scripps Networks Interactive in an $11.9 billion transaction. In its press release, Discovery highlighted that the transaction would align the two "complementary content producers" to create "a premier portfolio of real life

entertainment brands" by adding Scripps' HGTV, Food Network, Travel Channel, and DIY Network, among others, to Discovery's list of TV brands.[3]

3. DOJ Tries to Block AT&T-Time Warner Merger

On November 20, 2017, the Department of Justice, voicing antitrust concerns, sued to block AT&T's proposed $85.4 billion acquisition of Time Warner, which was first announced in October 2016.[4] A trial date has been set for March 19, 2018.[5] (Disclosure: Gibson Dunn represents AT&T and DirecTV in the suit.)

4. Meredith to Buy Time

Following a year of speculation, on November 26, 2017, Meredith Corporation, the owner of numerous local television stations and the publisher of magazines like *Parents* and *Better Homes & Gardens* announced that it will buy Time Inc. in an all-cash transaction valued at $2.8 billion, backed by Koch Equity Development.[6] As a result of the transaction, Meredith will add *Time*, *People*, *Fortune*, and *Sports Illustrated* and other titles to its stable of publications.[7]

5. Penske Media Takes Majority Stake in Rolling Stone Mag

On December 20, 2017, it was announced that Penske Media Corporation had purchased a majority stake in Wenner Media, owners of *Rolling Stone*, in a transaction that values Wenner Media at $100 million.[8] Despite selling a majority stake in the company, Wenner Media will retain control and editorial oversight over *Rolling Stone*. Penske plans to revitalize the iconic music magazine, including its digital operations, and add the well-known title to its growing portfolio, which already includes *Variety*, *Indiewire* and *Robb Report*.

B. Streaming Industry Pursues a Global Presence with Original and Local Content

1. Netflix's Continued Growth

Coming off the momentum of its Chinese market-entry deal in April 2017 with Beijing-based video service iQiyi,[9] Netflix has made continued efforts in 2017 to enter into foreign partnerships and expand its global presence.

In September 2017, Netflix renewed and expanded its distribution deal with France's leading telecom, Orange.[10] Where the original deal covered Orange's distribution of Netflix in France and Spain, the expansion made Netflix's streaming service available to the 29 countries across Europe, Africa and the Middle East where Orange operates.[11] Orange's Poland customers will be offered Netflix by the end of the year, and Netflix will launch in the other 28 countries in 2018.[12]

In a similar move, Netflix entered into a global partnership with Deutsche Telekom in November 2017, which enabled customers in Germany, Poland and the Netherlands to access Netflix's streaming content.[13] Previously, Netflix's content had been available only to German customers who subscribed to Deutsche Telekom's EntertainTV.[14]

Throughout the second half of 2017, Netflix has continued to invest in local content in its effort to expand internationally. In October 2017, the company premiered its first Italian original series, *Suburra*; released a German original show, *Dark*, in December 2017;[15] and will be releasing its first Polish language series and first Swedish original series in 2018.[16]

Netflix is also seeking to introduce local content in Latin America, where the biggest competition continues to be prime-time network telenovelas.[17] In November 2017, the company announced it will be producing its first Columbian original series in partnership with the *Narcos* production company Dynamo.[18] Also in November, Netflix announced an upcoming slate of 10 original Argentine productions ranging from series to documentaries.[19]

2. Amazon Expands Presence and Partnerships

In August 2017, Amazon announced it had entered into an overall deal with *The Walking Dead* creator Robert Kirkman and a first-look deal with Kirkman's company Skybound Entertainment.[20] Through the agreements, Kirkman and Skybound will develop television projects exclusively for Amazon Prime Video.[21]

In December 2017, Amazon announced that that Amazon Prime Video app would be available to stream on Apple TV in more than 100 countries.[22] Previously, Prime Video could only be streamed through the Apple AirPlay feature, a less streamlined method than utilizing a native app.[23]

3. Hulu's Breakthrough & Foray into Foreign Language Content

In September 2017, Hulu's original series *The Handmaid's Tale* became the first streaming show to win the award for Outstanding Drama Series at the Emmys, where the show also picked up four other awards. Along with expanding original content, Hulu also began its forays abroad by entering into a licensing deal with Studiocanal covering the foreign language Scandinavian dramas *Below the Surface* and *Midnight Sun*.[24] And with the announcement in December 2017 that Disney will acquire 21st Century Fox, Disney will become the majority owner of Hulu, bringing more stability to the co-owned streamer. Disney CEO Bob Iger stated that "Managing Hulu becomes a little bit more clear, a little bit more efficient," and said he expects to "flow more content" to Hulu, making it "a more viable competitor to those already out there."[25]

4. Disney Ends Netflix Deal & Announces Forthcoming Streaming Service

In August 2017, Disney announced it would end its distribution deal with Netflix and launch its own streaming service by 2019.[26] The deal with Netflix had only gone into effect in 2016.[27] As a result of the announcement, Netflix will lose access to newly announced Disney and Pixar films such as the sequel to *Frozen*, a live action version of *The Lion King*, and *Toy Story 4*.[28] Just days after this announcement, Disney lost showrunner Shonda Rhimes to Netflix, who signed a multi-year production deal with the company and ended her 15-year relationship with ABC Studios. Still, by removing the content stronghold of Pixar from Netflix, plus the popular content from Marvel Entertainment and Lucasfilm, and with the availability of even more content available through the 21st Century Fox deal,

Disney's streaming service, once launched, stands to become an immediate competitor in the streaming field.

5. iflix's Continuing Emergence

iflix, a streaming service that launched in Asia in 2015, continues to grow as a low-cost alternative to Netflix in emerging markets.[29] The organization now boasts a subscriber base of over 5 million, and announced that it received $133 million in a round of funding led by Hearst Corporation.[30] Additional investors include Catcha Group, Evolution Media, John C. Malone's Liberty Global and Sky.[31] With this latest funding round, iflix has raised more than $220 million through funding rounds in 2017.[32]

C. The China Outlook

1. Is The Heyday of Chinese Investments in Hollywood Over, or Just on Hold?

In the second half of 2017, Chinese investments in Hollywood continued their downward trend. In August 2017, the Chinese State Council and the National Development and Reform Commission issued guidelines on foreign investments, which categorized investments in film, entertainment and sports as "restricted industries," thereby placing increased scrutiny on Chinese investments in the media and entertainment industry.[33] These regulations are cited as a driving factor behind the multiple failed deals with Chinese investors throughout the year.[34] In 2017, there has been a precipitous drop in the amount of Chinese investments in the U.S. entertainment industry, which, as of September 30, 2017, was at an aggregate of $489 million, compared to the $4.78 billion in 2016, according to a study by the Rhodium Group.[35]

One of the most widely publicized deals that fell victim to the Chinese government's tightening of capital controls was the slate financing agreement between Paramount, Huahua Media and Shanghai Film Co., by which Huahua Media and Shanghai Film Co. were intended to finance twenty-five percent of Paramount's slate of films.[36] The $1 billion price tag on the deal was double the cost of any other slate deal between Chinese investors and Hollywood to date.[37] On November 7, 2017, it was announced that the three were parting ways, citing the Chinese government's new policies on foreign investments.[38] And Paramount then announced that it would instead enter into deals with Hasbro, Skydance Media and SEGA to create "a more flexible and tailored financing model going forward."[39]

The Paramount slate financing deal was not the only deal to falter in the second half of 2017. In late summer, Recon Holdings, a Chinese media investment firm, terminated its $100 million bid to acquire a controlling stake in Millennium Films, a deal that had been announced in February 2017.[40] Additionally, the merger of Legendary Entertainment into the publicly traded Wanda Cinema Line, which was projected in 2016 to be a major windfall for investors, was stopped in its tracks shortly after the Chinese government's new capital controls were issued.[41]

While the frenzy of Chinese investments in the U.S. media, entertainment and technology industries has been reined in by the Chinese government, China's own media, entertainment and technology industry has continued to see upward growth. In November 2017, Tencent became the first Asian technology firm to reach a valuation over $500 billion.[42] The day after Tencent reached this milestone, it surpassed

Facebook's market valuation and was approaching that of Amazon.[43] Tencent owns China's most popular messaging service, WeChat, which reaches nearly 1 billion users, and has made continuous efforts to expand its reach outside of China.[44] In taking steps toward becoming a global player, Tencent acquired a 5% interest in Tesla for $1.78 billion[45] and a 12% interest in Snap Inc., for $2 billion.[46] Tencent's investment in Snap Inc., the parent company of social media platform Snapchat, is the fifth largest investment in a U.S. tech firm involving a Chinese firm.[47]

D. Cutting-Edge Deals and Securities Developments

1. NBCUniversal/Snap's Mobile-Focused Venture

In October 2017, Snap Inc. and NBCUniversal announced the formation of a new 50/50 joint venture to create original scripted content designed for viewing on mobile and social-media platforms.[48] Although Snap has inked several studio deals for short-form content over the past year, the joint venture marks the continuation of a flourishing partnership between Snap and NBCUniversal.[49] NBCUniversal invested $500 million in Snap's March 2017 IPO and has produced a number of short-form programs for the Snapchat platform (including an Emmy-nominated *The Voice* offshoot).[50]

2. Royalty Flow Securitizes Eminem Royalties

Royalty Flow, a subsidiary of Royalty Exchange, has launched an IPO to raise between $11 million and $50 million that, if successful, will fund Royalty Flow's purchase of income streams derived from rap artist Eminem's music.[51] The concept of Royalty Flow is to allow fans, as shareholders in Royalty Flow, to share in income from royalties for artists' music through dividends paid by Royalty Flow, which currently holds an option to purchase 15 or 25 percent of royalty stream income from Eminem's albums released between 1999 and 2013.[52] Royalty Flow intends to acquire royalty streams from artists other than Eminem, though specific artists have not yet been named.[53] Royalty Flow follows in the footsteps of other celebrity-related securities, including "Bowie Bonds" which allowed holders to share in revenues generated by artist David Bowie's pre-1990 albums.

E. eSports

1. eSports Continue Electric Growth

We began our discussion of the growth of eSports—the professional competitive video gaming industry—in our 2017 Mid-Year Update, and the industry continues to see rapid growth and mainstream adoption. However, with the maturation of the industry comes an increased focus on legal issues, as investors and gamers alike face the challenges of the growing sector.

As major game developers such as Riot Games and Activision Blizzard have adopted traditional franchise models for their competitive eSports leagues, competitors are now realizing their role as professionals and viewing tournament play as a career, rather than a secondary source of income.[54] Riot has commented that it would support the development of an independent players association for league members.[55] However, players and coaches alike are already seeking legal

counsel to protect their interests, as some players as young as 17 years old are now seeing contracts reach over six figures and have the opportunity to partake in tournament bonus pools reaching, in the case of Blizzard's Overwatch League, $3.5 million.[56]

eSports is also seeing growing investment from traditional sports organizations and owners. In addition to the launch of the NBA 2K eSports league, which ties current NBA franchises to their respective eSports league teams, teams from Blizzard's Overwatch League have received investments from traditional sports team owners including New England Patriots Owner Robert Kraft and New York Mets COO Jeff Wilpon.[57] U.S.-based eSports franchise compLexity Gaming also recently sold a majority stake to Dallas Cowboys owner Jerry Jones.[58]

II. Regulatory Updates

During the first year of the Trump administration, the Republican-controlled Federal Communications Commission ("FCC") has approved sweeping rollbacks of regulations of internet service providers ("ISPs") and local broadcasters that were implemented during the Obama administration. These developments and the ongoing court challenges merit a close watch in the coming year, as states, businesses, and consumers react and adjust to the FCC's recent moves.

A. FCC Repeals "Net Neutrality" Rules

In early December 2017, the FCC voted 3-2 to repeal Obama-era rules concerning the regulation of ISPs—policies described by proponents as "net neutrality"—setting up a legal battle that could reshape how consumers pay for internet access.[59] The original rules went into effect in 2015, and laid out a regulatory plan that considered broadband service a utility under Title II of the Communications Act, giving the FCC broad power over ISPs.[60] Under those original rules, regulations were imposed on ISPs dictating how they could and could not provide internet broadband services, including a prohibition on regulating broadband delivery speeds for different categories of content.

By repealing these rules, the FCC will no longer regulate high-speed internet delivery as if it is a utility. Broadband providers will now have the option to offer a wider variety of service options. Critics of these changes claim that consumers may have to pay more to access high-trafficked content. In response, ISPs have reiterated their commitment to an open internet, and have stated that they currently have no plans to block or "throttle" sites, and will not engage in most forms of paid prioritization.[61]

FCC Chairman Ajit Pai has defended the repeal. "We are helping consumers and promoting competition," Mr. Pai said. "Broadband providers will have more incentive to build networks, especially to underserved areas."[62] Immediately following the vote, Senator Edward J. Markey (D-Mass.) and other Democrats on Capitol Hill vowed to introduce legislation to overturn the action.[63] Multiple state attorney generals vowed to file suit against the FCC after the rules become official in January 2018,[64] and on January 16, 2018, 21 states and the District of Columbia filed suit against the FCC, alleging violation of the Administrative Procedure Act in repealing the "net neutrality" rules.[65] The legal challenges to the repeal of these FCC regulations will surely be a hotly discussed issue over the coming year.

B. FCC Ends Rule on Media Co-Ownership

The FCC voted 3-2, in November 2017, to eliminate the broadcast ownership rules that limited a single entity's ownership of television, radio and newspaper properties within a local market.[66] As part of the vote, the FCC provided increased flexibility for media owners, including raising the number of television stations a company can own in a local market from one of the largest four stations to two, and allowing for ownership of a newspaper and broadcast station in the same market.[67] Like the legal battles over net neutrality rules, the FCC commissioners acknowledged that the FCC's vote may face challenges in court.

III. Recent Litigation Highlights

A. Hollywood's Moment of Reckoning: Legal Fallout from the Weinstein Moment and the #MeToo Movement

On October 5, 2017, the New York Times broke a long-simmering story that Harvey Weinstein, head of The Weinstein Company and former head of Miramax, had reached settlements with at least eight women over the course of three decades after being accused of sexual misconduct and assault.[68] Since then, dozens more women have come forward with similar allegations against Mr. Weinstein.[69] Mr. Weinstein has since been forced out of The Weinstein Company, and has been the subject of civil suits and criminal investigations in connection with his conduct.[70]

As of the end of 2017, at least seven civil suits have been filed against Harvey Weinstein, The Weinstein Company, Miramax, and their various board members in courts in California and New York in connection with these allegations.[71] In addition to asserting claims for, among other things, sexual assault and battery against Mr. Weinstein himself, the plaintiffs are seeking to hold Miramax, The Weinstein Company, and their directors liable in connection with Mr. Weinstein's actions.

For example, two actions filed in Los Angeles Superior Court, one by actress Dominique Huett and another by an anonymous plaintiff, seek recovery against The Weinstein Company for negligent supervision and retention of Mr. Weinstein on the basis that the company knew or had reason to know of Mr. Weinstein's propensity to use business meetings as a cover to lure actresses into compromising situations.[72]

Meanwhile, in the Southern District of New York, a suit filed by six women is seeking class certification on behalf of women who claim to have met with Mr. Weinstein to discuss professional prospects and were instead subject to abuse.[73] Among the 14 allegations in the complaint are claims that Miramax, The Weinstein Company, and their directors and employees, along with a network of professional and business intelligence firms, private investigators, law firms, journalists, and members of the entertainment industry effectively formed an organization engaged in racketeering by using threats, harassment, extortion, and misrepresentation to prevent disclosure of Mr. Weinstein's deeds.[74] Another suit accuses The Weinstein Company of sex trafficking on the basis that it facilitated foreign travel during which Mr. Weinstein would subject women to abuse.[75]

Other suits have been filed elsewhere,[76] and these early suits are unlikely to be the last.[77] In addition to private suits, the New York Attorney General has opened an investigation of The Weinstein Company, seeking to determine whether officials at the company violated state civil rights and New York City human rights laws.[78] Finally, after separating from The Weinstein Company, Mr. Weinstein himself brought suit against his former company seeking documents to defend himself against claims, and is considering an action for wrongful termination.[79]

These claims, and the public relations firestorm surrounding them, have already had serious implications for The Weinstein Company. After the allegations surfaced, many of the company's business partners cut ties,[80] requiring it to seek an emergency loan while it reportedly seeks buyers.[81] Other reports say that executives at The Weinstein Company are attempting to rename the business and scrub Weinstein's name in an attempt to save the company.[82] Another reported plan involves a proposal for an outside group to buy the company outright, rename it, hire a majority-female board, and set up a mediation process and litigation fund to compensate victims.[83] Regardless of the outcome, the scandal that has put the company at risk and rocked Hollywood has started a movement across industries in which reports of sexual misconduct against high-profile individuals are being reported on a near daily pace.

The public reaction to these allegations has been widespread. After the allegations against Mr. Weinstein were made public, the steadily increasing volume of sexual assault allegations making their way into the public consciousness this year turned into a veritable flood, leading some to dub it the "Weinstein Moment" or the #MeToo movement.[84] Dozens of other prominent figures in the media (and elsewhere) have since been accused of sexual misconduct.[85] In addition to the increased attention in the media being paid to issues of sexual assault, several changes to the business and legal landscape have been proposed.

Business commentators are advocating for leaders to strongly endorse zero-tolerance policies and clear reporting and investigation of claims of harassment.[86] There is also evidence that insurance covering claims arising from sexual harassment is increasing in popularity.[87] Morals clauses in industry agreements are likely to take on additional importance as well.

A spotlight has also been shone on non-disclosure agreements, which have come under criticism for silencing alleged victims. In the New York legislature, one proposed law would "bar organizations from making contractual provisions with the effect of concealing claims of discrimination, harassment, or other violations of public policy" in an attempt to short circuit the ability of predators to hide their actions from scrutiny using non-disclosure or non-disparagement agreements clauses.[88] Similarly, "[a] California state senator says she intends to introduce a bill next year to ban confidentiality provisions in monetary settlements stemming from sexual harassment, assault and discrimination cases."[89]

Another area to watch for change includes legislation creating rights of action against harassers. For example, after accusations that prominent venture capitalists sexually harassed female entrepreneurs seeking investments surfaced earlier this year, the California legislature is considering whether to add "investors" to the list of professionals who can be held liable for harassment of non-

employers.[90] Another proposal in New York seeks to address harassment in the fashion industry by assigning responsibility for workplace-related harassment to the client hiring the model.[91]

Other companies—perhaps especially those with high-profile executives or employees—should take note. Indeed, in addition to Mr. Weinstein, dozens of other powerful men in media (and elsewhere) have been accused of sexual harassment or misconduct this year resulting in their termination or resignation and attendant abrupt changes in their organizations. And in addition to claims from victims and public scorn directed at companies and employers, boards of directors may find themselves the targets of shareholder suits.[92]

B. Profit Participation (Film, TV, Music)

As headline-consuming as the sexual harassment scandals have been, other legal developments moved at a breakneck pace in 2017 in the entertainment industry. High-stakes profit participation battles continued this year, with developments from cases filed over the past few years and new filings as well. California state and federal courts remain popular venues for these suits, although one notable case is proceeding in arbitration.

1. MGM Wins Summary Adjudication in Home Video Class Action

Starting in January 2013, various individuals and entities—including directors, stuntmen, loan-out companies, and their successors—filed a series of class actions against six Hollywood studios[93] alleging that the studios were improperly reporting and underpaying putative class members' share of contingent compensation related to home video, going back to 1999.[94] The nearly identical complaints generally alleged that the studios breached their contracts with putative class members by calculating each participant's share of contingent compensation on 20% of revenues earned from the distribution of home video instead of 100% of gross receipts as plaintiffs claim was required by the contracts.

In September 2017, MGM moved for summary adjudication, arguing that most of the plaintiff's claims were time-barred by a two-year contractual limitations provision contained in the operative contract or by the applicable statute of limitations. On January 8, 2018, the court granted MGM's motion, significantly narrowing the plaintiff's contractual and quasi-contractual causes of action to exclude any claims based on participation statements issued prior to two years preceding the filing of the lawsuit, and also entering judgment for MGM on the open book accounting and California UCL claims because they were unavailable under New York law, which governs the contract. Plaintiff agreed that its conversion claim should be dismissed and the Court entered judgment in favor of MGM on that claim as well. (Disclosure: Gibson Dunn represents MGM in this case.)

2. Stallone Seeks *Demolition Man* Profits

In April 2017, Sylvester Stallone (through his loan-out company Rogue Marble) filed suit in Los Angeles Superior Court against Warner Bros. Entertainment Inc., alleging the company failed to pay him revenue from the 1993 film *Demolition Man*. Stallone alleges that when he contacted Warner Bros., the company first responded by issuing a statement purporting to indicate the film had over a $66 million deficit, and then sent a lump sum payment of $2.8 million. Stallone alleges breach of contract, fraud, accounting,

and other claims.[95] In September 2017, the court overruled Warner Bros.' demurrer, finding plaintiffs' claims (including its fraud claim) adequately pleaded, and took the step of ordering Warner Bros. to produce documents pertaining to the film's other profit participants.[96]

3. A *Supernatural* Royalties Fight

Warner Bros. recently became engaged in arbitration with Eric Kripke, creator of the CW's long-running show *Supernatural*, over the show's profits.[97] Kripke alleges Warner Bros. has reported a deficit despite the show running for 13 seasons, and also has challenged Warner Bros.' licensing agreements with the CW (co-owned by Warner Bros. and CBS), which he claims have depressed gross receipts by over $100 million. He also raises concerns with license fees from affiliated on-demand services, as well as from Netflix and Hulu. Warner Bros. has responded that Kripke's protest is baseless because "Kripke granted WBTV absolute discretion and control over how and whether to distribute and exploit the Series, including by authorizing WBTV to license the show to an affiliated company" and has still received millions in fees.[98] Kripke's counsel has reportedly been particularly aggressive about challenging JAMS and its arbitrators, seeking detailed disclosures regarding their prior business for the studio.[99]

4. Members of *Spinal Tap* Banned from Suit

In September 2017, all but one of the co-creators of the 1984 rock "mockumentary" *This Is Spinal Tap* were dismissed from a suit in California federal court against Vivendi S.A., its subsidiary (Studiocanal S.A.S.) and one of its executives (Ron Halpern). The court also dismissed a fraud claim for failure to plead a sufficient factual basis, with leave to amend.[100] The Plaintiffs had included Christopher Guest and the loan-out companies of Harry Shearer, Rob Reiner, and Michael McKean, as well as Spinal Tap Productions (a defunct corporation owned by the three loan-outs and Guest).[101] The suit asserts that Vivendi has not paid plaintiffs all film profits as required by contract, alleging that despite the film's decades of success as a cult classic, the plaintiffs allegedly received only $81 in merchandizing and $98 in musical income.[102] The court held that the three loan-out companies lacked standing to sue to enforce the contracts, which were formed between Vivendi's predecessor and Spinal Tap Productions, because the loan-outs were not intended third-party beneficiaries.[103] Guest, however, had standing and remains in the suit, and leave was granted to add his fellow co-creators or to allege additional facts.[104]

5. Quincy Jones Wins $9.4 MM at Trial over Contract with Michael Jackson

In 2013, Quincy Jones filed a lawsuit against MJJ Productions, the music label founded by Michael Jackson, alleging that Jones was owed $30 million in unpaid royalties, including on revenues from a joint venture between Sony and MJJ, the posthumous documentary *This Is It*, and Cirque due Soleil shows that featured Jackson's music.[105] In addition, Jones argued that contracts he formed with Jackson in 1978 and 1985 entitled him to royalty payments for the commercial exploitation of the albums Jones produced such as *Off The Wall* and *Thriller*.[106] Following a July 2017 trial, a jury awarded Jones $9.4 million in damages.[107] The court rejected MJJ's attempt to reduce the verdict award, denying defendants' motion for judgment notwithstanding the verdict,[108] and an appeal has been docketed with opening briefs yet to be filed.

The court deferred consideration of MJJ's separate equitable defenses, and briefing of its estoppel defense remains ongoing. MJJ argues in part that Jones waived his rights regarding the royalty rate, because he audited the royalty reports every year since the joint venture with Sony was formed in 1991 and renegotiated in 2009, without raising these issues.[109] The court has yet to rule on these equitable defenses.

C. Copyright Litigation

1. DMCA Developments

The Digital Millennium Copyright Act ("DMCA") featured prominently in copyright litigation in 2017. Although the DMCA was enacted over 19 years ago, the statute continues to generate disputes and key rulings regarding the meaning and interpretation of the law.

a. Safe Harbor & "Repeat Infringers"

The DMCA establishes a "safe harbor" from copyright liability for Internet Service Providers ("ISPs") that create a forum for third-party users to post content, as long as those ISPs meet certain conditions. Throughout 2017, copyright holders and ISPs continued to fight about just how far the DMCA's safe harbor provisions extend. For instance, the DMCA requires ISPs to "adopt and reasonably implement . . . a policy that provides for the termination in appropriate circumstances of subscribers and account holders of the service provider's system or network who are repeat infringers."[110] If ISPs fail to adopt such procedures, they may lose their safe harbor protection from liability.

A recurring issue is what standards govern the determination of who should be considered a repeat infringer for the purposes of determining whether an ISP has taken sufficient steps to qualify for the safe harbor defense. In the 2016 case, ***EMI Christian Music Group, Inc. v. MP3tunes, LLC***, record companies and music publishers brought a copyright infringement action against two websites, Sideload.com and MP3tunes.com. On Sideload.com, users could search for and download free music on the Internet. When they did so, those songs became part of an index of searchable songs for other users to stream and download. A sister site, MP3tunes.com, allowed users to store music for free in a virtual locker. If a user reached his capacity, he could purchase more space for his virtual locker. Before a jury trial, the district court had entered partial summary judgment for the ISPs, finding they had reasonably implemented a repeat infringer policy, which the court determined meant *willful* infringers.[111] The music companies appealed to the Second Circuit, which reversed, finding that the lower court's definition of "repeat infringer" was too narrow.[112] The Second Circuit explained that a "repeat infringer does not need to know the infringing nature of its online activities," given that copyright infringement is a strict-liability offense and does not require a showing of specific intent to infringe.[113]

The issue of repeat infringers remains pending in other courts. In October 2017, the Fourth Circuit held oral arguments in ***BMG Rights Management (US) LLC v. Cox Communications, Inc. et al.*** BMG, which holds and administers numerous copyrights in musical works, sued Cox in 2014 for Cox's failure to prevent repeat infringement by its customers of BMG's copyrights. In 2015, a judge in the Eastern District of Virginia entered partial summary judgment in favor of BMG, finding that Cox's efforts to terminate repeat infringers were inadequate and that Cox had lost safe harbor protection.[114] The Court

explained in rejecting Cox's argument that "repeat infringers" include those who are *accused* of infringement.[115]

Following the district court's partial summary judgment ruling, a trial was held and the jury assessed a $25 million infringement verdict against Cox, which appealed. On appeal to the Fourth Circuit, Cox argued that a repeat infringer can only be one who is adjudicated and found liable of infringement. BMG, in contrast, argued that Congress did not restrict repeat infringers to adjudicated infringers in the DMCA, and that no court has ever adopted this interpretation. The Fourth Circuit's decision is expected in the coming months.

b. Safe Harbor & Pre-1972 Copyrights

In June 2016, on an interlocutory appeal from a summary judgment order in the Southern District of New York, the Second Circuit held that the safe harbor provisions of the DMCA protect internet service providers from claims of infringement when users post works protected by state copyright law.[116] In the underlying case, Capitol Records, LLC and several other record and music publishing companies alleged that their copyrights were infringed by Vimeo, a website that allows users to post and share videos online.[117] Some of the works in question predated 1972, when Congress updated the Copyright Act to make clear that federal copyright law would preempt state copyright law going forward. Because Congress did not make those provisions retroactive, certain pre-1972 state law provisions governing sound recordings remained in force for then-existing works.[118]

Vimeo claimed it was protected by the safe-harbor provision of the DMCA. The district court, relying in part on a 2011 report from the Copyright Office, held that the DMCA does not apply to recordings not protected by federal law, reasoning that the term "infringement of copyright" is defined in the DMCA with reference to federal law, apparently excluding protection from infringement under state law.[119] The Second Circuit disagreed, holding that nothing in the statute suggests that federal law is the exclusive source of "infringement" from which the safe harbor guards from liability, reasoning that any other interpretation would eviscerate the purpose of the statute, which is to free ISPs from engaging in prohibitively expensive monitoring.[120] The Court of Appeals wrote that "to construe § 512(c) as leaving service providers subject to liability under state copyright laws for postings by users of infringements of which the service providers were unaware would defeat the very purpose Congress sought to achieve in passing the [DMCA]. Service providers would be compelled either to incur heavy costs of monitoring every posting to be sure it did not contain infringing pre-1972 recordings, or incurring potentially crushing liabilities under state copyright laws."[121] The court then specifically pointed to the volume of pre-1972 recordings that are still popular, including the work of The Beatles, among others.[122]

The Supreme Court denied plaintiffs' petition for a writ of certiorari in March 2017.[123]

2. Volitional Conduct Three Years After *Aereo*

After the Supreme Court's 2014 decision in *American Broadcasting Cos., Inc. v. Aereo, Inc.*, courts nationwide have wrestled with the question of whether *Aereo* eliminated the requirement of volitional conduct as a prima facie element of a copyright infringement case against an ISP. Decisions rendered

this year by the Ninth and Fifth Circuits answered that question in the negative, finding volitional conduct remains an essential element, and the Supreme Court denied certiorari of both cases, seemingly settling the question.

***Perfect 10, Inc. v. Giganews, Inc.*:** In 2011, the adult magazine Perfect 10 filed a lawsuit against the ISPs Giganews and Livewire, claiming the companies were engaged in indirect and direct copyright infringement. The case revolves around Usenet, "an international collection of organizations and individuals … whose computers connect to one another and exchange messages…."[124] Giganews is a Usenet provider. It stores content on its own servers and also provides access to content stored on servers of other Usenet providers.[125] Giganews, in exchange for a monthly fee, gives its users access to certain content via Usenet. This content allegedly included Perfect 10's images. On summary judgment, however, the district court found that Giganews did not select or post any of the infringing images, and held that Giganews had not infringed Perfect 10's copyrights.[126]

Perfect 10 appealed to the Ninth Circuit, which affirmed in January 2017, finding that Giganews did not engage in "volitional conduct" (*i.e.*, was not the direct cause of infringement) because its users are the ones who accessed Perfect 10's images and they merely did so using Giganews' platform.[127] The Court of Appeals found its decision to be consistent with *Aereo*, in which the defendant (Aereo) had been a more active participant in the infringement by facilitating a public performance of the works in question. The Ninth Circuit panel wrote that "[b]ecause *Aereo* did not expressly address the volitional-conduct requirement," the Supreme Court's decision could not have altered the widely accepted standard.[128] Perfect 10's petition for writ of certiorari was denied on December 4, 2017.[129]

***BWP Media USA, Inc. v. T&S Software Associates, Inc.*:** In *BWP Media USA, Inc. v. T&S Software Associates, Inc.*, the Fifth Circuit also confronted the volitional conduct requirement after *Aereo*. T&S is a website that hosted an online forum, on which users could post content and add comments. While there was a warning on the website not to post copyrighted images, many users posted images of celebrities. BWP, which owns the copyrights to those photographs, sued T&S for infringement. The Fifth Circuit held there was no infringement because there was no volitional conduct, and also that the DMCA had not abrogated the volitional-conduct requirement.[130] Like the Ninth Circuit in *Perfect 10*, the Fifth Circuit considered and distinguished *Aereo*.[131] The Court of Appeals explained that "although Aereo and T&S both provided a service that others could use to infringe, only Aereo played an active role in the infringement. That role was to route infringing content to its users."[132] The Fifth Circuit continued, "T&S hosts the forum on which infringing content was posted, but its connection to the infringement ends there."[133] The Supreme Court denied BWP's petition for writ of certiorari in October 2017.

3. Unmasking of Anonymous Infringers

In *Signature Management Team, LLC v. John Doe*, the U.S. Court of Appeals for the Sixth Circuit considered the question of whether ISPs can be compelled to disclose the identity of individuals who have been adjudicated to have infringed a plaintiff's copyrights.[134] The Court of Appeals held "that like the general presumption of open judicial records, there is a presumption in favor of unmasking anonymous defendants when judgment has been entered for a plaintiff."[135]

Doe had posted a hyperlink on his blog to a downloadable copy of the entirety of a volume of a book subject to a copyright held by Signature Management Team ("Team").[136] Team served the blog's hosting service with a DMCA take-down notice and Doe removed the hyperlink to the work. Team then filed suit seeking an order (1) unmasking Doe, and (2) requiring him to destroy all copies of the protected work in his possession and cease all infringing use of the protected work.[137] The District Court granted summary judgment for Team and ordered Doe to destroy all copies of the infringing work, but, in a follow-on motion, denied discovery that would reveal Doe's identity based on the balancing test from *Art of Living Found. v. Does 1-10*, No. 10-CV-05022, 2011 WL 5444622 (N.D. Cal. Nov. 9, 2011). The Court did, however, compel Doe's unmasking to the court and to Team's counsel, pursuant to a protective order.

Team appealed to the Sixth Circuit only as to the denial of the motion to unmask Doe. The Court of Appeals noted that "[n]o case has considered the issue" of post-judgment unmasking, finding it to be "an important distinction," and comparing it to the frequent pre-judgment unmasking cases in connection with effecting service of process.[138] The Court found that "entry of judgment against a Doe defendant largely eliminates [concerns about unmasking potentially nonliable defendants] because the plaintiff will have established liability."[139] At the same time, the Court noted that where a Doe defendant has complied with a court's order, the need to unmask is lessened.[140] The Sixth Circuit held that "there is a presumption in favor of unmasking anonymous defendants when judgment has been entered for a plaintiff," and notably did not cabin its holding to the copyright context, suggesting that litigants seeking to unmask anonymous defendants in other contexts will be able to rely on the precedent.[141]

The Court of Appeals also wrote that "[a]lthough Doe's infringing speech is not entitled to First Amendment protection, that speech occurred in the context of anonymous blogging activities that are entitled to such protection," and stated that unmasking decisions should consider whether "other, non-infringing anonymous speech . . . would be chilled if [the Doe's] identity were revealed."[142] The Court of Appeals sent the case back on remand for a decision on unmasking in accordance with its holding and the balancing test it articulated. Judge Suhrheinrich filed a dissenting opinion, stating that an infringer should not be entitled to anonymity generally—"Doe should not be shielded from the consequences of his own actions, since he could have preserved his right to speak freely and anonymously by simply refraining from copyright infringement."[143]

4. Hollywood Continues Its Judicial Assault on Piracy

In 2017, content owners and creators continued to band together to pursue online piracy via lawsuits, a tactic that has seen judicial success in recent years. And in June 2017, a group of thirty studios, television networks, and online gaming companies announced the formation of a new trade organization to fight online piracy, The Alliance for Creativity and Entertainment ("ACE"), signaling a commitment to pursue copyright infringers in the years to come.[144]

a. Time's Up for TickBox TV?

ACE's first lawsuit was filed in October 2017, on behalf of studios (Universal, Columbia, Disney, Twentieth Century Fox, Paramount, Warner Brothers) and streamers (Amazon, Netflix) against TickBox

TV, a Georgia-based company that sells set-top boxes it markets as providing free streaming content to users, but that the studios and streamers claim facilitates piracy.[145] According to the lawsuit, TickBox's website claims that users can "plug the TickBox TV into your current television and enjoy unlimited access to all the hottest TV shows, Hollywood blockbusters and live sporting events in one convenient little device … absolutely free."[146] If that sounds too good to be true, the studios and streamers would agree. TickBox TV operates using an open-source software called Kodi, which, along with available add-ons, allows users to search the internet for and watch non-licensed versions of films and shows, including those that are allegedly not available on SVOD platforms.

The lawsuit asserts that TickBox is secondarily liable for its users' acts of infringement on a theory that TickBox intentionally induced the infringement or otherwise engaged in contributory infringement.[147] Set-top box piracy is becoming increasingly problematic for Hollywood, as companies continue to offer consumers a purported ability to purchase unlicensed, pre-loaded set-top boxes.[148] Last year, a man in the United Kingdom was sentenced to four years in prison for selling set-top boxes "modified for copyright theft."[149] The seriousness of this threat, many explain, is that "it is less cumbersome than traditional pirate sites … [it] tends to attract older users and families … [and i]t even looks more legitimate."[150]

5. A Fairly Active Fair Use Docket

a. VidAngel's Wings Get Clipped

In August 2017, movie studios won a victory at the Ninth Circuit over VidAngel, a service launched in 2014 that takes DVDs sold by the studios, copies the content, and then sells consumers the ability to edit out purportedly objectionable material, such as violence or nudity. In December 2016, the studios won a preliminary injunction shutting down VidAngel, after a California federal judge found that plaintiffs had established a likelihood of success in showing that VidAngel was engaged in copyright infringement and violating the DMCA's ban on the circumvention of digital encryption measures.[151] Though VidAngel requires the user to purchase a physical DVD, Judge Andre Birotte found the service still illegally bypassed locks on the disc in order to upload it and stream it to those users: "The purchase of a DVD only conveys the authority to view the DVD, not to decrypt it."[152] After VidAngel's motion to the Ninth Circuit for an emergency stay pending appeal of the preliminary injunction was denied,[153] the Ninth Circuit held oral argument in June 2017.[154]

On August 24, 2017, the Ninth Circuit issued its decision against VidAngel.[155] First, the panel held that VidAngel could not claim the protections of the Family Home Movie Act, as it "would create a giant loophole in copyright law, sanctioning infringement so long as it filters some content and a copy of the work was lawfully purchased at some point."[156] The panel thought it was "quite unlikely that Congress contemplated such a result."[157] Rather, the statute was enacted to let people edit objectionable content, but only to "authorized" copies. VidAngel, in contrast, operates by streaming from a copy it ripped from a DVD, which constitutes unlawful copying.[158]

Second, the panel rejected VidAngel's claim that its service amounts to a fair use, upholding the district court's finding that VidAngel's use was not transformative: VidAngel "does not add anything to

Plaintiff's works,"[159] it simply "retransmit[s] [the original work] in a different medium."[160] The panel put it in universal terms: "*Star Wars* is still *Star Wars*, even without Princess Leia's bikini scene."[161] Finally, the panel upheld the district court's ruling that VidAngel violated the DMCA's protections for digital encryption when it ripped the movies to its servers.[162] A few months after this ruling, VidAngel filed for bankruptcy in Utah.[163]

b. What is Art? What is Infringement?: *Graham v. Prince*

In our 2016 Year-End Update, we wrote about a then-newly filed copyright suit against the famous appropriation artist Richard Prince. This year, a federal court in New York rejected Prince's request to dismiss the suit over an exhibit of photos he pulled from Instagram without permission, saying it was too early to decide if the works were protected by the fair use doctrine.[164] Prince had been sued for his work "Rastafarian Smoking a Joint"—part of an installation that consisted of screenshots of Instagram posts that Prince had commented on using his account "richardprince4" and then enlarged.[165] Prince moved for a ruling that the exhibit was protected by fair use, arguing that the case was an attempt to relitigate the principles of a landmark 2013 fair use ruling from the Second Circuit that Prince had won.[166]

In the pending case, *Graham v. Prince*, Judge Sidney H. Stein found the issue of fair use too complex to be answered at the motion to dismiss stage.[167] But the judge did note that, at this early stage, the fair use factors did not favor Prince: Prince had copied "the entirety of Graham's photograph" and did so "without significant aesthetic alterations," all for "a distinctly commercial purpose" that would usurp the primary market for the original photo—all strikes against a finding of fair use.[168]

c. Can Classics Be Adapted to Children's Books?

In September 2017, a court ruled that "children's versions" of classic books still under copyright protection like *The Old Man and the Sea* were not protected by the fair use doctrine.[169] In the case, *Penguin Random House LLC v. Colting*, the author claimed his "KinderGuides" to the novels of Ernest Hemingway, Jack Kerouac, and other iconic authors transformed the classic works enough to count as fair use, likening them to Cliffs Notes for kids, while the authors' estates and publishers disagreed, claiming the books brazenly violated the copyrights to the classic novels.[170] Judge Rakoff agreed with the plaintiffs, holding that Colting's books were infringing derivatives: "Fair use [] is not a jacket to be worn over an otherwise infringing outfit."[171] That Colting "tack[ed] on" a few pages of commentary does not provide "safe harbor for an otherwise infringing work."[172] The Judge went so far as to say that Colting only included the commentary in hopes that fair use would legalize a line of "clearly infringing" books.[173]

6. The "Monkey Selfie" Settlement

To the chagrin of legal reporters and punning headline writers everywhere, in September 2017, People for the Ethical Treatment of Animals (PETA) and the photographer David Slater reached a settlement to end a highly publicized lawsuit over PETA's claim that a crested macaque was entitled to copyright protection for a "monkey selfie."[174] While the case was pending at the Ninth Circuit, and following oral argument, the parties announced the resolution of the case, and therefore the Court of Appeals will

not issue a ruling at the center of a bizarre suit asking whether Naruto, the primate that snapped the viral image, has standing to file a copyright lawsuit in court.

PETA filed the publicity garnering suit in 2015 against Slater, whose camera Naruto used to snap the image.[175] The suit claimed that the monkey had the same rights in the photo as any human would, and that Slater had infringed them by publishing a book centered on the now-famous image.[176] In January 2016, a district judge held that Naruto—again, a primate—did not have standing, and that there was simply no indication that Congress intended to give animals standing to sue for copyright infringement.[177] PETA appealed the decision to the Ninth Circuit, where it was met with a skeptical panel at oral argument in July. Under the terms of the settlement, PETA agreed to dismiss the infringement claims in return for Slater contributing 25% of future proceeds from the "selfie" toward conservation-related charities.[178]

7. The Audio Home Recording Act Hits the Road

In 2014, a music industry group, the Alliance of Artists and Recording Companies, brought suit against General Motors, Ford, and other car manufacturers over the use of copyright-protected works in in-car entertainment systems. On October 24, 2017, during a hearing on cross motions for summary judgment, the federal judge presiding over the case expressed skepticism that the systems qualify as digital recording devices under the law.[179] The group's lawsuit alleges that the car companies sold vehicles with music and navigation systems that record songs, but that they had not paid royalties to artists.[180] Whether the systems qualify as "digital audio recording devices" under the 1992 Audio Home Recording Act turns on the question of whether they create "digital music recordings," as required by the Act.[181] The Act defines a digital music recording as a "material object," such as a compact disk or audio tape, that contains "only sounds, and material, statements, or instructions incidental to those fixed sounds."[182] Defendants argued that the cars' internal hard drives do not meet that definition because they contain GPS systems and other programs unrelated to music.[183] In response, plaintiff argued that a specific physical portion of the hard drive known as the "partition" satisfies the criteria for a digital music recording, and therefore opens the car companies up to copyright royalty liability under the AHRA.[184] During the October 24 hearing, Judge Ketanji Brown Jackson was described as appearing unconvinced by the plaintiff's arguments about the physical construction of the hard drive, and an opinion is expected in the coming months.[185]

D. Trademark Litigation

1. CGI and Nominative Fair Use

In July 2017, Rearden LLC, a computer-generated imagery (CGI) software company, accused The Walt Disney Co. of using its intellectual property to animate characters in some of its highest-grossing productions of the last few years, as well as to advertise and promote the films.[186] Rearden alleges that it owns registered trademarks, copyrights, and patents that are embodied in its Oscar-winning visual effects technology called MOVA Contour Reality Capture. Rearden claims that Disney knowingly contracted with parties who stole and falsely claimed ownership of the MOVA system and related IP assets to create film productions such as *Beauty and the Beast* and *Guardians of the Galaxy*. Rearden

separately pursued relief against the company providing these services, a Chinese company called Shenzhenshi Haitiecheng Science and Technology.

In the lawsuits against Disney and the other studios, Rearden claims they knowingly used an unauthorized version of the MOVA software. The studio defendants have moved to dismiss the claims, arguing that none of the alleged uses of the "MOVA" mark in press interviews, "featurette" material, or in movie credits constitutes infringement.[187] They argue that "Rearden's various trademark allegations fail for several reasons: in some cases, the marks are not even used; in others, the alleged use was by a third party; in others, the use plainly constitutes nominative fair use."[188] Relying on *New Kids on the Block v. News Am. Pub'g, Inc.*, 971 F.2d 302, 308 (9th Cir. 1992), the studios argue that the use of "MOVA"—to describe the technology that captured actors' facial performances, to describe a company (not a technology) in film credits, and to describe visual effects artists—meets the requirements for the nominative fair use affirmative defense, which allows use of another's trademark as a descriptor or identifier when meeting the Ninth Circuit's test in *New Kids*.[189] As of the date of this writing, the court has yet to decide this motion to dismiss.

2. EMPIRE Strikes Back: Ninth Circuit Holds Show's Name Is Non-Infringing

On November 16, 2017, a Ninth Circuit panel affirmed summary judgment in favor of Twentieth Century Fox Television and Fox Broadcasting Company for the use of the name "Empire" as protected by the First Amendment.[190] A federal court in the Central District of California had applied the test derived from *Rogers v. Grimaldi*[191] to determine whether the protection of the trademark held by a music recording and publishing company—Empire Distribution—should give way to expressive speech protected by the First Amendment.[192] Under the *Rogers* test, an artistic work's use of a trademark is not actionable unless (1) the use has no artistic relevance to the underlying work whatsoever, or (2) it explicitly misleads as to the source or the content of the work if it has some artistic relevance.[193] The district court held (1) that Fox's "Empire" television series, which tells the fictional story of a feuding entertainment industry family in New York, made an artistically relevant use of the word "Empire" for its expressive work and (2) that Fox has not explicitly misled consumers about its affiliation with Empire Distribution.

The Ninth Circuit upheld the lower court's use of the *Rogers* test to determine whether the Lanham Act applies, and concluded that both prongs of the test were satisfied. Judge Milan Smith explained "how a work fails the first prong of the *Rogers* test" is that it "bear[s] a title which has no artistic relevance to the work."[194] Judge Smith drew a contrast between ways courts had applied the first prong of the test in prior cases. In one earlier action brought by Mattel over the song "Barbie Girl," Judge Smith noted that the court had found the title to be artistically relevant, as the song was commenting on materialism associated with the doll. In contrast, Judge Smith pointed to a case concerning Outkast's song "Rosa Parks," where the court found a title not to be artistically relevant, because the composers did not intend the song to be about Parks. Ninth Circuit subsequently denied Empire Distribution's petition for panel rehearing and rehearing *en banc*.

3. No Fair Use for Trekkie-Seuss Book

ComicMix LLC created a book entitled *Oh, the Places You'll Boldly Go!* that combines creative elements from the *Star Trek* science-fiction franchise with the underlying Dr. Seuss classic *Oh, the Places You'll Go!* (*OTPYG*). Dr. Seuss Enterprises brought a trademark, copyright infringement and unfair competition action against ComicMix for the unauthorized exploitation of Dr. Seuss's works.[195] Dr. Seuss Enterprises alleges that the new book misappropriates key protected elements of *OTPYG*, including its trademarks.

On December 7, 2017, the district court denied ComicMix's motion to dismiss the amended complaint on the basis that the book is protected by fair use and nominative fair use doctrines.[196] As to the trademarks at issue, the court held the Seuss book's title is protected under section 43(a) of the Lanham Act, declined to determine whether trademark rights may be claimed in the fonts used in the Dr. Seuss book, and found that the general illustration style is not protectable. Applying the nominative fair use analysis in a narrowed inquiry involving only the *OTPYG* title, the court found that ComicMix was not able to satisfy each factor of the defense. In particular, the Court concluded that the Trekkie book is not protected because, even though Dr. Seuss's work is not readily identifiable without the use of the trademark, ComicMix's use of the mark—incorporating all of the words and even the look of the lettering—is more than reasonably necessary to identify the Dr. Seuss work as the object of the parody.

4. Federal Circuit Finds Ban on "Scandalous and Immoral" Trademarks Unconstitutional

In December 2017, the Federal Circuit held that the Lanham Act's ban on "scandalous and immoral" trademarks is unconstitutional,[197] just months after the Supreme Court unanimously held in *Matal v. Tam*, 137 S.Ct. 1744 (2017), that the statute's ban on "disparaging" marks was a facially unconstitutional restriction on speech. The government attempted to distinguish *Tam* by arguing the scandalous and immoral ban is viewpoint neutral, but Judge Moore, who wrote the Federal Circuit's original decision that was upheld in *Tam*, rejected the distinction.

The case concerned a registrant's request to trademark the name of his clothing brand entitled "FUCT."[198] The U.S. Patent and Trademark Office ("USPTO") refused to register the mark on the ground that it amounts to the past tense of a vulgar word, and therefore concerns scandalous matters.[199] The Trademark Trial and Appeal Board (the "Board") affirmed. The registrant appealed to the Federal Circuit, arguing (1) that the USPTO erred in concluding the mark comprises immoral or scandalous matter, and (2) whether the ban on registering immoral or scandalous marks is a constitutional restriction of free speech.

The Federal Circuit first affirmed the Board's decision that there was substantial evidence supporting the USPTO's finding that the mark "FUCT" is vulgar and not registrable.[200] They concluded that there was "no definition of scandalous, that in light of the PTO's fact findings, would exempt [the registrant's] mark."[201]

Second, the Federal Circuit determined that, "[i]ndependent of whether the immoral or scandalous provision is viewpoint discriminatory," "the provision impermissibly discriminates based on content in

violation of the First Amendment."[202] The court rejected the government's argument that the federal trademark registration program amounted to a limited public forum, subjecting the Lanham Act's content-based restriction on marks comprising immoral or scandalous matter to a less demanding degree of scrutiny.[203] The Federal Circuit explained that "[b]ecause trademarks are by definition used in commerce, the trademark registration program bears no resemblance to [] limited public forums." The court further noted that "[t]he speech that flows from trademark registration is not tethered to a public school, federal workplace, or any other government property."[204]

Because the prohibition on the registration of immoral or scandalous trademarks targets the expressive content of speech, the Federal Circuit found it to be subject to strict scrutiny.[205] The Federal Circuit concluded by stating that "[t]he First Amendment . . . protects private expression, even private expression which is offensive to a substantial composite of the general public."[206]

E. 1st Amendment Litigation

1. Defamation: ABC Settles "Pink Slime" Case

On June 28, 2017, in the midst of trial, meat producer Beef Products, Inc. settled claims it brought against ABC News in South Dakota for defamation over reports about a processed lean beef product dubbed "pink slime."[207] In 2012, ABC News correspondent Jim Avila reported that questions had been raised about the safety of the product. ABC News ultimately repeated the term "pink slime" over 350 times across six different media platforms, which Beef Products, Inc. claimed was a turn-off to consumers. Following the reports, sales allegedly fell nearly 80%, and the South Dakota company closed three plants and laid off 700 workers. The company sought $1.9 billion in actual damages, and an award of up to $5.7 billion under South Dakota law.[208]

ABC News argued throughout the suit that its reports were accurate and that it was entitled to protection under the First Amendment's free speech and free press clauses. Beef Products, Inc. denied the accuracy of the reports, and asserted that the damage done by false reporting by a news outlet with such a widespread reach was particularly devastating to its business.[209] The case reportedly settled for $177 million. In a statement released following the settlement, ABC News said that it decided to settle because "continued litigation of this case is not in the company's interests."[210] It did not retract or apologize for the reports, and continued to affirm their accuracy. Although the settlement of the suit means that it will not set precedent for future defamation claims, the case nonetheless highlights the risks in the current legal landscape surrounding reporting, particularly reporting regarding substantial commercial interests.

2. "Libel in Fiction": *Greene v. Paramount Pictures*

On February 18, 2014, relying on a little known subspecies of defamation law referred to as "libel in fiction," the former general counsel at the now infamous brokerage firm Stratton Oakmont sued the producers of the movie *The Wolf of Wall Street* for publishing allegedly defamatory statements about him.[211] In particular, Andrew Greene claims that the character of Nicky Koskoff was based on him, and that the defendants—Paramount Pictures, Red Granite, Martin Scorsese's Sikelia Productions, and Leonardo DiCaprio's Appian Way—acted with "actual malice" in making the false statements, via their

depiction of Koskoff, that Greene was responsible for Stratton Oakmont's illegal acts and that he engaged in illicit drug use and sexual misconduct.[212]

Because Greene is alleging libel in fiction, he must show that the Koskoff character can reasonably be understood by viewers of the film to be a depiction of him. In an October 13, 2017 letter to the Court requesting a pre-motion conference, defendants argued that this could not possibly be the case because the film used a fictional name and the character was actually based on a composite of other individuals who worked at Stratton Oakmont.[213] Defendants also assert that Greene cannot meet his burden to show the statements in the film were *false*, pointing to evidence that Greene in fact engaged in drug use, sexual misconduct, and was a co-conspirator in the company's money laundering scheme and other illicit activities.[214] Finally, defendants contend that Greene cannot demonstrate actual malice—*i.e.*, knowledge of falsity or reckless disregard for the truth: "Defendants believed that the statements about Nicky Koskoff could not be 'false' because they were of and concerning a fictional character named Nicky Koskoff, and no reasonable viewer would believe that Koskoff was really Greene."[215] The Court has set a briefing schedule and an order should be issued in the coming months.[216]

3. Right of Publicity: *Montel Williams v. Advanceable Technology, LLC*

Former Emmy-winning talk show host turned medical marijuana advocate Montel Williams has filed suit against several medical marijuana retailers, alleging that they unlawfully used his name, image, reputation, identity, and persona in "fake news or blog posts" promoting their nonmedical cannabidiol oils.[217]

The complaint alleges the following facts: Williams was diagnosed with multiple sclerosis in 2000.[218] After finding prescription medications to be ineffective at treating his symptoms, Williams tried medical marijuana at the urging of his doctor.[219] He allegedly found the products so effective that he thereafter became an advocate for medical cannabis reform law and founded his own company that produces medical marijuana products.[220] In an April 20, 2017 Forbes article, however, Williams "warned about medical cannabis companies that 'don't do the research' and whose products you would not call medicine." According to the complaint, a number of those very same companies allegedly used Williams' name and identity in online marketing schemes to sell their products, copying content from the Forbes article and even adding "completely fabricated quotes and content that they attribute to Williams, which content falsely indicates that Williams is affiliated with and endorses Defendants' Infringing Products."[221]

Williams asserted claims for, amongst other things, violation of the right of publicity and right of privacy under Florida law and violation of the common law right of publicity, arguing that the retailers have damaged his reputation by using his name and likeness for commercial gain.[222] Williams has thus far been granted limited third party discovery for the purpose of determining the identities of unknown defendants who participated in the purportedly unlawful acts.[223]

4. Right of Publicity: Can Using a Voice Double Give Rise to Liability?

On October 18, 2017, the California Court of Appeal affirmed a trial court's order partially granting an anti-SLAPP motion against the actress Paz de la Huerta.[224] De la Huerta was hit by a moving

ambulance while performing a stunt during the filming of the movie *Nurse 3D*.[225] In post-production, de la Huerta recorded 27 off-screen voiceover narration parts, but those parts were later re-recorded using a voice double without her knowledge.[226] In 2014, de la Huerta filed suit against Lions Gate Entertainment and individuals involved in the filming, alleging a number of claims related to both her injury and the voice dubbing, including claims for breach of contract, common law and statutory right to publicity, and trademark infringement. De la Huerta's central complaint as to the voice dubbing was that the voice double's performance was "inferior" to her own and that viewers mistakenly attributed those aspects of the performance to her.[227] The trial court granted the defendants' anti-SLAPP motion with respect to de la Huerta's dubbing claims.

Under the anti-SLAPP statute, a cause of action arising from the constitutionally protected right of free speech may be stricken unless the plaintiff can demonstrate that she is likely to prevail on the merits of her claims.[228] Here, the Court of Appeal held that the dubbing of plaintiff's voice was a "protected artistic activity."[229] Specifically, the Court held that de la Huerta's claims "arise from the decision to use a voice double to rerecord lines originally read by a well-known lead actress in a widely reviewed film. That is a creative decision implicating a matter of public interest and hence within the scope of the anti-SLAPP statute."[230] The Court thereafter determined that de la Huerta had failed to establish a likelihood of success on any of her dubbing claims. Notably, the Court held that de la Huerta's right of publicity claim—in which she asserted that defendants had misappropriated her name or voice, or misused her persona, when they distributed the film after using a voice double—would necessarily fail, as defendants did not use de la Huerta's name or voice *independently* of her performance in the film, and she had expressly consented to the use of her name or likeness in relation to the film.[231]

The Court of Appeal also affirmed the sustaining of defendants' demurrer to de la Huerta's claims related to her stunt injuries, thereby affirming the disposal of the case in its entirety.[232]

F. Music Litigation

1. Mechanical Royalty Rate to Remain Unchanged

On March 28, 2017, the Copyright Royalty Board adopted a final rule that sets continued, unaltered rates and terms for statutory licenses to use and distribute physical recordings and permanent digital downloads ("Mechanical Licenses") under subpart A of 37 C.F.R. 385.[233] The mechanical royalty rate, which is 9.1 cents for recordings of five minutes or less and 1.75 cents per minute of those over five minutes, was first set on January 1, 2006.[234] The Copyright Royalty Board noted that, although the originally proposed rule limited the rates to a time period ending in 2022, the rule as adopted will remain in effect until superseded by a subsequent rulemaking.

2. Streaming Drives Music Consumption Growth as Lawsuits Continue to Flow

Music streaming continued to see big growth in 2017, with over 618 billion on-demand streams throughout the year, an increase of 43 percent from 2016.[235] Overall, music consumption was up 12.5 percent in 2017, with streaming a big driver of that growth.[236] That growth has come with litigation pains, and mechanical royalties have been the subject of much litigation over the past year.

In May, Spotify proposed a $43 million settlement in a class action lawsuit brought by singer-songwriter Melissa Ferrick, who had alleged that the streaming service infringed thousands of songwriters' copyrights rather than follow the proper procedures to obtain mechanical royalties. After attorney fees, $28.7 million of that settlement figure is proposed to compensate songwriters and publishers.[237] Hundreds of musicians and music publishers have objected to the proposal,[238] and the Court held a fairness hearing on December 1, 2017, but has yet to approve the proposed settlement.

In July 2017, two separate lawsuits were filed in Nashville against Spotify, each alleging that the streamer had not obtained necessary licenses: one was filed by Bluewater Music, an independent publisher and copyright administration company, and the other by Robert Gaudio and his musical group Frankie Valli and the Four Seasons, among other plaintiffs.[239] In response, Spotify has argued that music streams should be considered akin to public performances such that streamers need not obtain mechanical licenses from music publishers.[240]

Most recently, on December 29, 2017, Wixen Music publishing—which licenses music from artists including Tom Petty, Neil Young, the Beach Boys, and Janis Joplin—sued Spotify in California, seeking damages of $1.6 billion, alleging that Spotify has been streaming works without the correct license.[241] That same day, Spotify filed court papers questioning whether Wixen's clients had authorized Wixen to take legal action against Spotify, arguing that it had given its clients only a brief opt-out period before their names would be included in the lawsuit.[242] Wixen admitted that it filed its suit before the end of the year due to the introduction in the House of Representatives of the bi-partisan sponsored Music Modernization Act, which would protect streamers against such suits.[243]

In other Spotify news, it was reported on January 3, 2018 that the company had filed papers with the SEC for its long-rumored IPO.[244]

3. Do "Players Playing" + "Haters Hating" = Copyright Infringement?

On September 18, 2017, Sean Hall and Nathan Butler sued Taylor Swift, among others, alleging that Swift's hit song "Shake it Off" infringes plaintiffs' copyright in the 2001 song "Playas Gon' Play" by the group 3LW, which Hall and Butler co-authored.[245] Specifically, Hall and Butler's song includes the lyrics "Playas, they gonna play / And haters, they gonna hate," which they allege are embodied in Swift's lyrics "Cause the players gonna play, play, play, play, play and the haters gonna hate, hate, hate, hate, hate."[246] The complaint attempts to establish that it was the industry norm for Swift to have cleared her lyrics with Hall and Butler, citing several instances where artists have cleared the use of lyrics that are similar to, but not verbatim, songs by other artists.[247]

On January 3, 2018, Swift and co-defendants moved to dismiss, arguing "there is no copyright protection in plaintiffs' alleged decision to combine players playing with haters hating," because the combined phrases are public domain elements.[248] The Central District of California dismissed similar allegations against Swift in 2015 after screening the complaint *in forma pauperis* of Jessie Braham, who alleged that Swift infringed his song "Haters Gone Hate."[249]

4. Ticketmaster Acquires Songkick in Settlement of Antitrust Suit

In December 2015, Songkick sued Ticketmaster and Live Nation, accusing them of antitrust violations in the market for live-concert ticket sales. Songkick, which recently shut down its ticketing business, citing pressure from the defendants,[250] was in the business of "artist presale" ticketing, in which artists sell (typically at a reduced price) a reserved portion of concert tickets to dedicated fans in advance of general ticket sales.[251] Songkick alleges that Ticketmaster and Live Nation, which merged in 2010, used their control of the majority of the concert ticket-sales market via exclusive contracts with venues, to prevent other parties like Songkick from engaging in "artist presale" ticketing.[252]

On October 16, 2017, the court denied defendants' motion for summary judgment, finding numerous material factual disputes in what it described as "an enormous gulf" between the proposed inferences from the known facts, but noting that "[t]here is no question that there is a restraint of trade involved."[253] Noting that the "[d]efendants certainly have potentially meritorious defenses," the court nonetheless found that the case could not be resolved by summary judgment.[254] With a trial date looming, on January 12, 2018, Songkick and Ticketmaster announced that they had reached a settlement in which Ticketmaster will pay $110 million to acquire Songkick's assets.[255]

5. Fractional Licensing: Consent Decree No Bar to BMI and ASCAP

On December 19, 2017, the Court of Appeals for the Second Circuit affirmed that consent decrees that have been in place since 1941 do not prevent Broadcast Music Inc. (BMI) and the American Society of Composers, Authors and Publishers (ASCAP) from granting fractional licenses or from licensing works in which BMI and ASCAP do not have the authority to grant full rights—such as when a work has multiple authors.[256] The United States District Court for the Southern District of New York ruled in favor of BMI last year, deciding that the consent decrees were silent as to fractional licensing.[257] The Second Circuit agreed, finding that the "appeal begins and ends with the language of the consent decree."[258] The court also rejected the DOJ's argument that allowing fractional licenses undermines the procompetitive objectives of the consent decree, finding that the government should seek to amend the decree or sue under the Sherman Act if it finds there are "unresolved competitive concerns."[259] BMI President Mike O'Neill praised the decision, stating that BMI is "incredibly gratified that Judge (Louis) Stanton and the Second Circuit agreed with [their] position."[260]

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[1] Dana Feldman, *What the Disney-Fox Merger Means for Consumers*, Forbes (Dec. 15, 2017), https://www.forbes.com/sites/danafeldman/2017/12/15/what-the-disney-fox-52-4b-merger-means-to-the-consumer/#4c204cd317c8.

[2] Benjamin Horney, *Disney Buys 21st Century Fox Assets in $52.4B Blockbuster*, Law360 (Dec. 14, 2017), https://www.law360.com/articles/994773.

[3] Press Release, Discovery Communications (July 31, 2017), https://corporate.discovery.com/wp-content/uploads/2017/07/Final-Infographic.pdf.

[4] Brian Fung, *The Justice Department is Suing AT&T to Block its $85 Billion Bid for Time Warner*, The Washington Post (Nov. 20, 2017), https://www.washingtonpost.com/news/the-switch/wp/2017/11/20/the-justice-department-just-sued-att-to-block-its-85-billion-bid-for-time-warner/.

[5] Hadas Gold, *Judge Sets March 19 trial date for AT&T, Time Warner case*, CNN (Dec. 7, 2017), http://money.cnn.com/2017/12/07/media/doj-att-trial-date/index.html.

[6] Press Release, Meredith Corporation, Meredith Corporation To Acquire Time Inc. to Create Premier Media and Marketing Company Serving Nearly 200 Million American Consumers (Nov. 26, 2017), https://ir.meredith.com/news-releases/press-release-details/2017/Meredith-Corporation-To-Acquire-Time-Inc-To-Create-Premier-Media-And-Marketing-Company-Serving-Nearly-200-Million-American-Consumers/default.aspx.

[7] *Id.*

[8] Variety Staff, *Penske Media, Wenner Media Invest in Rolling Stone at $100 Million-Plus Valuation*, Variety (Dec. 20, 2017), http://variety.com/2017/biz/news/penske-media-buys-majority-stake-in-rolling-stone-owner-wenner-media-for-over-100-million-1202646580/.

[9] Patrick Brzeski, *Netflix Signs Licensing Deal with China's iQiyi*, The Hollywood Rep. (Apr. 24, 2017), http://www.hollywoodreporter.com/news/netflix-signs-licensing-deal-chinas-iqiyi-997071.

[10] Elsa Keslassy, *Netflix Renews and Expands International Deal With Orange*, Variety (Sept. 14, 2017), http://variety.com/2017/digital/news/netflix-orange-1202558781/.

[11] *Id.*

[12] *Id.*

[13] Elsa Keslassy, *Netflix, Deutsche Telekom Ink Global Partnership*, Variety (Nov. 23, 2017), http://variety.com/2017/film/global/netflix-deutsche-telekom-ink-global-partnership-1202622357/.

[14] *Id.*

[15] Aaron Hemsworth, *Netflix: Growing Its Business through Innovation*, Market Realist (Nov. 7, 2017), http://marketrealist.com/2017/11/local-contents-gain-european-presence-netflix/.

[16] *Id.*

[17] Mac Margolis, *Netflix Woos Latin American Viewers by Going Local*, Bloomberg (Aug. 11, 2017), https://www.bloomberg.com/view/articles/2017-08-11/netflix-woos-latin-american-viewers-by-going-local.

[18] Denise Petski, *Netflix Greenlights Colombian Original Series From 'Narcos' Producer*, Deadline (Nov. 22, 2017), http://deadline.com/2017/11/netflix-colombian-original-series-narcos-producer-ciro-guerra-1202213839/.

[19] Manual Bentancourt, *Netflix is Releasing 10 Argentine Series, Including a Musical Teen Novela*, Remezcla (Nov. 29, 2017), http://remezcla.com/film/netflix-expanded-slate-argentine-productions/.

[20] Joe Otterson, *'Walking Dead' Creator Robert Kirkman Sets New Deal with Amazon*, Variety (Aug. 11, 2017), http://variety.com/2017/tv/news/robert-kirkman-skybound-entertainment-amazon-1202523592/.

[21] *Id.*

[22] Todd Spangler, *Apple TV Adds Amazon Prime Video After Years of Haggling*, Variety (Dec. 6, 2017), http://variety.com/2017/digital/news/apple-tv-amazon-prime-video-launch-1202631975/.

[23] *Id*.

[24] Peter White, *Hulu Strikes Foreign-Language TV Deal with Studiocanal*, Deadline (Nov. 27, 2017), http://deadline.com/2017/11/hulu-studiocanal-deal-1202214791/.

[25] Lucas Shaw, *Disney's Deal With Fox Could Solve Hulu's Ownership Headache*, Bloomberg (Dec. 14, 2017), https://www.bloomberg.com/news/articles/2017-12-14/disney-s-deal-with-fox-could-solve-hulu-s-ownership-headache.

[26] Jacob Kastrenakes, *Disney to End Netflix Deal and Launch Its Own Streaming Service*, The Verge (Aug. 8, 2017), https://www.theverge.com/2017/8/8/16115254/disney-launching-streaming-service-ending-netflix-deal.

[27] *Id.*

[28] Brooks Barnes, *How Disney Wants to Take on Netflix With Its Own Streaming Services*, N.Y. Times (Aug. 8, 2017), https://www.nytimes.com/2017/08/08/business/media/disney-streaming-service.html.

[29] Chad Bray, *Iflix Video-Streaming Service Secures $144 Million in Funding*, N.Y. Times (Aug. 7, 2017), https://www.nytimes.com/2017/08/07/business/dealbook/iflix-streaming-hearst-netflix.html.

[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] Sara Hsu, *China's New Capital Controls Expected to Slow Real Estate, But Improve Country's Economic Health*, Forbes (Aug. 28, 2017), https://www.forbes.com/sites/sarahsu/2017/08/28/chinas-new-capital-controls-expected-to-slow-real-estate-but-improve-countrys-economic-health/#13398af166fd.

[34] Ryan Faughnder & James Rufus Koren, *As China Cools on Hollywood, the Movie Business Looks Close to Home for Money*, L.A. Times (Nov. 12, 2017), http://beta.latimes.com/business/hollywood/la-fi-ct-china-hollywood-foreign-investment-20171112-htmlstory.html.

[35] *Id.*

[36] Brent Lang, *Paramount Loses Slate Financing Deal with China's Huahua*, Variety (Nov. 7, 2017), http://variety.com/2017/film/news/paramount-china-huahua-1202609480/.

[37] Meg James & Ryan Faughnder, *Paramount Pictures loses Huahua Media slate film financing deal*, L.A. Times (Nov. 7, 2017), http://beta.latimes.com/business/hollywood/la-fi-ct-paramount-huahua-film-financing-20171107-story.html.

[38] *Id.*

[39] Lang, *supra* note 37.

[40] Patrick Frater, *China's Recon Abandons Millennium Takeover Deal*, Variety (Aug. 30 2017), http://variety.com/2017/biz/asia/chinas-recon-abandons-millennium-takeover-deal-1202543634/.

[41] Patrick Brzeski, *Chinese Investors Unload Stakes in Wanda's Legendary Entertainment*, The Hollywood Rep. (Sept. 27, 2017), https://www.hollywoodreporter.com/news/chinese-investors-unload-stakes-wandas-legendary-entertainment-1043522.

[42] Arjun Kharpal, *China's Tencent surpasses Facebook in valuation a day after breaking $500 billion barrier*, CNBC (Nov. 21, 2017), https://www.cnbc.com/2017/11/21/tencent-surpasses-facebook-in-valuation.html.

[43] *Id.*

[44] *Id.*

[45] Meghan Reeder, *Tesla Deals Boosts Chinese Presence in US Auto Tech*, CNBC (Mar. 28, 2017), https://www.cnbc.com/2017/03/28/messaging-app-parent-tencent-takes-stake-in-tesla.html.

[46] Samantha Masunaga and David Pierson, *What will Tencent get out of its 12% stake in Snap Inc.?*, L.A. Times (Nov. 8, 2017), http://beta.latimes.com/business/technology/la-fi-tn-tencent-snap-20171108-story.html.

[47] *Id.*

[48] Todd Spangler, *Snap, NBCUniversal Form Studio Joint Venture, Tap Duplass Brothers for Original Shows*, Variety (Oct. 16, 2017), http://variety.com/2017/digital/news/snap-nbcuniversal-studio-venture-duplass-brothers-shows-1202591040/.

[49] *Id.*; *see also* Stephen Battaglio, *NBCUniversal and Snap Form a New Venture to Produce Scripted Shows for Mobile Users*, L.A. Times (Oct. 17, 2017), http://www.latimes.com/business/hollywood/la-fi-ct-snap-nbc-20171017-story.html.

[50] Spangler, *supra* note 49.

[51] Billboard Staff, *Royalty Flow Launches IPO, Offering Fans a Slice of Eminem Royalties*, Billboard (Nov. 27, 2017), https://www.billboard.com/articles/business/8046992/royalty-flow-ipo-eminem-royalties-nasdaq.

[52] *Id.*

[53] *Id.*

[54] Zachary Zagger, *5 Esports Issues Attorneys Should Watch*, Law360 (July 20, 2017), https://www.law360.com/media/articles/946025/5-esports-issues-attorneys-should-watch.

[55] *Id.*

[56] *Id.;* Sabiq Shah, *Overwatch's Highest-Paid Pro Lands $150,000 Salary Deal*, Engadget (Sept. 4, 2017), https://www.engadget.com/2017/09/04/overwatch-s-highest-paid-pro-lands-150-000-salary-deal/.

[57] Press Release, Activision Blizzard, The Overwatch League Partners With Sports, eSports Leaders to Build Teams for Major Cities Worldwide, (July 12, 2017), http://investor.activision.com/releasedetail.cfm?releaseid=1032873.

[58] Jacob Wolf, *Jerry Jones, John Goff Buy Majority Stake in compLexity Gaming*, ESPN (Nov. 6, 2017), http://www.espn.com/esports/story/_/id/21309068/dallas-cowboys-owner-jerry-jones-john-goff-buy-majority-stake-complexity-gaming.

[59] Cecilia Kang, *F.C.C. Repeals Net Neutrality Rules*, N.Y. Times (Dec. 14, 2017), https://www.nytimes.com/2017/12/14/technology/net-neutrality-repeal-vote.html.

[60] Keith Collins, *Why Net Neutrality Was Repealed and How It Affected You*, N.Y. Times (Dec. 14, 2017), https://www.nytimes.com/2017/12/14/technology/net-neutrality-rules.html.

[61] *Id.*

[62] Cecilia Kang, *F.C.C. Repeals Net Neutrality Rules*, N.Y. Times (Dec. 14, 2017), https://www.nytimes.com/2017/12/14/technology/net-neutrality-repeal-vote.html.

[63] Brian Fung, *The never ending battle over net neutrality is far from over. Here's what's coming next.*, Wash. Post (Dec. 15, 2017), https://www.washingtonpost.com/news/the-switch/wp/2017/12/15/the-never-ending-battle-over-net-neutrality-is-far-from-over-heres-whats-coming-next/.

[64] *Id.*

[65] Cecilia Kang, *Flurry of Lawsuits Filed to Fight Repeal of Net Neutrality*, N.Y. Times (Jan. 16, 2018), https://www.nytimes.com/2018/01/16/technology/net-neutrality-lawsuit-attorneys-general.html.

[66] Cecilia Kang, *F.C.C. Opens Door to More Consolidation in TV Business*, N.Y. Times (Nov. 16, 2017), https://www.nytimes.com/2017/11/16/business/media/fcc-local-tv.html.

[67] David Shepardson, *FCC to loosen TV, newspaper ownership rules*, Reuters (Oct. 25, 2017), https://www.reuters.com/article/us-usa-fcc-media/fcc-to-loosen-tv-newspaper-ownership-rules-idUSKBN1CU2TD.

[68] Jodi Kantor and Megan Twohey, *Harvey Weinstein Paid Off Sexual Harassment Accusers for Decades*, N.Y. Times (Oct. 5, 2017), https://www.nytimes.com/2017/10/05/us/harvey-weinstein-harassment-allegations.html.

[69] *E.g.*, Carla Herreria, *Gwyneth Paltrow: Harvey Weinstein Lied About Having Sex With Me to Lure Women*, *Huffington Post* (Dec. 5, 2017), https://www.huffingtonpost.com/entry/gwyneth-paltrow-harvey-weinstein-lied-sex_us_5a273869e4b0c2117626a8b0.

[70] Maya Salam, *6 Women Sue Harvey Weinstein and His Former Businesses in Proposed Class Action*, N.Y. Times (Dec. 6, 2017), https://www.nytimes.com/2017/12/06/business/harvey-weinstein-class-action.html; Yohana Desta, *Inside Harvey Weinstein's Growing Legal Nightmare*, Vanity Fair (Dec. 6, 2017), https://www.vanityfair.com/hollywood/2017/12/harvey-weinstein-lawsuits.

[71] Complaint, *Huett v. The Weinstein Company, LLC*, Case No. BC680869 (L.A. Super. Ct. Oct. 24, 2017) (hereinafter *Huett Complaint*); Complaint, *Ackers v. Harvey Weinstein*, Case No. BC681850 (L.A. Super Ct. Nov. 2, 2017) (hereinafter *Ackers Complaint*); Complaint, *Jane Doe 1 v. The Weinstein Co. Holdings, LLC*, C.A. No. 17 Civ. 8323 (C.D. Cal. Nov. 15, 2017) (closed); Complaint, *Jane Doe. v. The Weinstein Co. LLC*, Case No. BC683411 (L.A. Super Ct. Nov. 14, 2017) (hereinafter *Jane Doe Complaint*); Complaint, *Geiss v. The Weinstein Co. Holdings LLC*, C.A. No. 17 Civ. 9554 (S.D.N.Y. Dec. 6, 2017) (hereinafter *Geiss Complaint*); Complaint, *Noble v. Weinstein*, C.A. No. 17 Civ. 9260 (S.D.N.Y. Nov. 27, 2017) (hereinafter *Noble Complaint*).

[72] *Huett Complaint* ¶¶ 11-15, 18; *Jane Doe Complaint* ¶¶ 18-2, 29.

[73] *Geiss Complaint* ¶ 183-191.

[74] *Geiss Complaint* ¶ 192-218.

[75] *Noble Complaint*.

[76] Desta, *supra* note 71.

[77] *E.g.*, Gene Maddus, *Harvey Weinstein's Former Assistant Prepping Sexual Harassment Suit*, Variety (Dec. 6, 2017), http://variety.com/2017/biz/news/harvey-weinstein-assistant-erectile-dysfunction-drugs-1202631811/.

[78] Josefa Velasquez, *The Weinstein Company Now Probed by AG Schneiderman*, N.Y.L.J. (Oct. 23, 2017), https://www.law.com/newyorklawjournal/sites/newyorklawjournal/2017/10/23/102317ny_weinstein/.

[79] Ryan Faughnder, *Harvey Weinstein Sues His Own Company for Documents To Defend Himself Against Claims of Sexual Abuse*, L.A. Times (Oct. 26, 2017), http://www.latimes.com/business/hollywood/la-fi-ct-harvey-weinstein-lawsuit-20171026-story.html.

[80] Ryan Faughnder and Samantha Masunaga, *Harvey Weinstein's Company Gets A Financial Lifeline as He Faces New Criminal Probe*, L.A. Times (Oct. 16, 2017), http://www.latimes.com/business/hollywood/la-fi-ct-weinstein-colony-capital-20171016-story.html.

[81] Chris Lee, *Is The Weinstein Company Firing Bob Weinstein, Too?*, N.Y Mag. (Oct. 29, 2017), http://www.vulture.com/2017/10/is-the-weinstein-company-firing-bob-weinstein-too.html.

[82] David Ng and Ryan Faughnder, *Can Weinstein Co. Survive Without Harvey Weinstein?*, L.A. Times (Oct. 9, 2017), http://www.latimes.com/business/hollywood/la-fi-ct-weinstein-future-20171010-story.html.

[83] Ryan Faughnder, *Can Former SBA Head Maria Contreras-Sweet Save Weinstein Co.?*, L.A. Times (Nov. 19, 2017), http://www.latimes.com/business/hollywood/la-fi-ct-weinstein-company-bidder-20171119-story.html.

[84] Powerful men confronted as "Weinstein Effect" goes global, CBS News (Nov. 14, 2017), https://www.cbsnews.com/news/harvey-weinstein-effect-goes-global-powerful-men-confronted.

[85] Fiza Pirani, *From Weinstein to Lauer, A Timeline of 2017's Sexual Harassment Scandals*, Atlanta J.-Const. (Dec. 11, 2017), http://www.ajc.com/news/world/from-weinstein-lauer-timeline-2017-sexual-harassment-scandals/qBKJmUSZRJqgOzeB9yN2JK/.

[86] Victor Lipman, *3 Steps Companies Can Take to Prevent Sexual Harassment*, Forbes (Nov. 6, 2017), https://www.forbes.com/sites/victorlipman/2017/11/06/3-steps-companies-can-take-to-prevent-sexual-harassment/#3f956c5c38a9.

[87] Danielle Paquette, *More Companies Are Buying Insurance to Cover Executives Who Sexually Harass Employees*, Chi. Trib. (Nov. 3, 2017), http://www.chicagotribune.com/business/ct-biz-companies-sexual-harrassment-insurance-20171103-story.html.

[88] Katerina Ang, *A Proposed New York Law Would Ban the Use of NDAs to Silence Harassment Survivors*, Moneyish (Oct. 27, 2017), https://moneyish.com/ish/a-proposed-new-york-law-would-ban-the-use-of-ndas-to-silence-harassment-survivors/.

[89] Melanie Mason, *California Lawmaker Wants to Ban Secret Settlements In Sexual Harassment Cases After Weinstein Scandal*, L.A. Times (Oct. 19, 2017), http://www.latimes.com/politics/essential/la-pol-ca-essential-politics-updates-california-lawmaker-wants-to-ban-secret-1508428198-htmlstory.html.

[90] Lizette Chapman, *California Looks to Outlaw Sexual Harassment by VCs*, Bloomberg (Aug, 28, 2017), https://www.bloomberg.com/news/articles/2017-08-28/california-looks-to-outlaw-sexual-harassment-by-vcs.

[91] Steff Yotka, *A Proposed New York Amendment Seeks to Protect Models from Sexual Harassment*, Variety (Oct. 23, 2017), https://www.vogue.com/article/new-law-could-protect-models-against-sexual-harassment.

[92] *See In re Caremark Derivative Litig.*, 698 A.2d 959 (Del. Ch. 1996); Daniel Miller, Ryan Faughnder, and David Ng, *The Legal Fallout From the Mushrooming Weinstein Sex Scandal Could Be Big*, L.A. Times (Oct. 10, 2017), http://www.latimes.com/business/hollywood/la-fi-ct-weinstein-legal-fallout-20171010-story.html.

[93] The studios sued included 20th Century Fox Film Corp., Paramount Pictures Corp., Universal City Studios, LLC, Sony Pictures Entertainment, Inc., Warner Bros. Entertainment, Inc. and Metro-Goldwyn-Mayer Studios Inc. Plaintiffs settled the suits with all studios other than MGM and Warner Bros.

[94] Dominic Patten, *Universal, Paramount, Fox & Sony Slapped With Class Action Suits Over Home Video Royalties*, Deadline (Jan. 16, 2013), http://deadline.com/2013/01/universal-paramount-fox-sony-slapped-with-royalties-class-action-suits-405929/; Dominic Patten, *Hal Needham Hits Warner Bros With Class Action Suit Over 'Hooper' Home Video Royalties*, Deadline (Jan. 29, 2013), http://deadline.com/2013/01/hal-needham-hits-warner-bros-with-class-action-suit-over-hooper-home-video-royalties-416329/; *MGM Faces Class-Action Lawsuit Over Home Video Revenue*, Deadline (Mar. 21, 2014), http://deadline.com/2014/03/mgm-home-video-lawsuit-702923/.

[95] Bonnie Eslinger, *Stallone Sues 'Greedy' Warner Bros. Over Movie Revenue*, Law360 (Apr. 12, 2017), https://www.law360.com/articles/912991/stallone-sues-greedy-warner-bros-over-movie-revenue.

[96] Bonnie Eslinger, *Warner Bros. Ordered to Give Stallone Film Profit Docs*, Law360 (Sept. 27, 2017), https://www.law360.com/media/articles/968662/warner-bros-ordered-to-give-stallone-film-profit-docs.

[97] Eriq Gardner, *A 'Supernatural' Profits Fight, and the AT&T-TW Merger Issue That Few Are Discussing*, The Hollywood Rep. (Nov. 17, 2017), https://www.hollywoodreporter.com/thr-esq/a-supernatural-profits-fight-at-t-tw-merger-issue-few-are-discussing-1059396.

[98] *Id.*

[99] *Id.*

[100] *Century of Progress Productions v. Vivendi S.A.*, No. 16-cv-7733-DMG (ASx) (C.D. Cal. Sept. 28, 2017).

[101] *Id.* at 1.

[102] Eriq Gardner, *'Spinal Tap' Lawsuit: Judge Tosses Harry Shearer, Fraud Claim From Profits Case*, The Hollywood Rep. (Sept. 29, 2017), https://www.hollywoodreporter.com/thr-esq/spinal-tap-lawsuit-judge-tosses-harry-shearer-fraud-claim-profits-case-1044332.

[103] *Vivendi*, No. 16-cv-7733-DMG (ASx), at 8-9.

[104] *Id.*

[105] Complaint at 5–25, *Jones v. MJJ Productions, Inc.*, No. BC52803 (Cal. Super. Ct. Oct. 23, 2013).

[106] *Id.*

[107] Bonnie Eslinger, *Quincy Jones Wins $9.4M from Michael Jackson Co. at Trial*, Law360 (July 26, 2017), https://www.law360.com/articles/947858/quincy-jones-wins-9-4m-from-michael-jackson-co-at-trial.

[108] Order Denying JNOV, *Jones v. MJJ Productions, Inc.*, No. BC52803 (Cal. Super. Ct. Sept. 22, 2017).

[109] Reply Br. Regarding Equitable Defenses at 2–3, *Jones v. MJJ Productions, Inc.*, No. BC52803 (Cal. Super. Ct. Nov. 16, 2017).

[110] 17 U.S.C. § 512(i)(1)(A).

[111] *See EMI Christian Music Grp., Inc. v. MP3tunes, LLC*, 844 F.3d 79, 85 (2d Cir. 2016).

[112] *See id.* at 90.

[113] *Id.*

[114] *See BMG Rights Mgmt. (US) LLC v. Cox Commc'ns, Inc. et al.*, 149 F. Supp. 3d 634, 662 (E.D. Va. 2015).

[115] *Id.* at 661.

[116] *Capitol Records, LLC v. Vimeo, LLC*, 826 F.3d 78 (2d Cir. 2016).

[117] *Id.* at 86–87.

[118] *Id.* at 87.

[119] *Id.* at 87–89.

[120] *Id.* at 89–90.

[121] *Id.* at 90.

[122] *Id.* at 90.

[123] *Capitol Records, LLC v. Vimeo, LLC*, 137 S. Ct. 1374 (2017).

[124] *Perfect 10, Inc. v. Giganews, Inc.*, 847 F.3d 657, 663 (9th Cir. 2017) (quoting *Ellison v. Robertson*, 357 F.3d 1072, 1074, n.1 (9th Cir. 2004)).

[125] *See id.*

[126] *See id.*

[127] *See id.* at 668, 669-70.

[128] *Id.* at 667 (citing *Aereo*, 134 S.Ct. at 2507).

[129] *See* Perfect 10 v. Giganews et al., No.17-320, 2017 WL 3782333, at *1 (Dec. 4, 2017).

[130] *See BWP Media USA, Inc. v. T&S Software Assocs, Inc.*, 852 F.3d 436, 443-44 (5th Cir. 2017).

[131] *See id.* at 442.

[132] *Id.*

[133] *Id.*

[134] *Signature Mgmt. Team, LLC v. John Doe*, No. 16-2188 (6th Cir. Nov. 28, 2017) (slip op) (emphasis added).

[135] *Id.* at 6.

[136] *Id.* at 2.

[137] *Id.*

[138] *Id.* at 5.

[139] *Id.*

[140] *Id.*

[141] *Id.* at 6.

[142] *Id.* at 7, 9.

[143] *Id.* at 13.

[144] *See* Todd Spangler, *Entertainment Giants Forge New Alliance to Fight Piracy, Sue Offenders*, Variety (June 13, 2017), http://variety.com/2017/digital/news/entertainment-studios-piracy-lawsuits-1202463987/.

[145] *See* Complaint at 1, *Universal City Studios Productions LLLP et al. v. TickBox TV LLC*, No. 2:17-cv-07496 (C.D. Cal. Oct. 13, 2017).

[146] *See* Ryan Faughnder, *How an Atlanta Power Couple's Business Has Heightened Hollywood and Silicon Valley's Piracy Anxieties*, L.A. Times (Nov. 17, 2017), http://www.latimes.com/business/hollywood/la-fi-ct-kodi-tickbox-studios-20171117-htmlstory.html.

[147] *See Tickbox TV LLC* Complaint, at 16, 18.

[148] *See* Faughnder, *supra* note 147.

[149] *Id.*

[150] *Id.*

[151] Order Granting Plaintiffs' Motion for Preliminary Injunction, *Disney Enterprises, Inc. et al v. VidAngel Inc.*, Case No. 2:16-cv-04109 – AB (PLAx) at *1-*2 (C.D. Cal. Dec. 12, 2016).

[152] *Id.* at *7.

[153] Bill Donahue, *9th Circ. Rejects VidAngel's Emergency Stay Bid*, Law360 (Jan. 5, 2017), https://www.law360.com/articles/877896.

[154] Bill Donahue, *Hollywood Studios Beat Streaming Site At 9th Circ.*, Law360 (Aug. 24, 2017), https://www.law360.com/articles/957408.

[155] Opinion, *Disney Enterprises, Inc. v. VidAngel, Inc.*, No. 16-56843 (9th Cir. Aug. 24, 2017).

[156] *Id.* at 19 ("If the mere purchase of an authorized copy alone precluded infringement liability under the FMA, the statute would severely erode the commercial value of the public performance right in the digital context, permitting, for example, unlicensed streams which filter out only a movie's credits.").

[157] *Id.*

[158] *Id.* at 20-21.

[159] *Id.* at 22.

[160] *Id.* at 23.

[161] *Id.* at 22.

[162] *Id.* at 26-31.

[163] Dave Simpson, *VidAngel Files for Ch. 11 After 9th Circ. Copyright Loss*, Law360 (Oct. 18, 2017), https://www.law360.com/articles/976054.

[164] Memorandum and Opinion, *Graham v. Prince*, No. 15-cv-10160(SHS) (S.D.N.Y. July 18, 2017) at *2.

[165] *Id.*

[166] *Id.* at *13 (referencing *Cariou v. Prince*, 714 F.3d 694 (2d Cir. 2013)).

[167] *Id.* at * 16 ("This is not a case in which the 'open-ended and context-sensitive' fair use inquiry can be properly applied at the motion to dismiss stage.").

[168] *Id.* at *16-*23.

[169] Opinion and Order, *Penguin Random House LLC v. Colting*, No. 17-cv-386 (JSR) (S.D.N.Y. Sept. 8, 2017).

[170] *Id.* at *22.

[171] *Id.* at *24.

[172] *Id.* at *23.

[173] *Id.* at *24 ("Here, defendants' story summaries do not recount plaintiffs' Novels in the service of literary analysis, they provide literary analysis in the service of trying to make the Guides qualify for the fair use exception").

[174] Bill Donahue, *'Monkey Selfie' Copyright Suit Ends In Settlement*, Law360 (Sept. 11, 2017), https://www.law360.com/media/articles/962819/-monkey-selfie-copyright-suit-ends-in-settlement.

[175] *Id.*; Order Granting Motions to Dismiss, *Naruto v. Slater*, No. 15-cv-04324-WHO (N.D. Cal. Jan. 28, 2016).

[176] Order Granting Motions to Dismiss, *Naruto v. Slater*, No. 15-cv-04324-WHO (N.D. Cal. Jan. 28, 2016).

[177] *Id.* ("[The plaintiffs] argue that this result is 'antithetical' to the 'tremendous public interest in animal art.' [] Perhaps. But that is an argument that should be made to Congress and the president, not to me.").

[178] Donahue, *supra* note 175.

[179] Jimmy Hoover, *Music Group's Copyright Suit Against Ford, GM On The Rocks*, Law360 (Oct. 24, 2017), https://www.law360.com/articles/977666/music-group-s-copyright-suit-against-ford-gm-on-the-rocks.

[180] Complaint, *Alliance of Artists and Recording Cos. Inc. v. General Motors Co. et al.*, No. 1:14-cv-01271 (D.C. July 25, 2014) at *2.

[181] *Id.* at *3, *5.

[182] *Id.* at *7.

[183] *See* Memorandum of Points and Authorities in Support of Defendant General Motors LLC's Phase 1(A) Motion for Partial Summary Judgment at *9, *Alliance of Artists and Recording Cos. Inc. v. General Motors Co. et al.*, No. 1:14-cv-01271 (D.C. Dec. 6, 2017).

[184] *See* Plaintiff Alliance of Artists and Recording Companies, Inc.'s Memorandum in Support of Its Motion for Partial Summary Judgment As To Phase 1(A) at *4-*7, *Alliance of Artists and Recording Cos. Inc. v. General Motors Co. et al.*, No. 1:14-cv-01271 (D.C. Dec. 6, 2017).

[185] *See* Hoover, *supra* note 180.

[186] *See* Complaint, *Rearden LLC, et al. v. The Walt Disney Co., et al.*, No. 17-cv-04006, 2017 WL 3015899 (N.D. Cal. July 17, 2017). Rearden subsequently made similar claims against Twentieth Century Fox Film, Paramount Pictures, and Crystal Dynamics Inc.

[187] *See* Motion to Dismiss, *Rearden LLC, et al. v. The Walt Disney Co., et al.*, No. 17-cv-04006 (N.D. Cal. Sept. 15, 2017).

[188] *See id.* at *18.

[189] *Id.* at *18-21.

[190] *See Twentieth Century Fox Television, et al. v. Empire Distrib., Inc.*, 875 F.3d 1192, 1200 (9th Cir. 2017).

[191] *See Rogers v. Grimaldi*, 875 F.2d 994 (2d Cir. 1989).

[192] *See Twentieth Century Fox Television, et al. v. Empire Distrib., Inc.*, 161 F. Supp. 3d 902 (C.D. Cal. 2016).

[193] *See Mattel, Inc. v. MCA Records, Inc.*, 296 F.3d 894, 902 (9th Cir. 2002).

[194] *Empire Distrib., Inc.*, 875 F.3d at 1199.

[195] *See Dr. Seuss Enterprises, L.P. v. ComicMix LLC, et al.*, No. 16-CV-2779-JLS, 2017 WL 6059130 (S.D. Cal. Dec. 7, 2017).

[196] *Id.*

[197] *See In re Brunetti*, No. 2015-1109, 2017 WL 6391161 (Fed. Cir. Dec. 15, 2017).

[198] *See id.* at *2.

[199] *See id.*

[200] *Id.* at *4.

[201] *Id.*

[202] *Id.* at *6.

[203] *See id.* at *10.

[204] *Id.*

[205] *Id.* at *12.

[206] *Id.* at *17.

[207] Timothy Mclaughlin, *ABC TV settles with beef product maker in 'pink slime' defamation case*, Reuters (June 28, 2017), https://www.reuters.com/article/us-abc-pinkslime/abc-tv-settles-with-beef-product-maker-in-pink-slime-defamation-case-idUSKBN19J1W9; Christine Hauser, *ABC's 'Pink Slime' Report Tied to $177 Million in Settlement Costs*, N.Y. Times (Aug. 10, 2017), https://www.nytimes.com/2017/08/10/business/pink-slime-disney-abc.html.

[208] Mclaughlin, *supra* note 208.

[209] *Id.*

[210] *Id.*

[211] *See* Ltr. Requesting Pre-Motion Conf. at *1, *Greene v. Paramount Pictures Corp.*, No. 2:14-cv-01044 (E.D.N.Y. Oct. 13, 2017).

[212] *See id.*

[213] *See id.* at *3.

[214] *See id.*

[215] *Id.* at *2.

[216] *See* Order, *Greene v. Paramount Pictures Corp.*, No. 2:14-cv-01044 (E.D.N.Y. Dec. 18, 2017).

[217] *See* Complaint, *Williams v. Advanceable Techs., LLC*, No. 1:17-cv-23942-KMW, 2017 WL 4876233 (S.D. Fla. Oct. 27, 2017).

[218] *See id.*

[219] *See id.*

[220] *See id.*

[221] *Id.* ¶¶ 2, 27.

[222] *Id.* ¶¶ 67-84.

[223] Order, *Williams v. Advanceable Techs., LLC*, No. 1:17-cv-23942-KMW (S.D. Fla. Nov. 29, 2017).

[224] *De La Huerta v. Lions Gate Entm't Corp.*, No. B271844, 2017 WL 4676234, at *1 (Cal. Ct. App. Oct. 18, 2017), review filed (Nov. 27, 2017).

[225] *Id.*

[226] *Id.*

[227] *Id.* at *4.

[228] *Id.* at *2.

[229] *Id.* at *2-*3.

[230] *Id.* at *3.

[231] *Id.* at *6.

[232] *Id.* at *7-*9.

[233] Determination of Royalty Rates and Terms for Making and Distributing Phonorecords, 82 Fed. Reg. 58, 15297 (Mar. 28, 2017) (to be codified at 37 C.F.R. pt. 385).

[234] *Historical Royalty Rates*, Harry Fox Agency, https://secure.harryfox.com/public/HistoricalRoyaltyRates.jsp.

[235] Ed Christman, *U.S. On-Demand Streams Passed 618 Billion in 2017, Outpacing Sales Declines Again*, Billboard (Jan. 5, 2018), https://www.billboard.com/articles/business/8092882/on-demand-streams-618-billion-2017-outpacing-sales-declines.

[236] *Id.*

[237] Eriq Gardner, *A Legal Campaign Against Spotify Intensifies Ahead of the Company's Plan to Go Public*, The Hollywood Rep. (Sep. 13, 2017), https://www.hollywoodreporter.com/thr-esq/a-legal-campaign-spotify-intensifies-companys-plan-go-public-1038440.

[238] *Ferrick v. Spotify USA Inc.*, No. 1:16-cv-08412-AJN (S.D.N.Y.), ECF 208.

[239] Jack Stanley, *Spotify Has Been hit With Another Copyright Infringement Lawsuit*, https://hypebeast.com/2017/7/spotify-copright-infringment-frankie-valli-lawsuit.

[240] Memorandum at 6–7, *Gaudio v. Spotify USA Inc.*, No. 3:17-cv-01052 (M.D. Tenn. Aug. 30, 2017); Memorandum at 6–7, *Bluewater Music Services Corp. v. Spotify USA Inc.*, No. 3:17-cv-01051 (M.D. Tenn. Aug. 30, 2017).

[241] Complaint ¶¶ 9–25, *Wixen Music Publishing Inc. v. Spotify USA Inc.*, No. 2:17-cv-09288-GW-GJS (C.D. Cal. Dec. 29, 2017).

[242] Motion, *Ferrick v. Spotify USA Inc.*, No. 1:16-cv-08412-AJN (S.D.N.Y. Dec. 29, 2017).

[243] Andrew Flanagan, *Sweeping New Music Law Expedites A $1.6 Billion Lawsuit Against Spotify*, NPR Music (Jan. 3, 2018), https://www.npr.org/sections/therecord/2018/01/03/575368674/sweeping-new-music-law-expedites-a-1-6-billion-lawsuit-against-spotify.

[244] *Id.*

[245] Jem Aswad, *Universal's Move to Nullify $31 Million Prince Deal Approved by Judge*, Variety (July 13, 2017), http://variety.com/2017/music/news/universals-move-to-nullify-31-million-prince-deal-approved-by-judge-1202495369/.

[246] *Id.*

[247] *Id.* ¶¶ 31–34.

[248] Mot. to Dismiss at 1, *Hall v. Swift*, No. 17-cv-6882 (C.D. Cal. Jan. 3, 2018).

[249] *Braham v. Sony/ATV Music Publ'g*, No. 215-cv-8422, 2015 WL 7074571 (C.D. Cal. Nov. 10, 2015).

[250] Dave Brooks, *Ticketmaster Loses Motion for Summary Judgment in Songkick Case*, Billboard (Oct. 18, 2017), https://www.billboard.com/articles/business/8005831/ticketmaster-songkick-case-motion-summary-judgement.

[251] Complaint ¶¶ 1–19, *Complete Entm't Res. LLC v. Live Nation Entm't, Inc.*, No. 15-cv-9814 (C.D. Cal. December 22, 2015).

[252] *Id.*

[253] Order at 3, *Complete Entm't Res. LLC v. Live Nation Entm't, Inc.*, No. 15-cv-9814 (C.D. Cal. October 16, 2017).

[254] *Id.*

[255] Dave Brooks, *Ticketmaster Settles Songkick Lawsuit for $110M*, Billboard (Jan. 12, 2018), https://www.billboard.com/articles/news/8094201/ticketmaster-songkick-settle-lawsuit-110-million.

[256] *U.S. v. Broadcast Music, Inc.*, No. 16-cv-3830 (2d Cir. Dec. 19, 2017).

[257] Opinion and Declaratory Judgment, *U.S. v. Broadcast Music, Inc.*, No. 64-cv-3787 (S.D.N.Y. Sept. 16, 2016).

[258] *U.S. v. Broadcast Music, Inc.*, No. 16-cv-3830, slip op. at 4 (2d Cir. Dec. 19, 2017).

[259] *Id.* at 6–7.

[260] Diane Bartz, *U.S. Justice Department loses music licensing appeal*, Reuters (Dec. 19, 2017), https://in.reuters.com/article/usa-music-licensing-doj/u-s-justice-department-loses-music-licensing-appeal-idINKBN1ED2S5.

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