GIBSON DUNN

August 8, 2018

MEDIA, ENTERTAINMENT AND TECHNOLOGY GROUP - 2018 MID-YEAR UPDATE

To Our Clients and Friends:

For our latest semi-annual update, Gibson Dunn's Media, Entertainment and Technology practice group is taking stock of another active period of deals, regulatory developments, and litigation. The first half of 2018 has been marked by landmark M&A, esports growth, precedent-setting copyright cases, an end to the "Blurred Lines" saga, and some clarity from California and New York courts in anticipated right of publicity cases. And we have seen courts wrestling with twenty-first century legal issues raised by terms like geoblocking, top-level domains, Simpsonizing, and embedded Tweets. Here, then, is our latest round-up to bring you current on the deals and decisions that will hold lessons for the months and years to come.

I. Transaction Overview

A. M&A

1. AT&T and Time Warner Prevail in Antitrust Suit and Complete Merger

On June 12, 2018, in a 172-page decision following a six-week trial, U.S. District Judge Richard J. Leon denied the government's request to enjoin the proposed merger between AT&T and Time Warner, and the companies completed the merger two days later, bringing together the content produced by Warner Bros., HBO and Turner with AT&T's mobile, broadband, video and other communications services.[1] "Our merger brings together the elements to fulfill our vision for the future of media and entertainment," AT&T said in a press release.[2] On July 12, the government filed a notice of appeal.[3] (Disclosure: Gibson Dunn represents AT&T and DirecTV in the case.)

2. Comcast Ends Pursuit of 21st Century Fox, Clearing Path for Disney

The back-and-forth bidding between The Walt Disney Company and Comcast for Twenty-First Century Fox, Inc. appears to have ended, as on July 19, 2018, Comcast announced it would not pursue the acquisition any further, paving the way for Disney to close the deal.[4] Previously, on June 20, 2018, Disney and Fox announced that they had entered into an amended and restated merger agreement, providing for Disney's acquisition of Fox's film and television businesses for more than $71.3 billion in cash and stock, surpassing Disney's original offer of $52.4 billion in Disney stock and made one week after Comcast's unsolicited offer of approximately $65 billion in cash.[5] Under the amended and restated agreement, Fox's shareholders can elect to receive their consideration in the form of cash or Disney stock, subject to 50/50 proration.[6] On June 27, 2018, Disney announced that the Antitrust Division of the Department of Justice had entered into a consent decree with Disney and Fox, clearing

the way for the pending acquisition to close.[7] The consent decree requires the sale of the Fox Sports Regional Networks within 90 days of closing the Fox acquisition, subject to possible extension by the DOJ, and is subject to court approval.[8] On July 27, 2018, Disney's and Fox's shareholders voted to approve the acquisition.[9]

3. Suitors Continue to Vie for Sky

In abandoning its bid for Disney, Comcast turned its focus to acquiring Sky PLC, but Disney has its sights set on the European broadcaster as well.[10] At the moment, Comcast has the higher offer, currently valued at $34 billion, 5% higher than the latest bid from Fox, which owns 39% of Sky (a stake that will be sold to Disney as part of the Fox acquisition). Disney may then decide to pursue the remainder of Sky by topping Comcast's bid or may look to sell Fox's stake.[11]

These latest developments follow Fox's year-long battle with U.K. regulators regarding its proposed acquisition of Sky. The U.K. culture secretary, Matt Hancock, announced that the most recent terms offered by Fox are likely sufficient to allay concerns over media plurality.[12] Fox's proposed acquisition, which we previously reported has been the subject of British antitrust regulatory scrutiny, caused the U.K.'s Office of Communications to raise red flags, which led to the U.K.'s Competition and Markets Authority to oppose the transaction, noting the proposal would give Rupert Murdoch's family too much control over U.K. media.[13] Mr. Hancock noted that a sale of Sky News, the news outlet controlled by Sky PLC, to a suitable third party such as Disney (in connection with Disney's proposal to acquire Twenty-First Century Fox) could alleviate regulatory concerns associated with the deal. Comcast's bid for Sky was also given the green light by U.K. regulators.[14]

4. CBS Fights for Control in Midst of Viacom Merger Negotiations

Following months during which Shari Redstone, the controlling shareholder of both CBS and Viacom, actively participated in discussions between the companies regarding a potential merger,[15] tension regarding control came to a head on May 14, 2018 when CBS's board of directors, led by CBS Chairman-CEO Leslie Moonves, sued to dilute Redstone's preferred shares and those of her holding company National Amusements to prevent her from replacing board members to complete the deal.[16] Redstone and National Amusements returned suit on May 29, 2018, alleging that CBS's board was overstepping its authority by attempting to dilute her preferred shares.[17] Two days later, a group of CBS's non-voting Class B shareholders also filed suit against Redstone and National Amusements, claiming Redstone had improperly amended the bylaws to require a 90% board approval for special dividends that would give Class B stockholders the right to vote on the potential merger.[18]

5. The Weinstein Company's Bankruptcy Sale

In the wake of the sexual assault accusations against Harvey Weinstein, his eponymous production company, The Weinstein Company, filed for bankruptcy in March 2018, listing between $500 million and $1 billion in assets and the same amount in total liabilities. Lantern Capital purchased the production company in the bankruptcy sale for $289 million.[19] On July 16, 2018, The Yucaipa Companies brought suit against Lantern Capital (its former partner in a bid to buy The Weinstein Company), alleging that Lantern failed to reimburse Yucaipa for costs related to the sale and a related purchase fee.[20]

B. SVOD Update

1. Netflix, Hulu, and Amazon Each Ink High-Profile Creative Deals

Netflix has continued to balance both its retention of creative talent and attraction of new talent. The company closed out December 2017 by entering into a four-year, seven-figure overall deal with *Stranger Things* producer Shawn Levy and his production company 21 Lapps Entertainment.[21] And on February 13, 2018, Netflix announced a five-year overall deal with Ryan Murphy, moving the showrunner and producer from his longtime home of Twentieth Century Fox TV.[22] Under the deal, valued between $250 million and $300 million, Murphy will produce new series and films exclusively for Netflix.[23]

Less than a week after releasing the second season of its critically acclaimed original series *The Handmaid's Tale*, Hulu announced an overall deal with its showrunner Bruce Miller, on April 30, 2018.[24] Under the deal, made in conjunction with *The Handmaid's Tale* producer MGM Television, Miller will create and develop new projects for both Hulu and MGM Television.[25]

Amazon has also continued to pursue lucrative creative deals, and on June 5, 2018, it announced that it signed a first-look deal with Jordan Peele, writer and director of the film *Get Out*, and his production company Monkeypaw Productions.[26]

2. WndrCo Raises $1 Billion for NewTV

WndrCo announced on August 7, 2018, that it had closed a $1 billion funding round for a project with the working title "NewTV", a mobile-first media platform, led by Meg Whitman and Jeffrey Katzenberg.[27] The initial raise included investments by all of the major Hollywood studios, a number of independent television studios, and major technology companies. The round was led by Madrone Capital. Incubated at WndrCo, NewTV aims to build a user-friendly mobile platform to deliver short-form premium content, allowing users to make the most of every moment of their day. (Disclosure: Gibson Dunn represents WndrCo and NewTV.)

3. Streaming Industry Expands Through Strategic Partnerships

Through the first half of 2018, Netflix has continued to push for partnerships with U.S. cable companies, entering into a partnership with Altice USA, on January 31, 2018, under which Netflix is made available to Altice customers directly through Altice One,[28] and expanding its existing partnership with Comcast to provide Comcast the ability to include a Netflix subscription in new and existing Xfinity packages.[29]

In early 2018, YouTube TV entered into strategic partnerships with several sports leagues in an effort to expand its reach, including with MLB and the NBA to become the presenting sponsor of the 2018 World Series and the 2018 NBA Finals, respectively.[30] Despite experiencing a service outage during a World Cup semifinal match,[31] YouTube TV stands to see further expansion in the sports league space throughout the remainder of 2018.

On January 5, 2018, CBS became the first Amazon partner to offer a live stream of local broadcast TV by entering into a partnership that allows Amazon Prime U.S. members to access CBS All-Access as an add-on channel.[32] Amazon has increasingly stepped into the role of distributor and portal for companies with over-the-top streaming channels such as CBS, and Amazon's Prime Video Channels program also has add-ons for programmers such as HBO, Showtime, and Starz.[33]

4. Chinese Streaming Companies Go Public

Often called the "Netflix of China," iQiyi Inc. in mid-March 2018 launched an estimated $2.3 billion initial public offering.[34] iQiyi intends to use the IPO proceeds to extend its reach into China's online entertainment industry and continue to provide "blockbuster original content" through its collaborations with Hollywood and Netflix.[35]

Not long after, Bilibili Inc., a Chinese online platform used to primarily stream Japanese animation, launched its own IPO, priced at $438 million.[36] In its registration statement, Bilibili noted that it "believe[s] China will become the world's largest online entertainment market in the future and [its] brand recognition and market leadership among the young generations in China position[s it] well to capture the significant opportunities."[37]

C. China Partnerships

1. Blumhouse and Tang Media Partners Partner to Bring Horror Films to China

In June 2018, it was announced that Blumhouse Productions, known for its horror movies, partnered with Tang Media Partners, the Shanghai and Los Angeles-based entertainment company, to co-develop and co-finance a slate of Chinese language horror and thriller films.[38] Blumhouse Productions only recently had released its first movie in China in February with *Happy Death Day*.[39] One possible motivation for this partnership is the booming box office in China, which surpassed the U.S. in the first three months of this year.[40] In the first quarter of 2018, China's box office took in $3.17 billion in revenues, compared to $2.85 billion in the United States.[41] As the Chinese box office continues to grow, it remains an attractive and unique opportunity for Hollywood and the U.S. entertainment industry.

2. The Wanda Group Sees New Investments and Consolidation

On January 29, 2018, Wanda revealed that Tencent Holdings entered into an agreement to purchase $5.4 billion worth of shares in Dalian Wanda Commercial Management, equaling a 14% interest in the company.[42] Days later on February 5, 2018, it was announced that Alibaba Group Holding Ltd. and Beijing Cultural Investment Holdings, a Chinese government-backed company, agreed to purchase a $1.2 billion stake in Wanda Film Holding Co., The Wanda Group's domestic film and movie division, which includes the group's Chinese movie theater.[43] As of the transaction, Alibaba became the second biggest shareholder in Wanda Film Holding Co., with a 7.66% holding.[44] These investments by China's largest and well-known tech companies came at a time when The Wanda Group was under scrutiny by the Chinese government for its overseas investments and was in the process of selling off its overseas real estate assets to reduce its debt.[45]

Then, on June 25, 2018, Wanda Film Holding Co. unveiled plans to acquire a 96.8% stake in Wanda Media (the group's content-production business), in order to strengthen and consolidate the business's film and entertainment divisions beyond its cinema division (Wanda Film), with a price tag of $1.78 billion to be paid via cash and equity.[46] The proposed deal would increase content production and afford The Wanda Group the opportunity to produce, distribute and exhibit its content under one roof.[47] AMC Entertainment and Legendary Entertainment—U.S. companies acquired by Wanda in 2016—are not included in the proposed restructuring.[48] The deal is pending authorization by the Shenzhen Stock Exchange.[49]

D. Esports

1. Fortnite Brings Esports to Center Stage

Fortnite, developed and published by Epic Games, has quickly become a phenomenon, and in doing so has helped propel domestic esports—the fast-growing industry of competitive spectator video-gaming—into the mainstream quicker than any game in recent memory. A testament to the game's widespread adoption, a Fortnite Celebrity Pro-Am charity tournament was recently held at the Banc of California Stadium in Los Angeles during the annual E3 Expo. The tournament played host to 50 celebrities and 50 professional gamers competing for a $3 million cash prize pool.[50] Aside from the Pro-Am tournament, celebrities such as Drake and Travis Scott have taken part in livestreamed gameplay with professional gamers, including the famous Tyler "Ninja" Blevins, with some streams attracting more than 500,000 simultaneous live viewers.[51]

Like other game developers, including League of Legends developer Riot Games and Overwatch developer Activision Blizzard, Epic Games has announced its first venture into organized esports via the Fortnite World Cup, which will take place in 2019 with a $100 million total cash purse for winners.[52] However, unlike Riot's and Activision Blizzard's esports leagues, which require that teams buy into the league (which generally restricts admission to franchises), Epic has opted for strictly merit-based qualifiers with no spots reserved for organized teams or franchises.[53]

Fortnite's success and the potential for its esports league have also garnered the interest of investors. Tencent, which currently owns 40% of Epic Games, has doubled down on its investment by contributing an additional ¥100 million, half of which will be used to support game development and video content creators, and the other half being used to bring Fortnite to China and develop it as a Chinese esport.[54]

2. ICM Inks Joint Venture with Esports Agency Evolved

ICM Partners and esports talent agency Evolved have announced a joint venture that will give Evolved's roster of professional gamers, live streamers and internet personalities access to ICM's full-service offerings.[55] The joint venture will be supervised by ICM's Bennett Sherman and Peter Trinh, reporting directly to Managing Director Chris Silbermann, who sees esports as a growth opportunity for ICM Partners.[56]

3. High School Esports Is on Its Way

Los Angeles-based startup PlayVS recently closed a $15 million Series A funding round led by New Enterprise Associates with participation from the San Francisco 49ers, Science, CrossCut Ventures, Coatue Management, Cross Culture Ventures, rapper Nas, Dollar Shave Club founder Michael Dubin, and Twitch Cofounder Kevin Lin, among others.[57] PlayVS has worked closely with the NFHS, the high school equivalent of the NCAA, to develop an infrastructure for esports competition at the high school level.[58] PlayVS will be launching its first season in October 2018, bringing esports play to 5,000 high schools.[59]

II. Regulatory Updates

A. FCC Repeals "Net Neutrality" Rules, Congressional Efforts Stall, and Attention Turns to Litigation and Statehouses

In June 2018, the Federal Communications Commission ("FCC") formally repealed rules concerning the regulation of internet service providers ("ISPs") (popularly known as "net neutrality") and no longer considers broadband service a "utility" under Title II of the Communications Act.[60] The FCC erased rules mandating that ISPs treat all web traffic equally and overturned prohibitions on blocking, throttling, and paid prioritization. The agency also included language meant to prevent states from enacting their own consumer protection laws concerning ISPs. Weeks prior to this repeal, the Senate approved a resolution with a 52-47 vote to nullify the FCC's rollback, but the effort stalled in the House of Representatives.[61]

Months before the repeal was enacted, 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.[62] These cases were assigned to the Ninth Circuit via a judicial lottery. In March 2018, the Ninth Circuit granted petitioners' unopposed request to move the suits to the D.C. Circuit given the court's experience in presiding over net neutrality cases.[63] The first briefs are due on August 20, 2018, and we anticipate that this litigation will be closely watched over the next year.

In addition, a number of states have seen bills introduced (California) or enacted (Washington) to provide net neutrality-type protections.[64] Such bills are sure to be the subject of upcoming challenges and litigation.

B. The European Union's General Data Protection Regulation Goes into Effect

The European Union ("EU") enacted the General Data Protection Regulation ("GDPR") in 2016 to unify the patchwork of data privacy laws across all EU member countries into one regulation.[65] The GDPR strengthens the protection of personal data by making clear that location data and online identifiers, such as IP addresses, are considered personal data. European authorities already had taken a more stringent view than U.S. regulators as to what constitutes personally identifiable information subject to protection, including emails and contact information. The GDPR also prohibits the use of lengthy terms and conditions seeking consent; instead, any request for consent must be presented clearly and concisely, and without ambiguity of meaning. The GDPR further provides individuals with the right to, in certain

circumstances, require that a business erase personal data about them, obtain a restriction on the processing of personal data, and receive a copy of the personal data provided to the business. It permits individuals to file a class-action style complaint for any breach of personal data.

The regulation went into effect on May 25, 2018, and will be applicable to every citizen of the EU and any business entity that transacts with them, regardless of the location of business. Penalties for violating the GDPR are severe. Liable parties could be fined up to four percent of annual global turnover or 20 million Euros, whichever is greater. While many businesses who transact in the EU have updated their privacy policies in light of the GDPR, we strongly urge those who have not done so to review their policies and update them to reflect the new regulation. One immediate consequence of the GDPR has been that ICANN, the not-for-profit company that manages domain names, has already begun removing from its public "WhoIs" database the contact information for domain name registrants in the EU.[66] We are also watching to see whether privacy groups file lawsuits on behalf of groups of individuals seeking to enforce provisions of the GDPR.

C. Hollywood Dealmakers Can No Longer Inquire About Salary History

Effective January 1, 2018, California joined a growing number of states, including New York, that restrict an employer's inquiries into an applicant's salary history. Under California Labor Code Section 432.3, employers in the state will be prohibited from asking about an applicant's prior compensation and benefits. The law was enacted to help remedy the gender pay gap.

The new law is likely to have a significant impact on how deals are made in the entertainment industry. Going forward, when studios negotiate salaries for talent with agents, they will not be allowed to ask agents for recent quotes unless the talent provides written consent.[67] If consent is provided, agents can volunteer salary history, but studio executives are prohibited from asking for it or using other methods, like calling business affairs executives at previous places of employment to verify it. Should an employer violate this statute, the penalties could be more severe than the $250,000 fine under comparable New York law. In California, applicants will be able to file a lawsuit alleging damages, and remedies may include California's Private Attorney General Act.[68]

III. Recent Litigation Highlights

A. Antitrust Litigation

1. Ozzy Osbourne Challenging AEG over Tying Arrangement Regarding Los Angeles and London Venues

On March 21, 2018, entertainer Ozzy Osbourne filed a federal antitrust suit in Los Angeles against live entertainment promoter AEG and its subsidiaries and affiliates.[69] The putative class action alleges that AEG is violating the Sherman Act by enforcing an anticompetitive tying arrangement purportedly barring musicians from playing the O2 Arena—"London's most essential large concert venue"—unless they agree to play Staples Center on the Los Angeles leg of their tour.[70] According to the complaint, AEG—which owns the O2 Arena and Staples Center—effectively forces artists playing the O2 to forego playing certain venues in Los Angeles, like the Forum.[71] Osbourne claims this "Staples Center

Commitment" deprives artists like Osbourne from "enjoy[ing] the benefits of competition between Staples and the Forum," which recently underwent a $100 million renovation.[72] Osbourne seeks an injunction to prohibit AEG from imposing the alleged "illegal tying practice" on him and other musicians.[73]

In a recently filed motion to dismiss, AEG argues the lawsuit "is a poorly-disguised attempt by Ozzy's promoter, Live Nation (represented by the same lawyers), to pressure Defendants to abandon their lawful efforts to compete for bookings in Los Angeles and counteract Live Nation's tactics to steer business away from venues that AEG owns."[74] According to AEG, the lawsuit is flawed because the agreement Osbourne seeks to strike down is between AEG and Live Nation, and does not prevent Osbourne from playing at the Forum.[75] Rather, it merely prevents Live Nation from promoting Osbourne's Los Angeles shows.[76] On August 1, 2018, Judge Dale S. Fischer denied AEG's motion to dismiss.

2. Coachella Owner AEG Faces Antitrust Suit over Restrictions on Musicians' Ability to Play Competing Events

On April 9, 2018, Portland music festival promoter Soul'd Out Productions filed suit in federal court in U.S. District Court for the District of Oregon against AEG, owner of the Coachella Valley Music and Arts Festival, accusing it of anticompetitive behavior by barring Coachella musicians from playing other events within 1,300 miles in the months surrounding the festival.[77]

According to the complaint, AEG's invocation of a "radius clause" in its contracts blocks competition in ways that violate federal antitrust laws as well as Oregon and California state laws.[78] Specifically, the suit alleges that AEG and its co-defendants use their "substantial market power" to "coerce artists into agreeing to these unlawful restrictions on trade."[79] The plaintiff asserts that AEG's purported "strong-arming and leveraging tactics" have had "an anticompetitive effect on the consumer, music venues and festivals on the West Coast, and promoters of such events."[80] The suit accordingly seeks treble damages, a declaration that the "radius clause" is unenforceable, and injunctive relief.[81] AEG's motion to dismiss the suit is currently pending.

B. Profit Participation Suits

1. Disney to Face Trial in *Turner & Hooch* Royalty Fraud Claim

Disney has been unable to chase off a lawsuit contending it concealed profits from the 1989 Tom Hanks comedy *Turner & Hooch*.[82] The suit, filed by Christine Wagner, whose late husband, Raymond Wagner, produced the film, alleges that *Turner & Hooch*, which grossed $71 million at the box office and more than $167 million in worldwide gross receipts, was profitable as early as 1991, but that "Disney reported that the film is not in profits" and sent no statement of accounting in the years since the film was made.[83] Wagner asserts she should be seeing more royalties.[84]

In a decision in early May that sets the stage for a trial, a Los Angeles state court judge ruled that Wagner's fraud claim can move forward.[85] The court found that Disney had presented no evidence on summary adjudication to counter Wagner's assertion that it was Disney's misrepresentations—in royalty statements indicating there were no profits to share—that kept the producer or his wife from discovering

they had a claim.[86] Therefore, the court found that as it relates to the statute of limitations, Disney may not limit the royalties at issue to only the four years prior to the filing of the 2015 suit.[87]

2. No, CBS Isn't Paying Judge Judy Too Much

In April 2018, a Los Angeles judge dismissed a claim that Judy Sheindlin's (pka Judge Judy) compensation was purposely structured to wipe out profits on the hit television show.[88] Talent agency Rebel Entertainment Partners had filed a lawsuit in March 2016 against CBS and Big Ticket Television, alleging that it was entitled to a five percent share of net profits, but that the show had been running a deficit since February 2010 because Sheindlin's massive salary was deducted as an expense.[89] CBS argued in response that the salary was a necessary expense to keep *Judge Judy* on the air.[90]

In its ruling, the court accepted CBS's determination that it was doing what it considered to be best for the show, and, moreover, that plaintiffs had not presented sufficient evidence that Sheindlin's salary ran counter to industry custom.[91] Rather, the court found that "[h]er present salary was the result of arms-length negotiation and Sheindlin's final 'take-it-or-leave-it offer.'"[92]

3. *Columbo* Producers File Claim Against TV Studio, 45 Years After Show Airs

In February 2018, a Los Angeles Superior Court judge held that the creators of the 1970s show *Columbo* can proceed with their contract and fraud claims against Universal City Studios.[93] Producers William Link and the heirs of Richard Levinson claim that Universal never issued a profit participation statement to them.[94] They alleged that shortly after filing their complaint in November 2017, an accounting statement arrived with a check for $2.3 million.[95] Universal City Studios moved to dismiss the claim, arguing that plaintiffs "lacked specificity" on how they were allegedly underpaid, but the judge has allowed the case to proceed past demurrer.[96]

C. Copyright Litigation

1. Embedding Tweets Violates the Exclusive Display Right

In February 2018, U.S. District Judge Katherine B. Forrest determined on summary judgment that embedding a photo on a social media platform constitutes a "display" of work under Section 106(5) of the Copyright Act of 1976.[97] The plaintiff snapped a candid photo of Tom Brady, the Patriots' quarterback, and Danny Ainge, the Boston Celtics' general manager, walking in the Hamptons that quickly went viral, "rapidly moving from Snapchat to Reddit to Twitter—and finally . . . onto the websites of the defendants, who embedded the Tweet alongside articles they wrote about Tom Brady actively helping the Boston Celtics recruit basketball player Kevin Durant."[98]

The court noted that copyright law has "developed in response to significant changes in technology,"[99] and that Congress "cast a very wide net" in considering the display right.[100] Congress did "not intend to freeze the scope of copyrightable subject matter at the present stage of communications technology" when it passed the Copyright Act, and that its drafters intended it to broadly encompass new, not yet developed, technologies.[101]

After framing the case as requiring the "the Court [to] construe how images shown on one website but stored on another website's server implicate an owner's exclusive display right,"[102] the court rejected application of and criticized the "Server Test," a test deployed by the Ninth Circuit in *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (2007), noting that it has not been widely used outside of the Ninth Circuit.[103] The Court noted that under the Server Test, direct liability for infringement turns "entirely on whether the image is hosted on the publisher's own server, or is embedded or linked from a third-party server."[104] Here, however, the court focused on the fact that the defendants "actively took steps to 'display' the image."[105] The court found support in the Supreme Court's decision in *American Broadcasting Cos., Inc. v. Aereo Inc.* for the proposition that "liability should not hinge on invisible, technical processes imperceptible to the viewer."[106]

But, the case isn't over yet. The court explained:

In this case, there are genuine questions about whether plaintiff effectively released his image into the public domain when he posted it to his Snapchat account. Indeed, in many cases there are likely to be factual questions as to licensing and authorization. There is also a very serious and strong fair use defense, a defense under the Digital Millennium and Copyright Act, and limitations on damages from innocent infringement.[107]

Following its ruling, and recognizing that this is a "high-profile, high-impact copyright case" with possible precedential effects, Judge Forrest certified the ruling for interlocutory appeal to the Second Circuit.[108] However, on July 17, 2018, the Second Circuit denied defendants' request to take up the ruling.[109]

2. TVEyes Video Clip Search Engine Is Not Fair Use

In February 2018, the Second Circuit held that TVEyes's service could not be justified as fair use, reversing a summary judgment ruling.[110] As we wrote in our 2016 Mid-Year Update reporting on the summary judgment rulings, TVEyes provides a service that continuously records television programming and indexes it into a text-searchable database, "allowing its clients to search for and watch (up to) ten-minute video clips that mention terms of interest to the clients."[111] The district court had issued two summary judgment rulings, deeming a fair use TVEyes's "functions enabling clients of TVEyes to search for videos by term, to watch the resulting videos, and to archive the videos on the TVEyes servers" a fair use, but holding that functions "enabling TVEyes's clients to download videos to their computers, to freely e-mail videos to others, or to watch videos after searching for them by date, time, and channel (rather than by keyword)" were not fair use.[112]

While the Second Circuit found that TVEyes's service served a modest transformative purpose, isolating relevant television programing and allowing it to be accessed in a convenient manner, it further found that the fact that the service makes available, in its original form, almost all of Fox's content undermines its transformative value.[113] The court also found that TVEyes's service deprives Fox of licensing revenues and/or an ability to exploit the market itself.[114] On balance, therefore, the court concluded that "TVEyes's service is not justifiable as a fair use" because "[a]t bottom, TVEyes is unlawfully profiting off the work of others by commercially re-distributing all of that work that a viewer wishes to

use, without payment of license."[115] On May 14, 2018, the Second Circuit denied TVEyes's petition for rehearing *en banc*.[116]

3. In Suit for Infringement Based on Foreign Broadcast, Geoblocking Thwarts Personal Jurisdiction

In November, The Carsey-Werner Company filed a lawsuit in a California federal court against the British Broadcasting Company ("BBC") and Sugar Films, alleging copyright infringement for the use and airing on the BBC of *The Cosby Show* clips in a documentary entitled *Bill Cosby: Fall of an American Icon*.[117] BBC moved for dismissal, arguing that no actionable infringement took place within a California federal court's jurisdiction, as the documentary was only broadcast in the United Kingdom.[118] Afterward, it was available for 30 days on BBC's iPlayer website, which, because of geoblocking, meant that the program was only available to those located in the United Kingdom.[119] However, unauthorized viewers could access the content by using virtual private networks ("VPNs") and proxy servers.[120] Judge Percy Anderson held that "[u]nauthorized viewers outside of the United Kingdom do not provide a basis for personal jurisdiction; rather, Defendant's relationship with California must arise out of contacts that they themselves created with the state."[121] The court therefore held it lacked specific jurisdiction over BBC and Sugar Films.[122]

4. Who Owns VFX Software Output?

As we first wrote in our 2017 Year-End Update, in July 2017, Rearden LLC, a computer-generated imagery (CGI) software company, accused The Walt Disney Co., Marvel Studios, Paramount, and Fox of using without a license 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.[123] Rearden alleged trademark, copyright, and patent infringement claims relating to Oscar-winning visual effects technology called MOVA Contour Reality Capture ("MOVA"). 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 the studios knowingly used an unauthorized version of the MOVA software. With respect to the copyright claims, Rearden initially asserted a novel theory of copyright infringement, arguing that because its software program performs the "lion's share" of the creativity involved in the computer art program, the end user fails to meet the minimum threshold for originality, and therefore Rearden, not the end user, should be deemed the legal author of the final product of the program.[124] The defendants moved to dismiss, pointing to film directors and other artists as indispensable creative elements to the artistic expression embodied in the files output by the program.[125]

In February, the court sided with the defendants and rejected Rearden's copyright claims, explaining that "[t]he Court does not find it plausible that the MOVA Contour output is created by the program without any substantial contribution by the actors or directors."[126] The court thus dismissed the copyright

claims without prejudice, and Rearden subsequently amended its complaint to allege copyright claims under a new contributory theory of infringement.[127] This time, Rearden argues that MOVA is an original literary work of authorship fixed in a tangible medium of expression when stored on computer hard drives. When the program is run, Rearden claims that the temporary copies that are made in the random access memory of the end user's computer violate its copyright. The defendants again moved to dismiss Rearden's copyright claims.[128] On June 19, 2018, the court denied defendants' motion to dismiss, holding that Rearden plausibly alleged the defendants either induced or materially contributed to infringing conduct.[129] In light of this ruling, Rearden's copyright claims will proceed against the studios.

5. Disney and Redbox Tussle over Resale Rights

On November 30, 2017, Disney, Lucasfilm, and Marvel filed suit in the District Court for the Central District of California, arguing that Redbox's practice of reselling the digital download codes packaged with plaintiffs' movie "Combo Packs" violates the user license terms and constitutes copyright infringement.[130] Disney moved for a preliminary injunction, which the court denied, finding that the license restriction constituted copyright misuse.[131] Specifically, licensing language on the website where Disney's digital movie downloads are redeemed states that the downloader must be the owner of "the physical product that accompanied the digital code at the time of purchase."[132] According to Judge Pregerson, this constitutes an "improper leveraging of Disney's copyright" and "conflicts with public policy enshrined in the Copyright Act" because it forces users to "forego their statutorily-guaranteed right to distribute their physical copies of that same movie as they see fit."[133]

Disney subsequently updated the license terms, amended its complaint, and renewed its motion for a preliminary injunction.[134] Disney asserts that the new language, which instead requires the digital downloader to have received the code as part of the Combo Pack, rather than to be the current owner of the physical copies, satisfies the court's concerns regarding copyright misuse.[135] Redbox counters that this change does not cure the misuse because it forces the preceding owner of the Combo pack to "forgo[] the first sale rights associated with the DVD and Blu-ray discs" or otherwise render the digital code "worthless."[136] A hearing for the preliminary injunction motion was held on June 27, 2018, and Redbox filed a supplemental opposition brief on July 11, 2018, addressing additional changes to Disney's licensing language.[137]

6. Playboy's Centerfold Copyright Suit Folds

In February 2018, a District Judge in Los Angeles dismissed with leave to amend Playboy's copyright infringement suit against the owner of the website BoingBoing.[138] Back in November 2017, Playboy had accused Happy Mutants, LLC—the owner of BoingBoing—of using the magazine's centerfold photos without permission. The lawsuit pointed to a February 2016 post by BoingBoing that contained a link that directed viewers to a slideshow on a photo website that, at the time, contained the centerfold photos (it has since been taken down). BoingBoing responded that it did not create the offending content, and did not control the images or contribute to the infringement, and that if anything, its link constituted non-infringing fair use. Playboy responded that BoingBoing should not be permitted to knowingly link to copyright-infringing materials.[139]

In his decision, the Judge Olguin stated that he was "skeptical" that Playboy had alleged facts to support its inducement or material contribution theories of copyright infringement, and cited the Ninth Circuit's inducement theory as set forth in *Perfect 10, Inc. v. Giganews, Inc.*[140] The judge noted that BoingBoing's fair use argument was premature at this early stage.[141] Rather than amend their complaint, in early March 2018, Playboy voluntarily dismissed its claim without prejudice.[142]

D. DMCA Developments

1. Safe Harbor from Unfair Competition Claims

In March 2018, the District Court for the Southern District of New York dismissed most of Capital Records' state-law unfair competition claims against video-hosting website Vimeo, claims based on users' posts to Vimeo's site that are alleged to infringe pre-1972 copyrighted works. Previously, 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.[143] After the Supreme Court denied plaintiffs' petition for a writ of certiorari in March 2017,[144] the district court considered Vimeo's motion to dismiss and found that Capital Records' unfair competition claims, which are based on Vimeo's alleged infringement, were also foreclosed by the safe harbor of the DMCA.[145] The court reasoned that "[a]pplying the DMCA safe harbor to unfair-competition claims founded on copyright infringement ensures that service providers are aware of the infringing activity that forms the basis for the claims brought against them."[146] The court denied the motion to dismiss as to the instances in which Capital Records alleges that Vimeo had "red-flag knowledge" of the underlying infringement that would negate the protections of the DMCA safe harbor.[147] Motions for summary judgement are still pending.

2. DMCA May Protect ISPs Without a Written Takedown Policy

In March 2018, a Ninth Circuit panel ruled that a website hosting user-uploaded pornography was protected by the Digital Millennium Copyright Act's safe harbor provisions, even though it lacked a written policy to terminate users who repeatedly infringed copyrights.[148] Back in 2011, pornography producer Ventura Content sued Motherless, alleging claims of direct, vicarious and contributory copyright infringement and of unlawful, unfair and fraudulent business practices in violation of California Business and Professions Code for allowing its users to upload clips of movies that Ventura Content had created and had not licensed to Motherless.[149] In response, Motherless claimed that it qualified for protection under the DMCA's § 512 safe harbor provision, even though it did not have a written policy to terminate users who repeatedly infringed copyrights.[150] Motherless is owned and operated by a single person who reviewed videos individually for infringement, and described his policy as a "gut decision."[151] The divided panel found that Motherless did adhere to a policy, even if it was unwritten, to get rid of users who repeatedly uploaded infringing copyright of porn producers, and therefore qualified for the safe harbor provision of the DMCA.[152] Ventura has sought rehearing *en banc*.[153]

E. First Amendment

1. Right of Publicity

a. Court of Appeals Resolves Legal Feud in FX's Favor

On March 26, 2018, a California appeals court ruled that Olivia de Havilland's suit against FX Network and co-defendants is barred by the First Amendment.[154] In March 2017, FX aired a docudrama, *Feud: Bette and Joan*, in which Catherine Zeta-Jones portrays de Havilland.[155] De Havilland sued FX in June 2017, alleging misappropriation, violation of her right of publicity, false light invasion of privacy, and "unjust enrichment."[156] In September 2017, the trial court denied FX's anti-SLAPP motion, and FX (supported by a number of media organizations) appealed. Now, the appeal court has reversed the lower court's order on the motion to strike.[157] Applying the anti-SLAPP law's two-step test, the Court of Appeal reversed, finding that the now-102-year-old de Havilland failed to present evidence to establish that she is likely to prevail on her claims at trial.[158]

The court explained that the First Amendment protects expressive works, regardless of whether they are fact, fiction, or a combination thereof.[159] The court concluded that *Feud*'s portrayal of de Havilland was transformative because its "'marketability and economic value' does not 'derive primarily from [de Havilland's] fame' but rather 'comes principally from . . . the creativity, skill, and reputation' of *Feud*'s creators and actors."[160] The court also rejected de Havilland's false light and unjust enrichment claims.[161] On July 11, 2018, the California Supreme Court denied de Havilland's petition for review; the docket entry noted that Justice Cuéllar would have granted the petition.

b. *Lohan v. Take-Two Interactive Software*

In March 2018, the Court of Appeals of New York affirmed the dismissal of a lawsuit filed by Lindsay Lohan, claiming that Take-Two violated her right of privacy by featuring a "look-a-like" character in Grand Theft Auto without her permission.[162] The court concluded that while an avatar may be a "portrait" for purposes of New York's right of publicity statute, the avatar featured in Grand Theft Auto was not recognizable as Lohan.[163] In doing so, the court sidestepped larger First Amendment issues, including whether or not individuals featured in video games are subject to the state's right of publicity law, which "makes it a misdemeanor to use a living person's name, portrait or picture for advertising or trade purposes . . ."[164] The intermediate appellate court had confronted that issue, in 2016, finding that works of fiction or satire (like the video game) are not of "advertising" or "trade," in the language of the statute.[165] But the state's high court specifically declined to address the issue, ruling for Take-Two on the narrower ground that the woman in the video game was simply not recognizable as Lohan.

c. "Simpsonized" Character Is Not Actionable

In February 2018, a California appeals court affirmed the dismissal of a lawsuit filed by Frank Sivero against Twentieth Century Fox for misappropriation of his name and likeness in *The Simpsons*.[166] On October 21, 2014, Sivero filed the complaint, alleging common law infringement of right of publicity, misappropriation of name and likeness, misappropriation of ideas, interference with prospective economic advantage, and unjust enrichment.[167] Fox moved to strike the complaint under California's

anti-SLAPP statute.[168] The appeals court found that the cause of action arose from protected activity within the meaning of the anti-SLAPP statute, and that Sivero then failed to carry his burden to prove the merits of his claim.[169] Here, the court found that Sivero's character had been "Simpsonized," and thus contained "significant transformative content," insulating it against a right of publicity claim[170] The court explained: Louie, the alleged look-a-like, "is a cartoon character with yellow skin, a large overbite, no chin, and no eyebrows. Louie has a distinctive high-pitched voice which, as the trial court pointed out, has 'no points of resemblance to [Sivero].'"[171] The court concluded that this was not a "trivial variation," but rather, the creators had created something "recognizably [their] own."[172] Like in Lohan's case, the California court gave weight to the difference between the depicted character and the plaintiff alleging misappropriation.

2. Defamation

a. HBO & John Oliver Prevail over Coal CEO

In June 2017, coal CEO Robert Murray brought suit against John Oliver, Partially Important Productions, HBO, and Time Warner claiming that on Oliver's show "Last Week Tonight," the comedian defamed the coal magnate by depicting a "villainous" portrait of him.[173] The segment at issue was critical of the coal industry, referring to Murray as a "geriatric Dr. Evil."[174] Oliver's segment stated that a mining accident that killed nine people was at least partially the result of improper mining practices rather than an earthquake, as Murray's company had claimed.[175] Murray filed the suit for defamation, false light invasion of privacy, and intentional infliction of emotional distress.

Following remand, and in a single-page order, West Virginia state judge Jeffrey Cramer dismissed the action, agreeing entirely with HBO's argument that Murray failed to state a claim for defamation.[176] The critical portions of Oliver's segment that alleged facts were based on judicial opinions and government reports. Oliver's more "personal" jabs at Murray—including the *Austin Powers*-inspired name-calling—qualified as satire protected under the First Amendment.[177]

b. Did Cosby's Lawyer's Statements Defame Accuser?

Even after his criminal trial ended in a conviction in April 2018, Bill Cosby's reckoning with the #metoo movement continues in the courts. The actor is defending a defamation action arising from his alleged sexual misconduct with the former supermodel Janice Dickinson, one of several women who has accused Cosby of drugging and raping her in the 1980s. Dickinson alleges that a 2014 press statement by Cosby's former attorney calling her story "fabricated" and "an outrageous lie," constitutes defamation.[178]

In November 2017, a California appeals court allowed Dickinson's suit to move forward, rejecting Cosby's contention that his attorney's statement was non-actionable opinion.[179] The court held that based on the totality of the circumstances, "a reasonable fact finder could conclude that the demand letter states or implies a provably false assertion of fact—specifically, that Cosby did not rape Dickinson, and she is lying when she said that he did."[180] However, several courts examined nearly the same factual claims in other actions to reach different results. The First[181] and Third Circuits[182] dismissed actions brought by two other Cosby accusers on the grounds that Cosby's lawyer's statements constituted non-actionable opinions protected by the First Amendment.

On July 12, 2018, in considering Cosby's and Singer's anti-SLAPP motions to strike following remand, Los Angeles Superior Court Judge Randolf Hammock dismissed the defamation claims against Singer, holding that actual malice could not be established regarding Singer's statements without invading the attorney-client privilege.[183] That same day, Cosby filed his petition for writ of certiorari with the U.S. Supreme Court, asking the high court to determine whether Singer's statement qualifies as an opinion under the Supreme Court's 1990 holding in *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990).[184]

3. Public Fora in the 21st Century

a. @RealDonaldTrump Ruled a Public Forum

President Trump's use of Twitter as his favored communication platform is well known, and his tweets invariably lead to strong and diverse responses from other Twitter users. In a May 2018 ruling in *Knight First Amendment Institute v. Trump*, U.S. District Judge Naomi Reice Buchwald examined whether Trump's and several of Trump's close aides' use of Twitter's "blocking" feature—which prevents blocked users from viewing or replying to the blocker's Tweets—violated the First Amendment rights of the seven plaintiffs, all of whom had been blocked by the President's @realDonaldTrump's account. The court ruled in plaintiffs' favor, finding that the President's account is a "designated" public forum operated by the government.[185] Thus, the President is prohibited from blocking other users because of their viewpoints—namely, in this case, for their criticisms of him. The decision does not hold, contrary to the criticisms leveled against it, that Twitter is public property or that a user violates the First Amendment every time he or she blocks a "troll" on the platform. Rather, commentators observed that "Twitter is how the president speaks to the people; replies on Twitter are how the people speak to each other, in a 'place' the government uses for expression and has opened to the public for expression as well,"[186] adapting First Amendment precedent to the political and technological realities of 2018.

The 75-page ruling rejected the Justice Department's argument that Trump was largely acting in a personal capacity and thus as a private individual, much like, as the DOJ argued, "giving a toast at a wedding or giving a speech at a fundraiser."[187] In contrast, Judge Buchwald reasoned, through his Twitter "bio" and his use of the medium to comment on public policy, Trump portrays his account as presidential "and, more importantly, uses the account to take actions that can be taken only by the President as President," referring to his use of the platform to propagate executive-order like decrees.[188] Furthermore, Buchwald said, the space below Trump's tweets that show the public's replies is a public forum, because it is "generally accessible to the public" and anyone with a Twitter account is able to view those responses, assuming that the user has not been blocked.[189]

b. Conservative Institution's Lawsuit Against YouTube Fails

In March 2018, U.S. District Judge Lucy Koh dismissed a censorship claim against YouTube and its parent company, Google, ruling that the online video-sharing platform is not a public forum subject to the First Amendment.[190] Plaintiff Prager University, a conservative media company owned by Dennis Prager, claimed that YouTube's restricted mode, which filters out inappropriate content to protect young or sensitive viewers, was restricting access to Prager University videos about topics such as gun control and Islam while permitting access to left-leaning videos by liberal commentators like Bill Maher on the

same topics.[191] Amongst other claims, PragerU's complaint alleged that Google and YouTube's practice of selectively restricting PragerU's videos—and thus the group's speech—violates the U.S. and California constitutions. In response, Google claimed its own First Amendment protection, arguing that because YouTube is a private company, it is not subject to laws prohibiting governmental restrictions on free speech.

In dismissing the case, Judge Koh ruled that YouTube is not a "state actor" required to provide free speech protection merely because the company operates its private property as a forum for expression of diverse perspectives. Rather, "[Google and YouTube] are private entities who created their own video-sharing social media website and make decisions about whether and how to regulate content that has been uploaded on that website."[192] Additionally, Plaintiff failed to show "that defendants have engaged in one of the very few public functions that were traditionally exclusively reserved to the state."[193]

4. California's IMDB-Targeted Age Discrimination Law Declared Unconstitutional

In February 2017, Judge Chhabria of the Northern District of California issued a preliminary injunction enjoining California from enforcing AB 1687—a law enacted to address age discrimination in Hollywood that would have prevented in certain instances the popular industry website IMDB.com from posting actors' ages—writing that "it's difficult to imagine how AB 1687 could not violate the First Amendment."[194] In February 2018, Judge Chhabria made the injunction permanent.[195] The court held that the law "singles out specific, non-commercial—age-related information—for differential treatment."[196] Applying strict scrutiny, the court held that California did not prove that the measure was "actually necessary" to combat age discrimination.[197]

Judge Chhabria noted that "the record provides no evidence that California explored less-speech-restrictive alternatives," such as better enforcement of preexisting anti-discrimination laws.[198] He also explained that the law was both under- and over-inclusive, and therefore not narrowly tailored.[199] The law only bans one speaker from sharing age-related information and only requires IMDb to remove some age-related information.[200] Moreover, the law is not restricted to age-related information of those individuals protected by age discrimination laws.[201]

F. Trademark Litigation

1. No TRO Against Movie Trailer for *The Happytime Murders*

Sesame Workshop, the makers of Sesame Street, brought suit in the Southern District of New York against STX Entertainment over its upcoming film *The Happytime Murders*. The film, a raunchy comedy starring Melissa McCarthy, follows two detectives—McCarthy and her partner, a puppet named Phil Phillips—as they work to solve the murders of the former cast of a classic puppet television show. Sesame Workshop sued the film's backers, seeking a restraining order to block the production companies from using the phrase "No Sesame, All Street" in trailers and promotions for the film, alleging that the tagline seeded "confusion in the mind of the public as to the association between the movie, Sesame Street, and its beloved Muppets."[202] STX Entertainment responded that the phrase "No Sesame, All

Street" actually *distinguished* its film from Sesame Street. The court sided with STX Entertainment, denying Sesame Workshop's bid for a restraining order on May 31, 2018.[203] Sesame Workshop dismissed the suit shortly thereafter.

2. Generic TDLs Receive Protection After All?

In August 2017, a federal district court in Virginia reversed a decision of the Trademark Trial and Appeal Board ("TTAB") that "Booking.com" could not be registered as a trademark, ruling that the addition of ".com" to a generic term makes it potentially protectable under the Lanham Act.[204] The ruling specifically split from precedents in the Federal Circuit that have found the addition of a top-level domain to a generic word does not render it protectable, including the domain names Mattress.com and Hotels.com, finding that precedent unpersuasive.[205]

Even though it was successful in that TTAB appeal, the court ordered Booking.com to pay the U.S. Patent and Trademark Office $76,000 in attorneys' fees under the PTO's new legal interpretation that the agency must be reimbursed such fees after certain types of patent and trademark appeals, regardless of the outcome. On April 11, 2018, Booking.com asked the Fourth Circuit to strike down that new policy, arguing that it violates the First Amendment right to "petition the government for redress of grievances."[206] A separate case challenging the same PTO policy is currently pending *en banc* before the Federal Circuit. As of the date of this writing, neither the Fourth Circuit nor the Federal Circuit has ruled on this issue.

3. Suit Over Seussian Trekkie Book Dismissed

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. 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. But on May 21, 2018, the court granted ComicMix's motion for judgment on the pleadings with respect to the trademark claims.[207] ComicMix had argued that its work merited First Amendment protection under *Rogers v. Grimaldi*, which tasks judges with determining whether the use of a mark has artistic relevance, and if so, whether the work is explicitly misleading.[208] Previously, the court had held that a potential exception to the First Amendment protection provided in *Rogers* for misleading titles that are confusingly similar to other titles perhaps applied to ComicMix's work. But in light of the Ninth Circuit's recent decision in the *Empire* case, which treated the *Rogers* test similarly to the likelihood-of-confusion test, the court held that this exception from *Rogers* did not apply, dismissing Dr. Seuss Enterprises' trademark claims.[209]

G. Music

1. "Blurred Lines" and a Narrow Ruling at 9th Circuit

In March 2018, in a hotly awaited decision, the Ninth Circuit upheld on narrow grounds a 2015 jury's finding that Robin Thicke and Pharrell Williams's song "Blurred Lines" infringed the copyright of Marvin Gaye's "Got to Give It Up."[210] In the appeals court's 2-1 decision, the majority focused largely on questions of procedure and trial strategy in declining to review a summary judgment motion, noting a full jury trial had taken place and Thicke and Williams' lawyers had not preserved the issue by filing a motion.[211] The majority explained that after a jury trial, a court must measure the verdict against the weight of the evidence and such verdict may only be overturned in "an absolute absence of evidence supporting the jury's verdict."[212] With this, the majority upheld the damages award of $5.3 million.

In dissent, Judge Jacqueline Nguyen sharply criticized the majority and did not hesitate to engage with the substantive legal issues and industry concerns that the trial court result created, writing that, "[t]he majority allows the Gayes to accomplish what no one else has before: copyright a musical style."[213] In doing so, she wrote, "[t]he majority establishes a dangerous precedent that strikes a devastating blow to future musicians and composers everywhere."[214] Judge Nguyen concluded that the two songs differ in melody, harmony, and rhythm, and Gaye's expert witness ". . . identified four similar elements, none of which is protectable: (a) each phrase begins with repeated notes; (b) the phrases have three identical pitches in a row in the first measure and two in the second measure; (c) each phrase begins with the same rhythm; and (d) each phrase ends on a melisma (one word sung over multiple pitches)."[215] She would have concluded that such evidence is not appropriate to support an infringement verdict.[216] Nguyen seemed to encourage courts to appoint their own experts when the parties' experts seem to have "starkly different" assessments of the works' similarity.[217] The majority, in rebutting Nguyen's dissent, stated that "[t]he dissent's position violates every controlling procedural rule involved in this case" and "improperly tries, after a full jury trial has concluded, to act as judge, jury and executioner."[218] On July 11, the Ninth Circuit declined to rehear the case *en banc* and issued an amended opinion.[219]

2. Wolfgang's Vault Found Liable for Streaming Recordings of Live Performances

In April 2018, U.S. District Judge Edgardo Ramos found that Wolfgang's Vault, a collection of thousands of live concert performances, and its owners had committed a large-scale copyright infringement by streaming its collection to the public, but stopped short of issuing an injunction, finding that the availability of the recordings is in the public interest, while suggesting a licensing deal could remedy the injury to plaintiffs.[220]

In 2015, plaintiffs (music publishers and other rights holders) alleged that Wolfgang's Vault lacked the requisite mechanical licenses to stream a collection of works.[221] Judge Ramos held that Defendants had failed to properly license 206 concert videos, pursuant to Section 115 of the U.S. Copyright Act.[222] Judge Ramos rejected the Defendants' argument that certain contracts entered into with three major record labels were proof of the necessary consent needed.[223] To this same point, Judge Ramos underscored the fact that Defendants could not produce a single performance agreement.[224] A pending

trial will explore whether the copyright infringement was willful, meaning that Plaintiffs could be entitled to statutory damages of up to $150,000 per work.[225]

3. No Moral Rights for Foreign "Big Pimpin" Sample Holder

On May 31, 2018, after years of legal action regarding Jay-Z's 1999 hit, "Big Pimpin," the Ninth Circuit Court of Appeals affirmed a win for Shawn "Jay-Z" Carter and other defendants by refusing to allow the Egyptian plaintiff the ability to enforce moral rights over a sample used in the song.[226] Judge Bea wrote that "[s]ince our federal law does not accord protection of moral rights to American copyright holders as to non-visual art, neither does it recognize [Plaintiff's] claim to moral rights," and "[t]hat [Plaintiff] retains moral rights in Egypt does him no good here."[227]

The case involved the hook of "Big Pimpin," which came from a song titled "Khosara Khosara," composed by Baligh Hamday for a 1960 Egyptian film.[228] Shortly after Jay-Z's song came out in 1999, its producer, Timbaland paid EMI for a license to use the song.[229] Plaintiff, an heir of the composer Hamday, sought to enforce moral rights by alleging his uncle's song had been "mutilated" (a term of art that moral rights, common in foreign countries, may protect against).

The District Court first found the suit barred due to delay, but the case was revived following the Supreme Court's *Petrella* decision and went to trial in 2015—with the main issue being whether Hamday's heirs retained an inalienable moral right under Egyptian law—although District Judge Christina Snyder cut the suit short, granting Jay-Z's motion for a judgment as a matter of law.[230] Judge Snyder held that Plaintiff lacked standing to pursue the copyright infringement claim. The Ninth Circuit upheld that ruling and further held that the foreign plaintiff's moral rights are not enforceable in the United States.

---

[1] *United States v. AT&T Inc.*, No. CV 17-2511 (RJL), 2018 WL 2930849 (D.D.C. June 12, 2018); Press Release, AT&T Inc., AT&T Completes Acquisition of Time Warner Inc. (June 14, 2018), http://about.att.com/story/att_completes_acquisition_of_time_warner_inc.html.

[2] Press Release, AT&T Inc., AT&T Debuts "WatchTV" With 2 New Unlimited Wireless Plans (June 21, 2018), http://about.att.com/newsroom/watchtv_app_with_unlimited_wireless.html.

[3] Brent Kendall & Drew FitzGerald, *Justice Department Appeals Ruling Allowing AT&T-Time Warner Merger*, The Wall Street Journal (July 12, 2018), https://www.wsj.com/articles/justice-department-to-appeal-court-ruling-allowing-at-t-time-warner-merger-1531427031.

[4] Liz Moyer, *Comcast drops pursuit of 21st Century Fox assets, ending bidding war with Disney*, CNBC (July 19, 2018), https://www.cnbc.com/2018/07/18/comcast-drops-pursuit-of-its-bid-for-21st-century-fox-assets.html.

[5] Keach Hagey and Erich Schwartzel, *21st Century Fox Agrees to Higher Offer from Disney*, The Wall Street Journal (June 20, 2018), https://www.wsj.com/articles/fox-disney-announce-new-deal-1529496937.

[6] *Id*.

[7] Press Release, The Walt Disney Company, *U.S. Department of Justice Clears Disney Acquisition of 21st Century Fox* (June 27, 2018), https://www.wsj.com/articles/PR-CO-20180627-911016.

[8] *Id*.

[9] Edmund Lee and Brooks Barnes, *Disney and Fox Shareholders Approve Deal, Ending Corporate Duel*, N.Y. Times (July 27, 2018), https://www.nytimes.com/2018/07/27/business/media/disney-fox-merger-vote.html.

[10] Shalini Ramachandran, *Comcast Drops Bid for Fox Assets, Will Focus on Pursuit of Sky*, The Wall Street Journal (July 19, 2018), https://www.wsj.com/articles/comcast-drops-bid-for-fox-assets-will-pursue-sky-1532004447/.

[11] *Id.*

[12] Andria Calatayud, *Fox's Sky News Plan Meets Criteria: U.K. Official*, Marketwatch (June 19, 2018), https://www.marketwatch.com/story/foxs-sky-news-plan-meets-criteria-uk-official-2018-06-19.

[13] Adam Rhodes, *Sky Brushes Off Fox As $41B Comcast Offer Rolls In*, Law360 (Apr. 25, 2018), https://www.law360.com/media/articles/1037029/sky-brushes-off-fox-as-41b-comcast-offer-rolls-in.

[14] Calatayud, *supra* note 12.

[15] Jessica Toonkel, *Viacom, CBS CEOs discuss potential merger – sources*, Reuters (Jan. 25, 2018), https://ca.reuters.com/article/businessNews/idCAKBN1FE2XT-OCABS; Cynthia Littleton, *CBS and Viacom Merger Discussions Set to Accelerate, but Valuation Remains a Big Hurdle*, Variety (Mar. 23 2018), Variety (May 14, 2018), https://variety.com/2018/tv/news/cbs-viacom-merger-talks-deal-1202735168/.

[16] Cynthia Littleton, *CBS Sues Share Redstone and National Amusements in Bid to Block Viacom Merger*, Variety (May 14, 2018), https://variety.com/2018/biz/news/cbs-sues-shari-redstone-national-amusements-in-bid-to-block-viacom-merger-1202809526/.

[17] Meg James, *Shari Redstone sues CBS, taking aim at Leslie Moonves*, L.A. Times (May 29, 2018), http://www.latimes.com/business/hollywood/la-fi-ct-nai-redstone-sues-cbs-20180529-story.html.

[18] Meg James, *CBS shareholders sue Shari Redstone, National Amusements*, L.A. Times (May 31, 2018), http://www.latimes.com/business/hollywood/la-fi-ct-redstone-shareholder-lawsuit-20180531-story.html.

[19] Gene Maddaus, *Ron Burkle Sues Lantern Capital Over Weinstein Co. Costs*, Variety (July 16, 2018), https://variety.com/2018/biz/news/ron-burkle-lantern-suit-1202874814/.

[20] *Id.*

[21] Elise Sandberg, *'Stranger Things' Producer Inks Massive Overall Deal With Netflix*, Hollywood Reporter (Dec. 6, 2017), https://www.hollywoodreporter.com/live-feed/netflix-inks-deal-shawn-levys-21-laps-1064839.

[22] Debra Birnbaum and Cynthia Littleton, *Ryan Murphy Inks Mammoth Overall deal with Netflix*, Variety (Feb. 13, 2018), https://variety.com/2018/tv/news/ryan-murphy-netflix-overall-deal-fox-1202698305/.

[23] *Id.*

[24] Natalie Jarvey and Lesley Goldberg, *'Handmaid's Tale' Showrunner Bruce Miller Inks Overall Deal at Hulu*, The Hollywood Rep. (Apr. 30, 2018), https://www.hollywoodreporter.com/live-feed/handmaids-tale-showrunner-bruce-miller-inks-deal-at-hulu-1106790.

[25] *Id.*

[26] John Koblin, *Jordan Peele Signs TV Deal With Amazon*, N.Y. Times (June 5, 2018), https://www.nytimes.com/2018/06/05/business/media/amazon-jordan-peele.html.

[27] Press Release, WndrCo, *WndrCo Announces Initial Capital Raise of $1 Billion for New Media Platform* (Aug. 7, 2018), https://www.businesswire.com/news/home/20180807005288/en/WndrCo-Announces-Initial-Capital-Raise-1-Billion.

[28] Kevin Tran, *Netflix furthers US cable partnership push*, Business Insider (Jan. 31, 2018), http://www.businessinsider.com/netflix-furthers-us-cable-partnership-push-2018-1.

[29] Bruce Haring, *Comcast, Netflix Expand Partnership In Xfinity Packages*, Deadline (Apr.13, 2018), https://deadline.com/2018/04/comcast-netflix-expand-partnership-in-xfinity-packages-1202363637/.

[30] Sarah Perez, *YouTube TV becomes first-ever presenting partner for the NBA Finals, following similar deal with MLB*, TechCrunch (Mar. 26, 2018), https://techcrunch.com/2018/03/26/youtube-tv-becomes-first-ever-presenting-partner-for-the-nba-finals-following-similar-deal-with-mlb/.

[31] Todd Spangler, *YouTube TV Offers One-Week Credit After World Cup Outage*, Variety (July 12, 2018), https://variety.com/2018/digital/news/youtube-tv-outage-one-week-credit-world-cup-1202872304/.

[32] Todd Spangler, *CBS All Access Available to Amazon Prime Members in U.S. as Add-On Channel*, Variety (Jan. 5, 2018), https://variety.com/2018/digital/news/cbs-all-access-amazon-prime-channel-1202654346/.

[33] Sahil Patel, *Amazon has become an important distributor for over-the-top networks*, Digiday (June 4, 2018), https://digiday.com/media/amazon-has-become-an-important-middle-man-for-over-the-top-networks/.

[34] Tom Zanki, *'China's Netflix' Leads 6 IPO Launches Exceeding $3B Total*, LAW360 (March 19, 2018), https://www.law360.com/articles/1023526.

[35] *Id.*

[36] Tom Zanki, *Chinese Streaming Co Leads 4 IPOs Netting $828M*, LAW360 (March 28, 2018), https://www.law360.com/articles/1027175/chinese-streaming-co-leads-4-ipos-netting-828m.

[37] *Id.*

[38] Patrick Brzeski, *Blumhouse Teams with Tang Media Partners to Make Horror Movies in China*, The Hollywood Reporter (June 18, 2018), https://www.hollywoodreporter.com/news/blumhouse-teams-tang-media-partners-make-horror-movies-china-1120827.

[39] Nancy Tartaglione, *Blumhouse Partners With Tang Media On Chinese Horror/Thriller Pics*, Deadline (June 18, 2018), https://deadline.com/2018/06/blumhouse-tang-media-chinese-horror-thriller-movies-deal-american-nightmare-1202412372/.

[40] Cheang Ming, *China's Box Office Recently Beat The US, And Is Now On The Cusp Of A 'New Growth Cycle*,' CNBC (May 24, 2018), https://www.cnbc.com/2018/05/24/china-beats-us-box-office-in-q1-and-is-entering-new-growth-cycle-hsbc.html.

[41] *Id.*

[42] J. DeMorel, *Alibaba Buys State in Wanda Film in 41.2 Billion Share Sale*, Bloomberg (February 5, 2018), https://www.bloomberg.com/news/articles/2018-02-05/alibaba-takes-stake-in-wanda-film-as-part-of-1-2-billion-sale.

[43] *Id.*

[44] *Id.*

[45] Jason Raish, *Can China's Tech Giants Restore Confidence in Wanda?*, The Hollywood Reporter (February 16, 2018), https://www.hollywoodreporter.com/news/can-chinas-tech-giants-restore-confidence-wanda-1084151.

[46] Patrick Brzeski, *China's Wanda Plans $1.78B Consolidation of Film Assets*, The Hollywood Reporter (June 25, 2018), https://www.hollywoodreporter.com/news/chinas-wanda-plans-178b-consolidation-film-assets-1123282.

[47] Vivienne Chow, *Wanda Unveils $1.77 Billion Plan to Consolidate Film Units*, Variety (June 26, 2018), https://variety.com/2018/film/news/dalian-wanda-consolidate-film-units-china-1202857977/.

[48] Brzeski, *supra* note 46.

[49] *Id.*

[50] Press Release, Epic Games, Fortnite Pro Am 2018, https://www.epicgames.com/fortnite/en-US/pro-am2018.

[51] Justin Kirkland, *10 Celebrities Who Play Fortnite, Ranked*, Esquire (May 11, 2018), https://www.esquire.com/entertainment/g20139550/celebrities-playing-fortnite/; Paul Tassi, *Twitch Comments on the Record-Breaking Drake-Ninja 'Fortnite' Stream*, Forbes (Mar. 15, 2018), https://www.forbes.com/sites/insertcoin/2018/03/15/twitch-comments-on-the-record-breaking-drake-ninja-fortnite-stream/#4a4bbb5f46c6.

[52] Max Miceli, *Epic Games Unveils Esports Plans With Fortnite World Cup Coming in 2019*, The Esports Observer (June 25, 2018), https://esportsobserver.com/epic-games-fortnite-world-cup/.

[53] *Id.*

[54] Blake Hester, *Tencent Invests $15 Million to Bring 'Fortnite' to China*, Variety (Apr. 24, 2018), https://variety.com/2018/gaming/news/fortnite-tencent-china-1202785279/.

[55] Patrick Hipes, *ICM Partners Inks Partnership With Esports Talent Agency Evolved*, *Deadline Hollywood* (June 14, 2018), https://deadline.com/2018/06/icm-partners-esports-evolved-joint-venture-1202410240/.

[56] *Id.*

[57] Jordan Crook, *PlayVS, Bringing Esports Infrastructure to High Schools, Picks Up $15 Million*, Techcrunch (June 4, 2018), https://techcrunch.com/2018/06/04/playvs-bringing-esports-infrastructure-to-high-schools-picks-up-15-million/.

[58] *Id.*

[59] *Id.*

[60] Keith Collins, *Net Neutrality Has Officially Been Repealed. Here's How That Could Affect You.*, N.Y. TIMES (June 11, 2018), https://www.nytimes.com/2018/06/11/technology/net-neutrality-repeal.html.

[61] Cecilia Kang, *Senate Democrats Win Vote on Net Neutrality, a Centerpiece of 2018 Strategy*, N.Y. TIMES (May 16, 2018), https://www.nytimes.com/2018/05/16/technology/net-neutrality-senate.html.

[62] 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.

[63] Kelcee Griffis, *9th Cir. Hands Net Neutrality Litigation to DC Circ.*, Law360 (Mar. 28, 2018), https://www.law360.com/media/articles/1027383.

[64] Klint Finley, *New California Bill Restores Strong Net Neutrality Protection*, Wired (July 5, 2018), https://www.wired.com/story/new-california-bill-restores-strong-net-neutrality-protections/; Klint Finley, *Washington State Enacts Net Neutrality Law, In Clash With FCC*, Wired (Mar. 5, 2018), https://www.wired.com/story/washington-state-enacts-net-neutrality-law-in-clash-with-fcc/.

[65] Adam Satariano, *What the G.D.P.R., Europe's Tough New Data Law, Means For You*, N.Y. Times (May 6, 2018), https://www.nytimes.com/2018/05/06/technology/gdpr-european-privacy-law.html.

[66] Kieren McCarthy, *US government weighs in on GDPR-Whois debacle, orders ICANN to go probe GoDaddy*, The Register (Apr. 17, 2018), https://www.theregister.co.uk/2018/04/17/us_government_whois_debacle/.

[67] Mike Fleming Jr., *It Will Soon Be Illegal For Studios To Verify Salary Quotes: Hollywood Dealmakers Brace For California Labor Code 432.3*, Deadline (Dec. 13, 2017), https://deadline.com/2017/12/hollywood-dealmaking-california-labor-code-432-3-salary-quotes-1202225985/.

[68] Philip Bonoli, *Studios And Agencies Prepare For The Labor Code 432.3 Earthquake*, Forbes (Dec. 13, 2017), https://www.forbes.com/sites/legalentertainment/2017/12/13/studios-and-agencies-prepare-for-the-labor-code-432-3-earthquake/#221350426509.

[69] Eriq Gardner, *Ozzy Osbourne Brings Antitrust Lawsuit Against AEG for Tying London and L.A. Venues*, The Hollywood Rep. (Mar. 21, 2018), http://www.hollywoodreporter.com/thr-esq/ozzy-osbourne-brings-antitrust-lawsuit-aeg-tying-london-la-venues-1096448.

[70] *Id.*

[71] *Id.*

[72] *Id.*

[73] *Id.*

[74] Eriq Gardner, *AEG Says Ozzy Osbourne Lawsuit Isn't What It Pretends to Be*, The Hollywood Rep. (Jun. 4, 2018), http://www.hollywoodreporter.com/thr-esq/aeg-says-ozzy-osbourne-lawsuit-isnt-what-it-pretends-be-1116729.

[75] Id.

[76] Id.

[77] Bonnie Eslinger, *Coachella Owner Faces Antitrust Suit Over Artist Controls*, Law360 (Apr. 9, 2018), http://www.law360.com/articles/1031313/coachella-owner-faces-antitrust-suit-over-artist-controls.

[78] Eriq Gardner, *AEG Faces Antitrust Lawsuit over Territorial Restrictions for Coachella Artists*, The Hollywood Rep. (Apr. 10, 2018), http://www.hollywoodreporter.com/thr-esq/aeg-faces-antitrust-lawsuit-territorial-restrictions-coachella-artists-1101313.

[79] *Id.*

[80] *Id.*

[81] *Id.*

[82] Eriq Gardner, *Disney Headed to Trial Over 'Turner & Hooch' Profits*, The Hollywood Rep. (May 7, 2018), https://www.hollywoodreporter.com/thr-esq/disney-headed-trial-turner-hooch-profits-1109326.

[83] Daniel Siegal, *Disney Must Face 'Turner & Hooch' Royalty Fraud Claim*, Law360 (May 4, 2018), https://www.law360.com/articles/1040685/disney-must-face-turner-hooch-royalty-fraud-claim.

[84] *Id.*

*[*85] *Id.*; Gardner, *supra* note 82.

[86] *Id.*

[87] *Id.*

[88] Eriq Gardner, *Judge Judy's $47 Million Salary Isn't Too Much, Rules Real Judge*, The Hollywood Rep. (April 5, 2018), https://www.hollywoodreporter.com/thr-esq/judge-judys-47-million-salary-isnt-rules-real-judge-1100081.

[89] *Id.*

[90] *Id.*

[91] *Id.*

[92] *Id.*

[93] Eriq Gardner, *Judge Allows 'Columbo' Fraud Lawsuit Against Universal*, The Hollywood Rep. (Feb. 9, 2018), https://www.hollywoodreporter.com/thr-esq/judge-allows-columbo-fraud-lawsuit-universal-1083344.

[94] *Id.*

[95] *Id.*

[96] *Id.*

[97] *Goldman v. Breitbart News Network, LLC*, No. 17-CV-3144, 2018 WL 911340, at *1 (S.D.N.Y. Feb. 15, 2018).

[98] *Id.* at *2.

[99] *Id.* at *3 (quoting Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417, 430 (1984)).

[100] *Id.* at *4.

[101] *Id.* at *3 (quoting H.R. Rep. 94–1476, 47, 51 (1976)).

[102] *Id.* at *1.

[103] *Id.* at *5.

[104] *Id.*

[105] *Id.* at *8.

[106] *Id.* at *9.

[107] *Id.* at *10.

[108] Bill Donahue, *Embedded Tweet Copyright Case Sent To 2nd Circ.*, Law360 (Mar. 20, 2018), https://www.law360.com/articles/1024012.

[109] *Heavy, Inc. v. Goldman*, Case No. 18-910, Dkt. 35 (2d Cir. July 17, 2018).

[110] *Fox News Network, LLC v. TVEyes, Inc.*, 883 F.3d 169, 174 (2d Cir. 2018). *See also* Bill Donahue, *Siding With Fox 2nd Circ. Says TVEyes Is Not Fair Use*, Law360 (Feb. 27, 2108), https://www.law360.com/media/articles/1016495.

[111] *TVEyes*, 883 F.3d at 173–74.

[112] *Id.* at 174

[113] *Id.* at 174, 176–79.

[114] *Id.* at 174, 180.

[115] *Id.* at 180, 181.

[116] Bill Donahue, *2nd Circ. Won't Rehear TVEyes Fair Use Case*, Law360 (May 15, 2018), https://www.law360.com/articles/1043784/2nd-circ-won-t-rehear-tveyes-fair-use-case.

[117] Eriq Gardner, *'Cosby Show' Producer Sues BBC for Using Clips in Bill Cosby Doc*, The Hollywood Rep. (Nov. 6, 2017), https://www.hollywoodreporter.com/thr-esq/cosby-show-producer-sues-bbc-using-clips-bill-cosby-doc-1055167.

[118] Eriq Gardner, *BBC Points to Geoblocking in Bid To Defeat Lawsuit Over Use of 'Cosby Show' Clips*, The Hollywood Rep. (Jan. 12, 2018), https://www.hollywoodreporter.com/thr-esq/bbc-points-geoblocking-bid-defeat-lawsuit-use-cosby-show-clips-1074282; *The Carsey-Werner Co., LLC v. British Broad. Corp.*, No. CV 17-8041 PA (ASX), 2018 WL 1083550, at *1 (C.D. Cal. Feb. 23, 2018).

[119] *Id.*; *see also* Eriq Gardner, *BBC Points to Geoblocking in Bid To Defeat Lawsuit Over Use of 'Cosby Show' Clips*, The Hollywood Rep. (Jan. 12, 2018), https://www.hollywoodreporter.com/thr-esq/bbc-points-geoblocking-bid-defeat-lawsuit-use-cosby-show-clips-1074282.

[120] *Carsey-Werner Co.*, 2018 WL 1083550, at *1.

[121] *Id.* at *6.

[122] *Id.* at *7.

[123] *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).

[124] *See id.*

[125] *See* Reply in Support of Defendants' Motion to Dismiss, *Rearden LLC, et al. v. The Walt Disney Co., et al.*, No. 17-cv-04006, 2017 WL 7716172 (N.D. Cal. Nov. 9, 2017).

[126] *Rearden LLC v. Walt Disney Co.*, 293 F. Supp. 3d 963, 970 (N.D. Cal. 2018).

[127] *See* First Amended Complaint, *Rearden LLC, et al. v. The Walt Disney Co., et al.*, No. 17-cv-04006, 2018 WL 2948187 (N.D. Cal. Mar. 6, 2018).

[128] *See* Notice of Motions and Motions for Partial Dismissal of First Amended Complaints, *Rearden LLC, et al. v. The Walt Disney Co., et al.*, No. 17-cv-04006, 2018 WL 29498109 (N.D. Cal. Apr. 5, 2018).

[129] *See* Bill Donahue, *Hollywood Giants Must Face Copyright Claims Over Digital FX*, Law360 (June 19, 2018), https://www.law360.com/articles/1054886/hollywood-giants-must-face-copyright-claims-over-digital-fx.

[130] *Disney Enterprises, Inc. v. Redbox Automated Retail, LLC*, No. 2:17-cv-08655, Dkt. 1 (C.D. Cal. Nov. 30, 2017).

[131] *Disney Enterprises, Inc. v. Redbox Automated Retail, LLC*, No. 2:17-cv-08655, Dkt. 74 (C.D. Cal. Feb. 20, 2018).

[132] *Id.* at 17.

[133] *Id.* at 18.

[134] Dave Simpson, *Term Changes Don't Fix Disney's Copyright Misuse: Redbox*¸ Law360 (May 10, 2018), https://www.law360.com/articles/1042340/term-changes-don-t-fix-disney-s-copyright-misuse-redbox.

[135] *Disney Enterprises, Inc. v. Redbox Automated Retail, LLC*, No. 2:17-cv-08655, Dkt. 86 at 2 (C.D. Cal. Apr. 9, 2018).

[136] *Disney Enterprises, Inc. v. Redbox Automated Retail, LLC*, No. 2:17-cv-08655, Dkt. 94 at 12 (C.D. Cal. May 7, 2018).

[137] *Disney Enterprises, Inc. v. Redbox Automated Retail, LLC*, No. 2:17-cv-08655, Dkt. 113 (C.D. Cal. Jul. 11, 2018).

[138] Kat Greene, *Playboy May Amend Centerfold Copyright Suit, Judge Rules*, Law360 (February 15, 2018), https://www.law360.com/articles/1012972.

[139] *Id.*

[140] *Playboy Entm't Grp. Inc. v. Happy Mutants, LLC*, No. CV-178140, 2018 WL 2315936, at *1 (C.D. Cal. Feb. 14, 2018).

[141] *Id.* at *1, n.1.

[142] *See* Response to Order to Show Cause, *Playboy Entertainment Group, Inc. v. Happy Mutants, LLC*, Case No. 2:17-cv-08140-FMO-PLA (March 12, 2018).

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

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

[145] *Capitol Records, LLC v. Vimeo, LLC*, No. 09-CV-10101, 2018 WL 1634123, at *6 (S.D.N.Y. Mar. 31, 2018).

[146] *Id.* at *4.

[147] *Id.* at *6.

[148] Dave Simpson, *Split 9th Circ. Tosses Porn Co. Copyright Suit*, Law360 (March 14, 2018), https://www.law360.com/media/articles/1022316.

[149] *Id.*

[150] *Id.*

[151] *Id.*

[152] *Id.*

[153] *Id.*

[154] *de Havilland v. FX Networks, LLC*, 21 Cal. App. 5th 845 (2018), review filed (May 4, 2018).

[155] *Id.* at 851.

[156] *Id.*

[157] *de Havilland*, 21 Cal. App. 5th at 845.

[158] *Id.* at 856, 870–71.

[159] *Id.* at 849.

[160] *Id.* at 864.

[161] *Id.* at 864–67.

[162] *Lohan v. Take-Two Interactive Software, Inc.*, 97 N.E.3d 389, 392–93 (2018).

[163] *Id.* at 122.

[164] *Id.* at 119 (internal quotations omitted).

[165] Bill Donahue, *NY Top Court Says 'Game Over' For Lohan's 'GTA V' Suit*, Law360 (Mar. 29, 2018), https://www.law360.com/media/articles/1027785/ny-top-court-says-game-over-for-lohan-s-gta-v-suit.

[166] *Sivero v. Twentieth Century Fox Film Corp.*, No. B266469, 2018 WL 833696 (Cal. Ct. App. Feb. 13, 2018), reh'g denied (Mar. 2, 2018), review denied (May 23, 2018); *see also* Eriq Gardner, *Appeals Court Won't Let 'Goodfellas' Actor Have Another Shot at 'Simpsons' Mob Character*, The Hollywood

Rep. (Feb. 13, 2018), https://www.hollywoodreporter.com/thr-esq/appeals-court-wont-let-goodfellas-actor-have-shot-at-simpsons-mob-character-1084379.

[167] *Sivero*, 2018 WL 833696, at *1.

[168] *Id.* at 2.

[169] *Id.*

[170] *Id.* at 10.

[171] *Id.*

[172] *Id.*

[173] Ashley Cullins, *John Oliver, HBO Beat Coal Executive's Defamation Lawsuit*, The Hollywood Rep. (Feb. 24, 2018), https://www.hollywoodreporter.com/thr-esq/john-oliver-hbo-beat-coal-executives-defamation-lawsuit-1088133.

[174] *See id.*

[175] *See id.*

[176] *See Marshall Cty. Coal Co. v. Oliver*, No. 17-C-124, 2018 WL 1082525, at *1 (W. Va. Cir. Ct. 2018).

[177] *See* Amy B. Wang, *A coal exec sued John Oliver for calling him a 'geriatric Dr. Evil.' A judge tossed the case*, The Washington Post (Feb. 26, 2018), https://www.washingtonpost.com/news/arts-and-entertainment/wp/2018/02/26/a-coal-exec-sued-john-oliver-for-calling-him-a-geriatric-dr-evil-a-judge-tossed-the-case/.

[178] *See* Eriq Gardner, *Bill Cosby Asking Supreme Court to Review Janice Dickinson Defamation Lawsuit*, The Hollywood Rep. (June 4, 2018), https://www.hollywoodreporter.com/thr-esq/bill-cosby-asking-supreme-court-review-janice-dickinson-defamation-lawsuit-1116912.

[179] *See Dickinson v. Cosby*, 17 Cal. App. 5th 655, 660-61 (2017).

[180] *See id.* at 687.

[181] *See McKee v. Cosby*, 874 F.3d 54, 62 (1st Cir. 2017).

[182] *See Hill v. Cosby*, 665 F. App'x 169, 177 (3d Cir. 2016).

[183] Eriq Gardner, *Bill Cosby's Ex-Lawyer Marty Singer Escapes Janice Dickinson Lawsuit*, The Hollywood Rep. (July 16, 2018), https://www.hollywoodreporter.com/thr-esq/bill-cosbys-lawyer-marty-singer-escapes-janice-dickinson-lawsuit-1127509.

[184] Petition for Writ of Certiorari, *Cosby v. Dickinson*, No. 18-70.

[185] *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 302 F. Supp. 3d 541, 574-75 (S.D.N.Y. 2018).

[186] Garrett Epps, *What the @RealDonaldTrump Ruling Actually Means*, The Atlantic (May 24, 2018), https://www.theatlantic.com/technology/archive/2018/05/what-the-realdonaldtrump-ruling-actually-means/561146/.

[187] Bryan Fung and Hamza Shaban, *Trump violated the Constitution when he blocked his critics on Twitter, a federal judge rules*, The Washington Post (May 23, 2018), https://www.washingtonpost.com/news/the-switch/wp/2018/05/23/trump-cannot-block-twitter-users-for-their-political-views-court-rules/.

[188] *Knight First Amendment Inst.*, 302 F. Supp. 3d at 567.

[189] *Id.* at 574.

[190] *See Prager Univ. v. Google LLC*, No. 17-CV-06064-LHK, 2018 WL 1471939, at *8 (N.D. Cal. Mar. 26, 2018).

[191] Eriq Gardner, *Why Won't Google Comment on a Lawsuit Accusing YouTube of Censoring Conservatives?*, The Hollywood Rep. (Oct. 27, 2017), https://www.hollywoodreporter.com/thr-esq/why-wont-google-discuss-a-lawsuit-accusing-youtube-censoring-conservatives-1052497.

[192] *Prager Univ.*, 2018 WL 1471939, at *8.

[193] *Id.*

[194] *IMDb.com, Inc. v. Becerra*, No. 16-CV-06535-VC, 2017 WL 772346, at *1–2 (N.D. Cal. Feb. 22, 2017).

[195] *IMDb.com, Inc. v. Becerra*, No. 16-CV-06535-VC, 2018 WL 979031, at *3 (N.D. Cal. Feb. 20, 2018). *See also* Eriq Gardner, *California's IMDb Age Censorship Law Declared Unconstitutional*, The Hollywood Rep. (Feb. 20, 2018), https://www.hollywoodreporter.com/thr-esq/californias-imdb-age-censorship-law-declared-unconstitutional-1086540.

[196] *IMDb.com*, 2018 WL 979031, at *2.

[197] *Id.*

[198] *Id.*

[199] *Id.* at *3.

[200] *Id.*

[201] *Id.*

[202] *See* RJ Vogt, *Sesame Street Can't Block Raunchy Movie Tagline In TM Row*, Law360 (May 31, 2018), https://www.law360.com/articles/1048982/sesame-street-can-t-block-raunchy-movie-tagline-in-tm-row.

[203] *See id.*

[204] *See* Bill Donahue, *Overturning TTAB, Judge Rules 'Booking.com' Not Generic*, Law360 (Aug. 10, 2017), https://www.law360.com/articles/952925/overturning-ttab-judge-rules-booking-com-not-generic.

[205] *Id.*

[206] *See* Bill Donahue, *Booking.com Asks Full 4th Cir. To Nix USPTO Atty Fee Rule*, Law360 (Apr. 12, 2018), https://www.law360.com/articles/1032794/booking-com-asks-full-4th-circ-to-nix-uspto-atty-fee-rule.

[207] *See* Eriq Gardner, *'Star Trek'/Dr. Suess Mashup Creator Beats Trademark Claims*, The Hollywood Rep. (May 22, 2018), https://www.hollywoodreporter.com/thr-esq/star-trek-dr-seuss-mashup-creator-beats-trademark-claims-1113911.

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

[209] *See* Gardner, *supra* note 207.

[210] Ben Sisario, *"Blurred Lines" Verdict Upheld by Appeals Court*, The New York Times (Mar. 21, 2018), https://www.nytimes.com/2018/03/21/business/media/blurred-lines-marvin-gaye-copyright.html.

[211] Bill Donahue, *"Blurred Lines" Ruling Leaves Big Questions Unanswered*, Law360 (Mar. 21, 2018), https://www.law360.com/articles/1024899/.

[212] *Williams et al. v. Gaye et al.*, No. 15-56880, 2018 WL 3382875, at *21 (9th Cir. Mar. 21, 2018) (Amend. Op.).

[213] *Williams*, 2018 WL 3382875, at *23.

[214] *Id.*

[215] *Id.* at *27.

[216] *Id.* at *31-32.

[217] *Id.* at *33, n.14.

[218] *Id.* at *19.

[219] Eriq Gardner, *Appeals Court Won't Rehear "Blurred Lines" Case*, The Hollywood Rep., July 11, 2018, https://www.hollywoodreporter.com/thr-esq/appeals-court-wont-rehear-blurred-lines-case-1126253.

[220] Eriq Gardner, *Music Publishers Win Major Copyright Fight Over Streaming of Legendary Rock Concerts*, The Hollywood Rep. (Apr. 10, 2018), https://www.hollywoodreporter.com/thr-esq/music-publishers-win-major-copyright-fight-streaming-legendary-rock-concerts-1101359.

[221] *Id*.

[222] *Abkco Music, Inc., et al. v. William Sagan, et al.*, 2018 WL 1746564, at *12 (S.D.N.Y. Apr. 9, 2018).

[223] *Id*. at *12-15; *see also* Gardner, *supra* note 220.

[224] Gardner, *supra* note 220.

[225] *Id*.

[226] Eriq Gardner, *Jay-Z Triumphs in "Big Pimpin" Appeal as Egyptians Can't Enforce Moral Rights*, The Hollywood Rep. (May 31, 2018), https://www.hollywoodreporter.com/thr-esq/jay-z-triumphs-big-pimpin-appeal-as-egyptians-cant-enforce-moral-rights-1116131.

[227] *Fahmy v. Jay-Z*, 891 F.3d 823, 823, 831 (9th Cir. 2018).

[228] *Id*. at 826.

[229] *Id*.

[230] *Id*. at 829.

The following Gibson Dunn lawyers assisted in the preparation of this client update: Scott Edelman, Howard Hogan, Ben Ross, Nathaniel Bach, Corey Singer, Jonathan Soleimani, Sara Ciccolari-Micaldi, Michael Policastro, Aaron Frumkin, Andrew Blythe, Rachil Davids, Lauryn Togioka, Harrison Korn, Brittany Schmeltz, Sarah Graham, and Sean O'Neill.

Gibson Dunn lawyers are available to assist in addressing any questions you may have regarding these developments. Please contact the Gibson Dunn lawyer with whom you usually work, the authors, or the following leaders and members of the firm's Media, Entertainment & Technology Practice Group:

Scott A. Edelman - Co-Chair, Los Angeles (+1 310-557-8061, sedelman@gibsondunn.com)
Kevin Masuda - Co-Chair, Los Angeles (+1 213-229-7872, kmasuda@gibsondunn.com)
Orin Snyder- Co-Chair, New York (+1 212-351-2400, osnyder@gibsondunn.com)
Ruth E. Fisher - Los Angeles (+1 310-557-8057, rfisher@gibsondunn.com)
Howard S. Hogan - Washington, D.C. (+1 202-887-3640, hhogan@gibsondunn.com)
Ari Lanin - Los Angeles (+1 310-552-8581, alanin@gibsondunn.com)
Benyamin S. Ross - Los Angeles (+1 213-229-7048, bross@gibsondunn.com)
Helgi C. Walker - Washington, D.C. (+1 202-887-3599, hwalker@gibsondunn.com)
Nathaniel L. Bach - Los Angeles (+1 213-229-7241,nbach@gibsondunn.com)