

MEDIA, ENTERTAINMENT AND TECHNOLOGY GROUP OUTLOOK AND REVIEW – 2019

To Our Clients and Friends:

With an active end to 2018 and a quick start to 2019, we have had no shortage of material to report on for our semi-annual Media, Entertainment & Technology Practice Group Update. From remasters (of pre-1972 recordings) to remand (“Stairway to Heaven”), and from Tweets (Stormy Daniels v. Trump) to retweets (Joy Reid). There was M&A and the passage of the MMA—the Music Modernization Act, enacted to facilitate the accounting and payment of royalties in the digital streaming era. Cert denials cemented notable rulings regarding California’s right of publicity, copyright fair use, and the DMCA. And in trademark law, the Supreme Court’s 2017 ruling in *Matal v. Tam* continued to make waves. Here, then, are the deals, rulings, and regulatory actions that capture current legal trends and will define future industry movement.

I. Transaction & Regulatory Overview

A. M&A

1. Disney’s Acquisition of Twenty-First Century Fox Races to Completion

On July 27, 2018, Disney and Fox shareholders voted to approve the acquisition of the majority of Twenty-First Century Fox, Inc. by The Walt Disney Company for \$71.3 billion in cash and stock.^[1] The U.S. Department of Justice had already approved the arrangement between Disney and Fox, on June 27, 2018, with the stipulation that Disney must sell Fox’s regional sports networks.^[2]

Through the latter half of 2018, a number of foreign regulatory bodies evaluated the Disney-Fox merger. The Competition Commission of India approved the merger of Star India and related assets (Fox Star Studios and National Geographic channels) in August 2018.^[3] The European Commission’s approval of Disney’s purchase of Twenty-First Century Fox assets followed in November 2018, subject to the condition that Disney discharge its A&E channels in Europe to address concerns that the deal with Fox would remove competition with respect to factual channels.^[4] China unconditionally approved the Disney-Fox deal in November 2018.^[5] Despite lingering approvals required from other regulators, approval from the United States, the European Union, and China were thought to be the most important obstacles to clear.^[6]

Brazil’s antitrust regulator Cade (Administrative Council for Economic Defense) noted on December 3, 2018 that the Disney-Fox deal raised concerns “about undermining competition in the cable television market,” specifically regarding concentration in the market of cable sports channels.^[7] Cade recommended remedial measures and has until March 2019 to issue a decision (which deadline can be

extended for 90 days).[8] On January 4, 2019, Bloomberg Law reported that Cade is expected to approve the proposed merger between Disney and Fox without asking for any asset sale.[9] Disney and Fox were expected to present a proposal including offers to change behavior to facilitate approval of the deal.[10] Regulators returned from year-end recess on January 30, 2019.[11] Despite meetings between Bob Iger, Disney’s Chief Executive Officer, and representatives of CADE in early February 2019, Cade has not issued a decision as of February 12, 2019.[12] Brazilian regulators remain divided on whether the deal can be approved without Disney’s sale of one of its two sports channels in the country (Fox Sports and ESPN), with reports that some Cade board members still view behavioral remedies as the path to approval.[13] Bloomberg reports that the deadline for a decision from Cade is March 17, 2019, though an extension can be requested if the case isn’t discussed at Cade’s upcoming February 27 meeting.[14]

At the end of 2018, Disney and Fox also awaited authorization of regulatory authorities in Mexico, with speculation of regulations due to the likelihood that this deal will monopolize sports TV and that Disney, after the acquisition, would own 28% of the content distribution market in Mexico.[15] On January 31, 2019, Mexico’s Federal Economic Competition Commission approved the Disney-Fox merger after Disney agreed to sell its share of Walt Disney Studios Sony Pictures Releasing de México to Sony Pictures Releasing International Corporation.[16]

Twenty-First Century Fox announced its filing of a registration statement for Fox Corporation, the new Fox entity to be spun off in connection with the merger, with the SEC on January 7, 2019.[17] At the end of January 2019, as per a filing with the SEC, Disney expects the Disney-Fox deal to close by June 2019,[18] though other sources expect the deal to close in February or early March 2019.[19]

2. Universal and Lionsgate Expand on Prior Collaborations

On August 6, 2018, Universal Music Group (“UMG”) announced a multi-year, first-look television deal with Lionsgate.[20] Under the deal, Lionsgate and Polygram Entertainment, UMG’s film and television production and development division, will create original scripted and unscripted television projects drawn from UMG’s catalogue of music, labels, and artists.[21] David Blackman, the head of Polygram Entertainment, stated that “[w]ith this partnership, we’ll continue to expand the definition of music-driven stories—whether that means narratives set against entire scenes of eras of music, or projects driven by our artists’ catalogues.”[22] UMG will also produce soundtrack albums associated with the projects.[23]

This deal builds on the companies’ past successful collaborations, which includes film scores and soundtracks to *La Land*, *Hunger Games*, and *Divergent*. [24] Additionally, the announcement came days after Universal Music Publishing Group executed an exclusive administration deal to represent Lionsgate’s music publishing properties and administer its music rights.[25]

3. Sinclair and Tribune Sue Each Other Over Failed Merger

In August 2018, Tribune Media Co. terminated its agreement to be acquired by Sinclair Broadcast Group and filed suit against Sinclair, seeking approximately \$1 billion in damages for Sinclair’s alleged failure to fulfill its obligation under their merger agreement to use its reasonable best efforts to obtain regulatory

approval. The \$3.9 billion deal, which was announced in May 2017, would have created a company that owned television stations in 108 markets, covering 72% of U.S. homes.[26] Before the agreement was terminated, the U.S. Federal Communications Commission issued an order stating there were “substantial and material questions of fact” as to whether “Sinclair engaged in misrepresentation and/or lack of candor in its applications with the Commission” and referred review of the acquisition to an administrative law judge.[27]

Tribune alleged in its lawsuit that “in an effort to maintain control over stations it was obligated to sell, Sinclair engaged in unnecessarily aggressive and protracted negotiations with the [government] over regulatory requirements, refused to sell stations in the markets as required to obtain approval, and proposed aggressive divestment structures and related-party sales that were either rejected outright or posed a high risk of rejection and delay—all in derogation of Sinclair’s contractual obligations.”[28] Sinclair has called the lawsuit meritless, saying that it fully complied with its obligations under the merger agreement and that Tribune is trying “to capitalize on an unfavorable and unexpected reaction from the Federal Communications Commission to capture a windfall.”[29] Sinclair also filed a countersuit against Tribune, alleging Tribune breached its obligation under their merger agreement to use its reasonable best efforts to obtain regulatory approval by prioritizing its litigation strategy against Sinclair at the expense of its cooperation with Sinclair to try to close the merger.[30]

4. Nexstar Agrees to Acquire Tribune

A few months after the failure of its merger with Sinclair, Tribune found a new buyer. In December 2018, Tribune signed a deal to be acquired by Nexstar Media Group for \$4.1 billion in cash.[31] If completed, the deal, which is worth \$6.4 billion including the assumption of Tribune’s debt, would make Nexstar the largest regional U.S. TV station operator.[32] Tribune shareholders will receive an additional 30 cents per share per month in consideration (less any dividends paid by Tribune) if the merger does not close by August 31, 2019.[33] In order to get U.S. Federal Communications Commission approval for the merger, Nexstar said it plans to divest some of the more than 200 television stations that would be owned by the combined company, including stations in 13 of the 15 markets in which both Tribune and Nexstar currently own stations.[34]

5. Sky Auction Draws to a Close

The nearly two-year battle to acquire the European pay-TV broadcaster Sky PLC drew to an end in September 2018, with Comcast prevailing over Twenty-First Century Fox (which was backed by Disney due to the Fox acquisition).[35] Fox, which held a 39% stake in Sky, was the first to offer a bid in December 2016, but faced delays due to the prolonged regulatory review in the U.K.[36] Comcast thereafter made its own offer, with each company making competing bids thereafter until they deadlocked at \$34 billion.[37] The stand-off exceeded the September 22, 2018 deadline imposed by U.K. regulators and triggered a rare blind auction to force the companies to disclose their best offers.[38] The auction was a one-day bidding process that lasted three rounds and required sealed bids with cash-only offers.[39] After the bidding closed, it would be left to the Sky shareholders to accept either offer.[40]

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In the final round in September 2018, Comcast outbid Fox by \$3.6 billion, offering a total of \$38.8 billion.[41] Comcast officially acquired Sky on October 9, 2018, by purchasing more than 75% of the company's shares, including the 39% stake that Fox previously owned.[42]

6. Microsoft Studios Acquires Six Video Game Development Studios and Finds a Seventh in 2018

On November 10, 2018, Microsoft Studios announced its acquisition of two video game development studios, Obsidian Entertainment and inXile Entertainment, for undisclosed amounts.[43] Both studios are known for their development of role-playing games (RPGs), such as Obsidian's *Fallout: New Vegas* and *Star Wars Knights of the Old Republic II: The Sith Lords* and inXile's *Wasteland* series.[44] The acquisitions followed the June 2018 announcement of Microsoft's founding of a new video game studio, The Initiative, and its acquisitions of four other gaming developers: Compulsion Games (*We Happy Few*), Ninja Theory (*Hellblade: Senua's Sacrifice*), Undead Labs (*State of Decay* series), and Playground Games (*Forza Horizon* series).[45] Microsoft now owns thirteen gaming development studios.[46]

B. SVOD Update

1. Diversification, Even More Original Content, and Increased Competition

In July 2018, Netflix collected 112 Emmy nominations (across 40 different shows),[47] further illustrating its prioritization of original content to propel growth and influence in the streaming video on demand (SVOD) industry. By October, Netflix had spent over \$8 billion on content in 2018, and announced plans to offer another \$2 billion in senior notes on October 22, 2018 to be used "for general corporate purposes, which may include content acquisitions, production and development, capital expenditures, investments, working capital and potential acquisitions and strategic transactions." [48]

Hulu and Amazon have also positioned themselves for continued growth through expansion of original content in early 2019. Following Disney's acquisition of Fox, Disney will own a 60% stake in Hulu, and, along with the potential integration of additional Fox content, Disney plans to use its expanded influence to invest in more original content for Hulu and promote international expansion of the service.[49] Additionally, a study by Ampere Analysis from September 2018 revealed that Amazon's current plans for new original programming will almost double its original content, with over 100 upcoming projects that will supplement the 105 original programs currently on its roster.[50]

In addition to these efforts to expand original content, the latter half of 2018 was marked by efforts to shake up the SVOD industry with numerous new entrants. In October 2018, AT&T announced that it would be releasing a streaming service in late 2019; [51] in November 2018, Disney officially confirmed that its upcoming streaming service will be called Disney+ and will be launching in late 2019.[52]

2. Katzenberg & Whitman Launch Short-Form Streamer Quibi

Quibi, a new streaming service led by Jeffrey Katzenberg and Meg Whitman, plans to create a library of high-quality, short-form videos for viewing on mobile devices. Named for the "quick bites" of entertainment it will broadcast, the service plans to launch at the end of 2019 with 5,000 unique pieces

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of content, each 10 minutes or less, specifically designed to be viewed on a phone.[53] Despite being nearly a year away from its anticipated launch date, Quibi is already attracting top talent, including Oscar-winning director Guillermo del Toro, *Twilight* and *Lords of Dogtown* director Catherine Hardwicke and *Spider-Man* director Sam Raimi.

Incubated at WndrCo, the consumer technology holding company and venture investor, Quibi raised \$1 billion in August 2017 from major Hollywood studios, a number of independent television studios and major technology companies. The aim of such investments, in part, is to allow Quibi to tap into the studios' creative talent and resources and the technology companies' innovations like 5G broadband, big data and analytics. [Disclosure: Gibson Dunn represents WndrCo and Quibi.]

C. China Update

1. Open Road Films Files for Chapter 11 Bankruptcy

On September 6, 2018, Open Road Films LLC, the North American film distributor known for its release of independent films such as the Best Picture Academy Award-winning film *Spotlight*, and its affiliated entities filed for Chapter 11 bankruptcy in the U.S. Bankruptcy Court for the District of Delaware, reporting approximately \$141 million in liabilities.[54] In August 2017, Tang Media Partners, the Shanghai and Los Angeles-based investment group, had acquired Open Road Films from AMC Entertainment and Regal Entertainment Group for approximately \$28.8 million.[55] This acquisition followed Tang Media Partners' previous acquisition in summer 2016 of IM Global, a film finance and sales agency, and the related launch of a television joint venture, IM Global Television, with Chinese technology firm Tencent Holdings.[56] Announcing its plans to combine Open Road Films, IM Global, and IM Global Television under one brand, Tang Media Partners launched Global Road Entertainment in October 2017 as a global content company with a particular focus on the development, production, and distribution of film and television content that would bridge the U.S. and China markets.[57] In February 2018, Global Road announced a commitment of \$1 billion to production finance over three years,[58] but the studio struggled to raise the capital needed to complete the Global Road restructure and suffered from poor box office performance.[59] In July 2018, Tang Media Partners cut off additional funds to Open Road Films,[60] and shortly thereafter bank lenders froze its cash assets.[61]

On December 19, 2018, the U.S. Bankruptcy Court for the District of Delaware approved the asset sale by Open Road, including its library of around 45 films, for approximately \$87.5 million to stalking horse bidder Raven Capital Management.[62]

2. Tencent's China Literature Acquires New Classics Media for \$2.25 Billion

On August 13, 2018, China Literature, the publicly listed e-books company that was spun off by Tencent Holdings in November 2017, announced that it would wholly acquire the film and television production company New Classics Media for approximately \$2.25 billion.[63] A prolific production company, New Classics Media is known for producing Chinese television series and blockbuster films, including *Hello Mr. Billionaire*,[64] which was one of last year's five highest-grossing films at China's box office, earning \$367 million.[65] In March 2018, Tencent had previously purchased a 27 percent stake in New Classics Media from Beijing Enlight Media, an investment that was designed to unlock content for

Tencent’s streaming-video platform, Tencent Video.[66] In announcing the buyout of the remaining equity interest in New Classics Media, Tencent cited its desire to join New Classics Media’s production expertise with China Literature’s extensive literary library, considering that a third of the top 50 films and a quarter of the top TV series in China are literary adaptations.[67] The acquisition marked yet another strategic investment in the entertainment sector by Tencent, which, in addition to its own film distribution and production unit, holds minority equity stakes in a number of entertainment companies, including the China-based studios Huayi Brothers Media and Bona Film Group and the U.S.-based entertainment companies Skydance Media and STX Entertainment.[68]

3. Tencent Music Entertainment Raises \$1.1 Billion in its U.S. IPO

Following a delay of its planned IPO in October 2018, due to a downturn in technology stocks and a rise in global market volatility fueled, in part, by U.S.-China trade tensions, Tencent Music Entertainment, the online music division controlled by Tencent Holdings, raised \$1.1 billion through its U.S. IPO last December, with an implied valuation of \$21.3 billion.[69] Tencent Holdings created Tencent Music after acquiring a controlling interest in China Music Corporation in 2016, which Tencent Holdings then combined with its own music streaming business.[70] Tencent Music offers the largest music-streaming service in China, and the company focuses on three main offerings: music streaming, online karaoke, and live-streamed performances. At the time of its IPO, Tencent Music reported over 800 million unique monthly active users,[71] but, unlike traditional subscription-based models, only a small percentage of these users are paying subscribers.[72] In Q2 2018, the company earned over 70% of its revenue through in-app tipping, virtual gifts, and other music-related “social entertainment services.”[73]

4. The Dalian Wanda Group Scales Back AMC Ownership

As Chinese regulators continue their efforts to retrench Chinese companies’ foreign investments, it was announced on September 14, 2018 that the Dalian Wanda Group would be curtailing its equity interest in AMC Entertainment,[74] which Wanda acquired in 2012 for \$2.6 billion.[75] AMC Entertainment repurchased around a third of the shares owned by Wanda and raised \$600 million from private equity firm Silver Lake Partners through the issuance of unsecured convertible notes.[76] Following the transaction, Wanda owns around 50% of AMC shares; however, upon a full conversion of the notes, Wanda’s ownership stake in AMC would fall to around 38%.[77]

II. Legislative & Regulatory Updates

A. Music Modernization Act Enacted into Law

In October 2018, the Music Modernization Act, the most sweeping update to copyright law in decades, was signed into law, introducing reforms that were designed to modernize copyright law for the digital streaming era.[78] The bill unanimously passed both houses of Congress and had widespread support among record labels, musicians, and digital service providers.[79] The act has three main pieces of legislation combined together:

First, the Music Modernization Act creates a formalized non-profit agency, the Mechanical Licensing Collective, run by major music publishers, which creates a comprehensive database of recordings and

then administers the mechanical license of recordings streamed on services like Spotify, Amazon Music, Google Play, and Tidal. Rather than identifying who holds the mechanical license to a particular track, this agency will be responsible for establishing blanket royalty rates that would be used to pay the composers and songwriters for interactive streaming or digital downloads. The legislation also revamps the rate court process when there are disputes over royalty rates by allowing disputes to be adjudicated by a randomly assigned district judge in the Southern District Court of New York, instead of being assigned to a single rate court judge.

Second, the Compensating Legacy Artists for their Songs, Service, and Important Contributions to Society (“CLASSICS”) Act ensures that sound recordings made before 1972 are covered by federal copyright law until February 15, 2067. Previously, sound recordings made prior to February 15, 1972 did not receive federal copyright law protection. Because some state laws granted these recordings copyright protection and others did not, the CLASSICS Act is intended to address this patchwork of state laws. Musicians will now have the opportunity to receive royalties for songs recorded before 1972. The statute also ensures that older songs will enter the public domain. Recordings made before 1923 will enter the public domain after a three-year period, with recordings from 1923 to 1956 entering within the next few decades.

Finally, the Allocation for Music Producers (“AMP”) Act improves royalty payouts for producers, mixers, and sound engineers from SoundExchange, the non-profit organization established by Congress that distributes royalties on sound recordings, when their sound recordings are used on streaming services or digital downloads. Notably, this is the first time that music producers have ever been mentioned in federal copyright law.^[80]

Regulations are currently being drafted to implement the provisions of the Music Modernization Act, and we will be watching closely to see how those regulations give effect to the Act, and how such provisions begin to be interpreted by the courts.

B. DOJ Opens Review of Paramount Consent Decrees

In October 2018, the Department of Justice opened a review of the Paramount Consent Decrees that for over seventy years have regulated how certain movie studios distribute films to movie theaters.^[81] In 1938, the DOJ brought an antitrust suit against the major movie picture studios at the time (including Paramount, MGM, Universal, Columbia Pictures (now Sony), 20th Century Fox, United Artists, and Warner Brothers), alleging that they had conspired to control the industry through their ownership of film distribution and exhibition. A decade later, the Supreme Court ruled in *United States v. Paramount Pictures, Inc.* that the studios had engaged in a widespread conspiracy and required that each studio enter into a consent decree with the DOJ, now known as the “Paramount Consent Decrees.”^[82] The studios were mandated to divest their distribution operations or movie theaters and, going forward, they were not permitted to both distribute movies and own theaters without prior court approval. The decree also set limits on other practices such as circuit dealing and setting minimum pricing, and the practice of giving exclusive film licenses for certain geographic areas.

The premise of the Department of Justice’s review is that the motion picture industry has changed considerably since the Paramount Consent Decrees were entered.^[83] For example, unlike the movie palaces seventy years ago that had one screen and showed one movie at a time, there are now multiplex theaters that have multiple screens showing movies from numerous different distributors at the same time. Consumers today are also not limited to watching movies in theaters and have the ability to view movies on cable and broadcast television, DVDs, and over the Internet through streaming services. The Department of Justice recently completed a thirty-day review period for public comment and is now determining whether these decrees should be modified or terminated altogether, which might lead to structural changes in the industry or encourage consolidation.

C. Supreme Court Declines Appeal Against Net Neutrality Laws

On November 5, 2018, the Supreme Court denied a petition for writ of certiorari brought by the Trump administration and the telecommunications industry to overturn a D.C. Circuit ruling that had upheld Obama Administration-era net neutrality rules.^[84] Two years ago, the D.C. Circuit held that the Federal Communications Commission (“FCC”) had proper authority to reclassify broadband internet under Title II of the Telecommunications Act and could promulgate rules requiring internet service providers to offer equal access to all web content regardless of who build the facilities that allow that data to be disseminated.^[85] The Supreme Court’s refusal to take up the appeal does not affect a pending challenge to the 2017 repeal of net neutrality rules by the now Republican-led FCC. The D.C. Circuit heard oral arguments in that case on February 1, 2019, with a decision expected by this summer.^[86]

In response to the FCC’s net neutrality repeal, some states have taken legislative action. In September 2018, California passed a net neutrality bill seeking to restore internet access rules. The Justice Department swiftly sued the state, alleging that Congress granted the federal government, through the FCC, the sole authority to create rules for internet service providers.^[87] A month later, California reached an agreement with the DOJ to stay the lawsuit until the D.C. Circuit issues its ruling on the pending challenge to the FCC’s 2017 repeal of federal net neutrality rules.^[88]

III. Recent Litigation Highlights

A. Music Industry

1. Ninth Circuit Holds Remasters Do Not Defeat Plaintiff’s Copyright Claims

On August 20, 2018, the Ninth Circuit overturned the district court’s grant of summary judgment in favor of CBS Corporation in a state-law copyright infringement suit brought by Plaintiff ABS Entertainment, sending the case back to district court for further proceedings.^[89] On August 17, 2015, plaintiffs had filed a putative class action against CBS alleging violations of California state law that protects plaintiffs’ rights in pre-1972 sound recordings—recordings that precede amendments to federal copyright law that went into effect in 1972. CBS moved for summary judgment, arguing that the digitally remastered recordings it broadcasted constituted derivative works that were themselves capable of federal copyright protection, thereby preempting plaintiffs’ state-law claims. After excluding plaintiffs’ expert on the subject under FRE 702, the district court held that there was no dispute of

material fact as to whether the remastered recordings constituted derivative works, and granted summary judgment in CBS's favor.

On appeal, the Ninth Circuit reversed both the grant of summary judgment and the exclusion of plaintiffs' expert. Applying the *Durham* test for determining whether a recording constitutes a "derivative work" as defined in the Copyright Act, the Ninth Circuit found that "the district court's identification of 'perceptible changes' between the recordings in characteristics relating to 'quality' did not ensure that the remastered versions contained *anything of consequence* owing its origin to the remastering engineers."^[90] The appellate court concluded that "[a]lthough we do not hold that a remastered sound recording cannot be eligible for a derivative work copyright, a digitally remastered sound recording made as a copy of the original analog sound recording will rarely exhibit the necessary originality to qualify for independent copyright protection."^[91]

2. Royalty Streaming Disputes

Two class action complaints against Sony Music Entertainment and Warner Music Group were filed at the end of 2018 on behalf of various musical artists alleging that the defendant distributors had failed to pay contractually owed royalties for the digital streaming of plaintiffs' works abroad.

In the Southern District of New York, The Rick Nelson Company, as a representative party of a similarly situated class of music artists, sued Sony Music Entertainment, alleging that Sony has been improperly assessing an "intercompany charge" on revenues collected from its wholly owned foreign affiliates that takes "up to 68% off the top of the international revenue earned from streaming sales" of plaintiffs' artistic works.^[92] Sony has not yet responded to the complaint.

In California, Leonard Williams filed a similar complaint against Warner Music Group in the Los Angeles County Superior Court, alleging that Warner was also assessing improper "intercompany charge[s]" in violation of existing agreements.^[93] Shortly thereafter, Warner Music Group removed to the District Court for the Central District of California and filed a motion to dismiss, arguing that there could be no breach of contract as a matter of law because the contract attached to the complaint "contains no provision for royalties to be paid based upon the digital streaming of sound recordings, let alone the foreign digital streaming of sound recordings," instead limiting royalties to "sales" of "phonograph records" and "tape albums" by the distributor.^[94]

3. Ninth Circuit Walks "Stairway" Back to District Court

In September 2018, the Ninth Circuit overturned a 2016 jury verdict in favor of Led Zeppelin and remanded for a new trial in a copyright infringement suit alleging that Led Zeppelin's hit "Stairway to Heaven" was substantially similar to plaintiffs' song "Taurus" (performed by the group Spirit).^[95]

Although at trial the jury found that plaintiff owns the copyright to "Taurus," a finding not disputed on appeal, it also found that the two songs were not "substantially similar" under the extrinsic test for unlawful appropriation that requires the factfinder to determine similarity "by breaking the works down into their constituent elements, and comparing those elements."^[96] On appeal, plaintiff Skidmore argued among other points that the court's instructions to the jury failed to make clear that the selection

and arrangement of unprotectable musical elements are themselves protectable by copyright. The Ninth Circuit agreed, finding that the district court's failure to include such an instruction, despite receiving such a proposed instruction from both parties, constituted an abuse of discretion.

Defendants argued both that plaintiff had failed to preserve an objection to the exclusion of this instruction and that the error was otherwise harmless. The panel disagreed, calling the waiver argument "baseless" and noting that the error was substantial in light of Skidmore's heavy reliance at trial on the theory of selection and arrangement in arguing infringement.^[97] The Ninth Circuit similarly agreed with plaintiff that the court had erred in providing instructions to the jury that "copyright does not protect chromatic scales, arpeggios or short sequences of three notes" and that "any elements from prior works or the public domain are not considered original parts and not protected by copyright."^[98] The panel noted that "[t]here is a low bar for originality in copyright" that can extend to "an arrangement of a limited number of notes."^[99]

In remanding the case for retrial, although the panel confirmed that the scope of the protected copyright under the 1909 Act is defined by the deposit copy of the song, it found that the district court abused its discretion in refusing to allow recordings of "Taurus" to be played in the presence of the jury to prove that Led Zeppelin had access to the song for copying.^[100] The district court had found that, although probative, such recordings would be unduly prejudicial as they do not define the scope of the copyright in deciding whether copying occurred. The Ninth Circuit held that "[l]imiting the probative value of observation was not proper here, as the risk of unfair prejudice or jury confusion was relatively small and could have been reduced further with a proper admonition."^[101] A petition for rehearing *en banc* is currently being briefed, accompanied by several amici.

4. *Bluewater v. Spotify*

On October 4, 2018, the District Court for the Western District of Tennessee denied Spotify USA Inc.'s motion to dismiss a suit filed by Bluewater Music Services Corporation alleging willful copyright infringement of music compositions published by plaintiff and seeking the maximum \$150,000 statutory damage award for each of 2,142 music compositions.^[102] Bluewater's complaint alleged that Spotify failed to obtain licenses for works it streamed that are owned by Bluewater, including after Bluewater demanded proof of licensing and gave notice to Spotify terminating any rights defendant may have claimed to have.^[103] Spotify moved to dismiss the complaint, arguing that Bluewater had no standing as the mere administrator of the underlying copyrights and that Bluewater lacked copyright registrations for 23 of the music compositions in suit.

Regarding standing, the court evaluated Bluewater's administrative agreements and found that their grant of "the sole and exclusive right . . . to print, publish, sell, dramatize, use and license the use of the Compositions" was sufficient, despite another provision that prohibited Bluewater from executing any mechanical licenses except at the "full statutory rate without prior written consent."^[104] Regarding the failure to obtain copyright registrations before filing suit, the court acknowledged that existing precedent requires such registration but also expressed judicial-efficiency concerns about the dismissal of only 23 works from the case.^[105] Ultimately, the court denied the motion to dismiss the unregistered works with leave to refile after the Supreme Court decides *Fourth Estate Pub. Benefit Corp. v. Wall-Street.com*,

LLC (No. 17-571), which the court expects will decide whether “a copyright infringement action may be taken after the creative work has been filed with the Copyright Office, but before registration is approved.”^[106]

5. **Chris Brown Loses Case Against Philippine Church for Alleged Extortion**

On December 6, 2018, a Los Angeles Superior Court Judge dismissed all claims brought by the singer Chris Brown against Iglesia Ni Cristo (a Philippine church) and its general counsel for alleged extortion. Brown had brought suit alleging that following a July 2015 concert he performed in Manila, he was detained at a hotel at the direction of the church, which controls an arena where Brown had previously canceled a New Year’s Eve concert. Brown alleged that the church sought to extort a payment from him in connection with his release and departure from the Philippines and that Brown had suffered emotional distress as a result.

In September 2018, Judge Patricia Nieto of the Superior Court granted defendants’ motion to dismiss Brown’s second amended complaint against the church’s California branch (which was named in the lawsuit in an effort to confer California jurisdiction). The court found that Brown failed to plead an alter ego theory or single enterprise theory as a matter of law and denied Brown an opportunity to replead the theory. Later that month, the Philippine parent church organization and its general counsel, as specially appearing defendants, brought a separate motion to quash Brown’s service of summons on these two Philippine defendants for lack of personal jurisdiction. On December 6, 2018, Judge Nieto granted the motion to quash, finding that Brown had failed to provide competent evidence to confer jurisdiction and held that asserting jurisdiction would violate the Supreme Court’s and California’s governing precedents on general and specific jurisdiction.^[107] After filing a notice of appeal, Brown failed to timely pursue that appeal, which the California Court of Appeal dismissed, on February 6, 2019. [Disclosure: Gibson Dunn represented Iglesia Ni Cristo, its general counsel, and Iglesia Ni Cristo’s California branch.]

6. ***Viktor v. Top Dawg Entertainment LLC***

On October 24, 2018, Judge Engelmayer of the District Court for the Southern District of New York denied a partial motion for summary judgment that sought to bar the plaintiff Lina Iris Viktor from receiving certain damages in her suit alleging that defendant creators of the music video for the single *All the Stars* by Kendrick Lamar infringed her copyrights by including her paintings in the music video without permission.^[108] The suit seeks actual damages and indirect profits for infringement of Viktor’s unregistered copyrights in her paintings, which appear in a 19-second part of the music video released in connection with the album accompanying the *Black Panther* film.

Because Viktor’s copyrights are unregistered and therefore not entitled to statutory damages, she bears a burden under the Copyright Act to “demonstrate a causal relationship between the infringement and the defendants’ revenues.”^[109] Defendants sought summary judgment on the basis that “no non-speculative evidence could possibly be mustered that would demonstrate a causal nexus between defendants’ profits and defendants’ alleged infringing use of Viktor’s artwork in the video.”^[110] However, the court found the motion to be premature as discovery had not yet concluded, finding that “a challenge by the defense to this claim for damages is properly resolved on a motion for

partial summary judgment following the development of a full factual record.” The court also deferred a decision as to whether Viktor would be entitled to prove damages for reputational harm, an injury not explicitly recognized in the Copyright Act.[111] On December 21, the case was dismissed following an apparent settlement.[112]

B. Copyright Fair Use Developments

1. *Fox News Network, LLC v. TVEyes, Inc.*

Ending a legal battle that began in 2013, the Supreme Court denied the media-monitoring company TVEyes’s petition for certiorari, leaving in place the Second Circuit’s February 2018 decision that TVEyes’s media-monitoring service could not be justified as fair use because it “deprives Fox of revenue that properly belongs to the copyright holder.”[113]

TVEyes recorded television around the clock and provided a searchable database of real-time television clips for its subscribers (which include journalists, politicians, and companies), who pay a monthly fee. In 2013, Fox News sued TVEyes for copyright infringement.[114] After a lengthy battle in the district court, in February 2018 the Second Circuit reversed the lower court’s ruling that the service was protected by the fair use doctrine. While the video service was a useful tool, the Second Circuit said it was “not justifiable as fair use” because “at bottom, TVEyes is unlawfully profiting off the work of others by commercially redistributing all of that work that a viewer wishes to use, without payment or license.”[115] TVEyes had argued that its function of allowing users to search the “vast corpus” of available news material rendered it transformative and thus protected by the fair use doctrine, much like Google’s unauthorized digitization of millions of books, the subject of the landmark decision *Authors Guild, Inc. v. Google, Inc.*[116] The Second Circuit agreed that the searchability of the material did weigh in favor of fair use, but that the service “usurped a function for which Fox is entitled to demand compensation under a licensing agreement” by allowing excessive use of the recorded clips and thus defeated the defense of fair use.[117]

TVEyes sought to overturn the ruling, writing in its petition for certiorari that the ruling would allow networks like Fox News to “wield copyright law as a shield” against criticism and that the fair use doctrine is the “key first Amendment safeguard to protect the public from such abuses.”[118] Fox News urged the Supreme Court to pass on the case, accusing TVEyes of trying to “clothe itself in the mantle of media criticism” and emphasizing that the Second Circuit’s decision did not involve political speech or First Amendment issues, but rather was a simple case of “unauthorized distribution of copyrighted content.”[119] Following denial of certiorari, the parties reached a settlement.[120]

2. *Prince/Warhol*

In a key case regarding artistic expression, a federal judge in New York City will determine whether Andy Warhol’s iconic colorized images are protected from copyright claims by the fair use doctrine.[121] In April 2017, Warhol’s estate sued photographer Lynn Goldsmith, asking the court for a declaration that his 1984 paintings of Prince did not violate her copyright in the original photo because, although Warhol often used photographs as inspiration, his works were “entirely new

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creations.”^[122] Goldsmith filed a counterclaim for copyright infringement shortly afterwards, and dueling motions for summary judgment are currently before the court.^[123]

Goldsmith argues that the court should grant her copyright claim on summary judgment because Warhol’s work directly copied hers and is not eligible for protection under the fair use doctrine. “In today’s digital world, anyone can easily modify a photograph on a computer to add high contrast, coloration and artifacts” and Warhol “did little more than that” in the works at issue, Goldsmith argues.^[124] If the court were to find these “superficial revisions” transformative, she says, this would give a “free pass to appropriation artists and destroy derivative licensing markets for commercial photographers whose works are used without permission.”^[125]

Warhol’s estate, on the other hand, argues that the substantial similarity requirement for copyright infringement centers on protectable elements like lighting, shading, and the “aesthetic effect”—precisely the elements that Warhol manipulates in his works.^[126] After Warhol’s artistic manipulations, Warhol’s estate argued, the only commonality remaining between Warhol’s Prince Series and Goldsmith’s photograph is “the rough outline of Prince’s face—which cannot be copyrightable as a matter of law.”^[127] In addition, Warhol’s estate pointed out that the market for Goldsmith’s work is not harmed by Warhol’s works—fine art collectors who buy Warhol’s work are not “rock-and-roll memorabilia collectors” who buy hers.^[128] Finally, Warhol’s estate’s attorneys warned that a contrary ruling would “create a torrent of doubt and dispute over artists long considered to be transformative” and “chill[] future creativity.”^[129] A ruling is expected sometime this year.

3. Instagram Art Show Was Fair Use, Richard Prince Says

Richard Prince, a famous “appropriation artist,” is pushing to end copyright litigation over his Instagram-themed art exhibit, arguing that he was allowed to display largely unaltered versions of other artists’ images because he utilized them in “a radically different aesthetic context.”^[130] Mr. Prince is facing two separate copyright infringement lawsuits from photographers whose works were featured in “New Portraits”—an installation of large images made to look like Instagram posts, with captions written by Mr. Prince. He moved for summary judgment in both cases, saying that his use of the images was protected by the fair use doctrine.^[131]

In both instances, Mr. Prince took images of the artists’ works, blew them up, and placed them in art installations designed to look like Instagram posts. He acknowledges that his copies do not “cut, mark, paint over, scratch or otherwise obscure” the original photograph, but that this was a feature of his fair use argument, not a problem with it.^[132] Mr. Prince argues that his intent was to “authentically replicate[] in the physical world the virtual world of social media,” and therefore that this is protected by the fair use doctrine.^[133] Rulings are expected sometime this year.

C. DMCA

1. Supreme Court Denies Certiorari for Porn Copyright Case

In late October, the Supreme Court rejected an invitation to clarify the scope of the Digital Millennium Copyright Act’s (“DMCA”) safe harbor provision,^[134] which immunizes online service providers from

liability for infringing material maintained “at the direction of a user . . . on a system or network controlled or operated by or for the service provider” under certain circumstances.[135]

As reported in our 2018 Mid-Year Update, in *Ventura Content Ltd. v. Motherless Inc., et al.*,^[136] the Ninth Circuit rejected an attempt to reverse a grant of summary judgment to Motherless, Inc., a website that allows users to upload pornographic videos for public viewing. Appellant Ventura Content Ltd. argued that Motherless failed to remove material that it knew or should have known was copyright infringing, and that Motherless did not have a proper policy for removing users who repeatedly infringed copyright. Relying on a case from the Second Circuit, *Capitol Records, LLC v. Vimeo, LLC*,^[137] the panel rejected the notion that Motherless had actual or constructive knowledge of the infringing material, holding that “[t]he copyright owner must show knowledge” of the specific videos “that infringed its copyright and are the subject of its claim.”^[138] Moreover, the panel affirmed the district court’s determination that there was “no issue of triable fact” as to whether Motherless had “adopted and reasonably implemented” a policy of terminating users who repeatedly posted copyright-infringing materials.^[139]

After its loss, Ventura filed a petition for certiorari in the Supreme Court, but in November 2018 the Supreme Court rejected Ventura’s petition, leaving the Ninth Circuit ruling in place.^[140]

2. Cox Settles BMG Case, Faces New Claims from Labels and Publishers

Just days before trial was set to begin, Cox Communications settled a case brought by BMG Rights Management seeking to hold Cox liable for Cox users’ illegal downloads of BMG’s copyright-protected material. The suit, which began in 2014, alleged that Cox failed to implement a policy for terminating the service of users who repeatedly downloaded the material at issue, a so-called “repeat infringer” policy, thereby allowing offending users to continue to illegally download the material. After U.S. District Judge Liam O’Grady ruled that Cox’s failure to enact or enforce such a policy deprived Cox of the shelter of the safe harbor provision,^[141] the case went to trial, and in 2015 a jury found Cox liable and awarded BMG a multimillion dollar verdict.

The Fourth Circuit reversed, holding that the district judge had given improper jury instructions, but the panel importantly also held that the district court had properly found that Cox had failed to enforce its repeat infringer policy.^[142] The case was remanded to the district court for further proceedings.^[143]

In late 2018, Cox and BMG reached a settlement, but the settlement does not end Cox’s legal woes. A case brought against Cox by a number of major record labels, including Sony Music Entertainment, Universal Music Corp., and Warner Bros. Records, raises similar issues and is also being presided over by Judge O’Grady. Given that the Fourth Circuit has already upheld the ruling stripping Cox of safe harbor protection,^[144] and that Judge O’Grady recently denied a motion for transfer of venue,^[145] the case warrants ongoing attention, given the potential impact it may have on the liability of internet service providers nationwide.

D. Trademark

1. Lanham Act Ban on Immoral or Scandalous Matter Unconstitutional?

In June 2017, the U.S. Supreme Court decided *Matal v. Tam*, invalidating the provision of the Lanham Act that permitted the USPTO to refuse registration of a trademark if it contained “disparaging” matter. The Supreme Court held the provision unconstitutional under the First Amendment.^[146] In the wake of that landmark decision, in December 2017 the Federal Circuit also invalidated under the First Amendment a similar provision of the Lanham Act, which permitted the USPTO to refuse registration of a mark if it contained “immoral” or “scandalous” matter.^[147] In September 2018, the government filed a petition for writ of certiorari to the Supreme Court in that case, which is now captioned *Iancu v. Brunetti*.^[148]

The *Brunetti* case involves the clothing brand FUCT. The USPTO had refused to register the FUCT mark under the immoral or scandalous provision of the Lanham Act because of its similarity to a popular swear word.^[149] In light of the Supreme Court’s decision in *Tam*, the Federal Circuit held that the immoral or scandalous provision, like the disparaging provision, violates the First Amendment. Unlike *Tam*, which was decided on the basis of impermissible viewpoint discrimination, the Federal Circuit held that the immoral or scandalous provision is unconstitutional as impermissibly *content* discriminatory, without reaching whether the provision is also viewpoint discriminatory.^[150]

In its petition for a writ of certiorari, the government argues that *Tam* is not controlling on the immoral or scandalous provision at a minimum because of this distinction between viewpoint discrimination and the less egregious content discrimination, and it further emphasizes several doctrinal questions not fully decided by *Tam*, such as whether trademark registration could be viewed as either a government subsidy or commercial speech—either of which would lower the level of constitutional scrutiny that would be applied to the provision. The Supreme Court granted certiorari on January 4, 2019.^[151]

2. Seattle’s Transit Restriction on Disparaging Bus Ads also Falls

The Supreme Court’s *Matal v. Tam* decision has also found influence in the realm of advertising, as the Ninth Circuit recently cited the *Tam* decision in striking down Seattle’s law that had allowed the transit authority to reject advertisements to be displayed on public buses if those ads were “disparaging.”^[152] In September 2018, the Ninth Circuit held that *Tam* applied with “full force” to Seattle’s ban on disparaging bus ads.^[153] The decision was a victory for the far-right group American Freedom Defense Initiative, previously known as the Stop Islamization of America. The group sued the city after the Metro rejected a proposed advertisement featuring the slogan “Faces of Global Terrorism,” which included mugshots of alleged terrorists primarily of Middle Eastern or Asian descent, on the basis that the ad was disparaging.^[154] In light of *Tam*, the Ninth Circuit struck down Seattle’s ban on disparaging advertising, holding that it too violated the First Amendment as impermissibly viewpoint discriminatory.

3. San Diego Comic-Con Wins \$4M Fee Award in Trademark Dispute

In a suit filed in August 2014, the San Diego Comic Convention (“SDCC”) brought trademark infringement allegations against a rival Utah event called Salt Lake Comic Con. SDCC, which holds trademarks for its logo and various permutations of the term “Comic-Con,” alleged that the Utah event was infringing its “Comic-Con” mark and capitalizing on SDCC’s many decades of brand building.[155] In response, the Utah event argued that the mark had been diluted, arguing both that the mark was invalid by virtue of its prior generic use, and that the mark had in any event become generic through SDCC’s broad licensing and failure to police.[156] The case was tried before a jury in December 2017, and the jury found that the Utah event had infringed SDCC’s trademarks, but the infringement was not willful. The jury awarded \$20,000 in corrective advertising damages.[157]

On post-trial motions, U.S. District Judge Anthony Battaglia granted SDCC’s request for a permanent injunction barring the Utah event from using the phrase “Comic-Con” with or without the hyphen, as well as anything that sounds similar. Judge Battaglia further awarded nearly \$4 million in attorneys’ fees, citing the Utah event’s questionable litigation tactics and repeated disregard for court rules.[158] The Utah event has appealed these post-trial rulings to the Ninth Circuit, where briefing is scheduled to be completed in February 2019.

4. Coachella Settles Trademark Dispute with Filmchella

In August 2017, Coachella sued Filmchella founder Trevor Simms, alleging, among other things, trademark infringement. U.S. District Judge R. Gary Klausner entered a preliminary injunction barring Simms from using either “Filmchella” or “Filmchilla” for his independent Joshua Tree Film Festival, but Judge Klausner denied Coachella’s motion for summary judgment on the issue of trademark infringement, explaining that a reasonable jury could find no likelihood of confusion between Coachella and Filmchella due to the difference in the nature of the festivals.[159] Trial was scheduled for October 2018, but the parties reached a resolution just before trial was to begin. Under the settlement, Simms agreed to forgo use of the term Filmchella and to transfer the domain name to Coachella.[160] The other terms of the settlement remain confidential.

E. 1st Amendment

1. Media Access

a. CNN & Jim Acosta Prevail Over White House

On November 7, 2018, the White House revoked CNN chief White House correspondent Jim Acosta’s hard pass—a type of press pass held by regular White House reporters—after a press conference in which President Trump cut off Mr. Acosta’s questions, ordered him to be seated, and called him a “rude, terrible person” after a White House staffer attempted to take the microphone out of his hands. The next week, CNN and Mr. Acosta filed a lawsuit, claiming First and Fifth Amendment violations.

The United States District Court for the District of Columbia granted CNN and Mr. Acosta’s request for a temporary restraining order and ordered the White House to restore Mr. Acosta’s press pass

immediately. The district court found that CNN and Mr. Acosta had a “First Amendment liberty interest” in Mr. Acosta’s hard pass because the Government had opened the White House to reporters.[161] The district court concluded that CNN and Mr. Acosta were likely to succeed in showing the White House violated CNN and Mr. Acosta’s Fifth Amendment Due Process rights: the White House’s original reason for the revocation was “likely untrue” and was based on “evidence of questionable accuracy,” the decision-making process regarding whether to revoke the hard pass was “shrouded in mystery,” and the White House failed to provide CNN and Mr. Acosta with adequate notice before taking away his hard pass.[162]

Further, the district court held that Mr. Acosta and CNN were harmed “every day” they continued to have their constitutional rights infringed. Finally, the district court decided the harm Mr. Acosta would suffer from losing his hard pass “outweighed” the Government’s interest in holding “respectful” press conferences, so restoring Mr. Acosta’s hard pass served the public interest.[163] Following the district court’s order, the White House issued a final decision restoring his hard pass, and he returned to reporting news. [Disclosure: Gibson Dunn represented CNN and Mr. Acosta.]

b. *Gubarev v. BuzzFeed, Inc.*

On December 19, 2018, the District Court for the Southern District of Florida granted summary judgment to BuzzFeed, Inc., in a defamation lawsuit filed against it by a Cyprus tech CEO, Aleksej Gubarev.[164] The lawsuit arose from BuzzFeed’s publication of an online article entitled *These Reports Allege Trump Has Deep Ties to Russia*, which contained a 35-page dossier that included statements about the plaintiffs, such as that Gubarev’s company “XBT/Webzilla and its affiliates had been using botnets and porn traffic to transmit viruses, plant bugs, steal data, and conduct ‘altering operations’ against the Democratic Party leadership.”[165] The Court ruled that BuzzFeed’s decision to publish the dossier was protected by New York’s fair report privilege, which “exists to protect the media while they gather the information needed for the public to exercise effective oversight of the government . . . even when they report on official action that the government would like to keep secret.”[166] The Court further held that BuzzFeed’s presentation was fair and true, as required by the fair report privilege, because it reproduced the dossier in full without editorializing.

Notably, the ruling came one day after the district judge ruled that Gubarev is not a public figure because he had not involved himself in the ongoing public debate about Russian interference in the 2016 election.[167] This meant that plaintiffs would have had to meet a lower standard for defamation against BuzzFeed, had the district court not granted summary judgment based on the fair report privilege. Plaintiffs have filed an appeal of the district court’s fair report ruling in BuzzFeed’s favor.

2. Right of Publicity

a. Supreme Court Declines to Take Up de Havilland’s Feud Against FX

On October 5, 2018, the 102-year-old actress Olivia de Havilland filed a petition for writ of certiorari with the U.S. Supreme Court, asking the high court to take up the California Court of Appeal’s ruling in her lawsuit against FX Network.[168] De Havilland sued FX in June 2017 over its depiction of her in the docudrama *Feud: Bette and Joan*, alleging misappropriation, violation of her right of publicity, false

light, invasion of privacy, and unjust enrichment.[169] In response, FX filed an anti-SLAPP motion, which the trial court denied in September 2017. In March 2018, the California Court of Appeal reversed, rejecting de Havilland's claims and finding that the First Amendment protects expressive works, regardless of whether they are fact, fiction, or a combination thereof.[170] De Havilland petitioned the California Supreme Court for review, which it denied on July 11, 2018.

In de Havilland's petition for writ of certiorari before the U.S. Supreme Court, de Havilland argued that the California Court of Appeal's rulings create "absolute First Amendment immunity for docudramas," even those that include knowingly false statements.[171] FX filed its brief in opposition to de Havilland's petition on November 13, 2018, asserting that the Court of Appeal's "decision rested on a straightforward application of well-established law" and "that there is nothing cert-worthy about this case." [172] On January 7, 2019, the Supreme Court denied de Havilland's petition without explanation.[173]

b. Second Circuit Lifts Injunction Against Lynyrd Skynyrd Film

The Second Circuit recently lifted a district court's injunction against *Street Survivor: The True Story of the Lynyrd Skynyrd Plane Crash*, a movie about the plane crash that killed Lynyrd Skynyrd band members Ronnie Van Zant and Steve Gaines as told through the eyes of surviving band member Artimus Pyle.[174] After the crash, Van Zant's widow and two of the three surviving band members, Gary Rossington and Allen Collins, entered into a "blood oath" to never use the name Lynyrd Skynyrd again.[175] The oath remained intact for ten years, until the surviving band members embarked on a tribute tour in 1987 and Van Zant's widow, Judith, objected to the band's use of the Lynyrd Skynyrd name.[176] Judith filed suit, which ended with the district court entering a consent order restricting how the parties to the suit, including Pyle, could use the name Lynyrd Skynyrd, biographical material of Van Zant, the history of the band, and more.[177]

After Pyle and Cleopatra Records, Inc., entered into a deal to create the *Street Survivor* film, heirs of Van Zant and Gaines, as well as founding lead guitarist Gary Rossington, sued Cleopatra. In August 2017, the District Court entered a permanent injunction prohibiting the film from being made, asserting that it violated the consent order because of Pyle's participation in the project.[178] The Second Circuit reversed. Although the court stated that the district court's order did not constitute a "prior restraint" because the injunction was imposed as a result of a private contract rather than government censorship, it held that the order "implicates free speech concerns." [179] Moreover, the court held that the injunction could not restrict the actions of Cleopatra, which was not a party to the consent order.[180] Finally, the court examined the language of the consent order and found that it was insufficiently specific to prohibit the making of the film.[181] The court therefore lifted the injunction.

c. Daniels v. FanDuel Inc.

In October 2018, the Indiana Supreme Court held that the use of players' names, pictures, and statistics in online fantasy sports contests do not violate Indiana's right of publicity law.[182] The decision arose as the result of a class action lawsuit filed by collegiate student-athletes against various fantasy sports website operators, including DraftKings, Inc. and FanDuel, Inc., for using the players' likenesses without

their consent. The district court dismissed the lawsuit, concluding that two statutory exceptions to Indiana’s right of publicity law permit the companies to use players’ names, likenesses, and statistics without compensation.[183] On appeal, the Seventh Circuit certified the question “[w]hether online fantasy-sports operators that condition entry on payment, and distribute cash prizes, need the consent of players whose names, pictures, and statistics are used in the contests, in advertising the contests, or both,” to the Illinois Supreme Court.[184] The Illinois Supreme Court held that no consent was needed because the use of the players’ names, pictures, and statistics fell within the “newsworthy value” exception to Illinois’s right of publicity statute.[185] Ultimately, the court concluded that the use at issue “bears resemblance to the publication of the same information in newspapers and websites across the nation.”[186]

Following the Illinois Supreme Court’s decision, the plaintiffs requested that the Seventh Circuit remand the case to the District Court to address the separate question of whether the fantasy-sports games violate Indiana criminal law.[187] In a decision written by Judge Easterbrook, the Seventh Circuit stated that it had “nothing to say on the question whether the business of FanDuel or DraftKings violates Indiana’s criminal laws,” ruling that “this civil suit is over.”[188]

d. Can LeBron James License His Own Tattoos?

In a case that intertwines the issues of whether and when copyright issues arise following the grant of rights of publicity, Defendants 2K Games, Inc. and Take-Two Interactive Software, Inc. recently moved for summary judgment in a lawsuit filed against them by Solid Oak Sketches, LLC. Solid Oak brought suit over defendants’ depiction of tattoos on several prominent professional basketball players, including LeBron James, who appear in the videogame *NBA 2K16*. [189] Solid Oak had obtained copyright licenses for the tattoos for use in a clothing line that was never produced, and now claims that the use in the videogame constitutes copyright infringement.[190] In their summary judgment motion, defendants argue, amongst other things, that their use of the tattoos constitutes “fair use.”[191] In opposition to defendants’ motion, Solid Oak argues that while the professional basketball players granted their rights of publicity to the companies, that does not include the copyright to the artwork in their tattoos.[192] As to defendants’ fair use argument, Solid Oak asserts that the defense must fail, as “it is clear that Defendants’ appropriated the fundamental essence of the tattoo artists’ works, the copyright attached to same being owned by Plaintiff.”[193] Defendants filed their reply brief on October 12, 2018, and the motion remains pending.

3. Defamation

a. Stephanie Clifford’s Defamation Lawsuit Against President Trump Dismissed

On October 15, 2018, U.S. District Judge S. James Otero dismissed a defamation lawsuit brought by adult-film actress Stephanie Clifford’s (p/k/a Stormy Daniels) against President Trump.[194] The basis for the lawsuit was a tweet the president posted on April 18, 2018 from his personal Twitter account, @realDonaldTrump, claiming that the composite sketch Clifford released of a man who had purportedly threatened her in Las Vegas in 2011 was a “total con job” and “about a nonexistent man.”[195]

In dismissing Clifford's suit under the Texas anti-SLAPP statute,[196] the district court agreed with the president that the statements he disseminated through Twitter were mere "rhetorical hyperbole." The court reached this conclusion in light of the president's "incredulous tone" and the fact Clifford had publicly positioned herself "as a political adversary to the President." [197] The court also reasoned that if it were to conclude that the president's tweet was actionable under a theory of defamation, "it would significantly hamper the office of the President" by making any "strongly-worded response" by a president to criticism espoused by another public figure potentially unlawful.[198] The court also found significant the fact that the president's tweet was a "one-off" comment and not a "sustained attack" on Clifford's claims regarding the threatening incident.[199] Clifford appealed the district court's order the same day it issued.[200]

On December 11, 2018, Clifford was ordered to pay the president approximately \$292,000 in attorney's fees. The court also ordered Clifford to pay \$1,000 in sanctions.[201]

b. Discovery Communications Not Liable to Co-Host of *Dual Survival*

On November 2, 2018, a district court in Arizona granted summary judgment to Discovery Communications in a defamation lawsuit brought by Cody Lundin, one of the original co-hosts of the reality television series *Dual Survival*. [202] In the suit, Lundin argued that Discovery edited an episode that depicted his departure from the show in a way that portrayed him in a false light and was defamatory.[203] The district court disagreed. It held that none of the eight individual scenes that Lundin contended falsely depicted him as "grossly incompetent" and mentally ill was actionable under either theory. Specifically, each scene depicted Lundin's character in a "substantially true" manner even if it contained a number of "minor inaccuracies." [204]

In dismissing Lundin's defamation lawsuit, the district court also described as "significant" the fact that *Dual Survival* "more than just occasionally falsely depicted what was actually occurring." [205] In one scene, for example, Lundin and his co-host unexpectedly encountered a rattlesnake that had, in reality, been purchased and placed there by the film crew. The court therefore viewed Lundin's claims with some level of skepticism given that he was "happy to participate in the charade as long as he was portrayed in the manner he preferred." [206] In November 30, 2018, Lundin appealed the summary judgment order. The appeal remains pending before the Ninth Circuit.[207]

c. Court of Appeals Revives Defamation Lawsuit Against Kylin Pictures

On November 27, 2018, a California appeals court reversed the grant of an anti-SLAPP motion in a defamation suit Bliss Media and its CEO Wei Han brought against Kylin Pictures.[208] The suit arose because Kylin's CFO Leo Shi Young called Han a "swindler" and Bliss a "shell company" at a press conference in China. Bliss and Kylin had previously worked together to produce various films, but relations between the two companies soured when Kylin sued Bliss over the acquisition rights to *Birth of the Dragon*, a movie about Bruce Lee.[209]

Kylin filed an anti-SLAPP motion in early 2017, arguing that the allegedly defamatory statements were made in connection with an issue of public interest because the purpose of the press conference was to address a dispute about the production of the Chinese-language version of a separate, critically acclaimed

film—*Hacksaw Ridge*.^[210] The trial court agreed, concluding that the dispute between Bliss and Kylin “concerned the production of a very public thing” and that there “is very little that is private about the movie business.”^[211]

The California Court of Appeal reversed. It first noted that the fact the press conference was held to discuss a dispute about *Hacksaw Ridge* was immaterial, because the alleged defamatory comments were about the plaintiffs’ conduct “concerning financing and rights acquisitions” for two different films, *Birth of the Dragon* and *The King’s Daughter*.^[212] It also rejected the defendants’ argument that the public is “specifically interested” in these two films merely because *Birth of the Dragon* is about Bruce Lee and *The King’s Daughter* features two movie stars.^[213] Because the alleged defamatory statements “in no way mention[ed] or implicat[ed] Bruce Lee or the movie stars,” the defendants failed to draw “any connection” between the statements and what purportedly made the films at issue of interest to the public.^[214] The appeals court also concluded that Han was not, at the time the statements were made, in the “public eye” simply because she is active in the Chinese film industry and in Hollywood.^[215]

d. Retweets and the Communications Decency Act of 1996

On September 25, 2018, Roslyn La Liberte sued MSNBC host Joy Reid in the Eastern District of New York, alleging that several of Reid’s posts on Twitter, Instagram, and Facebook are defamatory.^[216] La Liberte’s original complaint focused primarily on Reid’s retweet of a photograph of La Liberte wearing a “Make America Great Again” hat and seemingly yelling at a high school student. This photo was accompanied by a caption stating that “[s]he . . . in her MAGA hat” called the student a “dirty Mexican” and warned him that he would “be the first deported.”^[217]

La Liberte’s complaint alleges that because she never made any racial slurs directed at the student, Reid’s retweet is defamatory.^[218] It also alleges that Reid’s subsequent posts on Facebook and Instagram of the photograph alongside an image dating from the Jim Crow era are defamatory.^[219]

The allegations in the original complaint raised the question of whether section 230 of the Communications Decency Act of 1996 shielded Reid from civil liability for her retweet. Section 230 provides, in relevant part, that “[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”^[220] However, La Liberte recently dropped the allegations from her complaint regarding Reid’s retweet. Section 230 is therefore no longer at issue in the case.^[221] The remainder of the case remains pending before the district court.

F. Profit Participation/Royalties

1. Back to the Future Royalties Dispute Dismissed

In October 2018, after years of disputes between the parties, a New Jersey district judge ruled that John DeLorean’s estate will not be able to collect additional royalties regarding the famous *Back to the Future* DeLorean from the DeLorean Motor Company (“DMC”) arising out of DMC’s separate licensing agreement with Universal Pictures.^[222] In 2014, John DeLorean’s estate filed a suit alleging that DMC violated the estate’s trademark by designing and selling various items under the estate’s asserted

trademarks and by licensing use of the marks to others.[223] The parties settled the case in 2015, and in relevant part the estate agreed “not to sue [DMC] pertain[ing] to [DMC’s] use of the following words and trademarks: (i) the name DeLorean Motor Company, (ii) the DMC logo, and (iii) the stylized word ‘delorean.’”[224]

In 2018, the estate brought another suit against DMC, claiming that DMC had improperly claimed a right to royalty payments arising from an agreement between the Mr. DeLorean and Universal. That agreement between the estate and Universal gave Universal “the right to use (i) ‘[t]he appearance of the DeLorean automobile,’ (ii) ‘[t]he name ‘DeLorean,’ and (iii) ‘[t]he logo ‘DMC’ as it appears on the radiator grille of the DeLorean automobile.’”[225] The estate alleged that DMC had improperly represented to Universal that DMC was entitled to certain royalties arising from the *Back to the Future* DeLorean, and the estate sought to receive the payments from Universal instead.

The court dismissed the estate’s case, finding that the two agreements covered “the same or similar terms” and holding that that because “both agreements pertained to the merchandizing of similar items associated with the DeLorean automobile’s image, brand and related trademarks,” the “Plaintiff’s claims under the Universal Agreement were incorporated in, and therefore barred by, the Settlement Agreement.”[226]

2. Donald Glover Fights Label Over Royalties

Donald Glover (who records and performs as Childish Gambino) is countersuing his music label, Glassnote Entertainment Group, in an ongoing dispute regarding royalties from non-interactive streaming of Glover’s albums *Awaken, My Love!*, *Because the Internet*, and *Camp*. In 2011, Glover signed a license agreement with Glassnote in which he retained the rights to master recordings of up to three future albums but “granted to Glassnote the exclusive right to exploit the master recordings on those albums” in exchange for a royalty equal to fifty percent of net proceeds.[227] The license expired in late 2017, at which time Glassnote alleges that Glover “took the position that he was entitled to the entirety of Glassnote’s []share of public performance royalties” and “that Glassnote was not entitled to any such royalty.”[228]

In July 2018, Glassnote sued Glover seeking a declaration that it is entitled to 50% of all performance royalties from non-interactive streams on Pandora, Spotify, SiriusXM, and others. The suit claims that, under the Copyright Act, “it is Glassnote—not Glover—which is ‘the copyright owner of the exclusive right [] to publically perform’ Glover’s sound recordings,” and the statutory royalties due to the copyright holder should therefore belong to Glassnote.[229]

In September 2018, Glover countersued Glassnote, alleging that after an audit in 2017, Glover discovered “Glassnote’s multiple breaches under the License Agreement” and “significant amounts that [Glassnote] failed to account and pay to” Glover.[230] According to Glover, Glassnote agreed “to pay [Glover] a royalty equal to 50% of the ‘Net Proceeds’ realized from the exploitation of each” licensed album.[231] After a 2017 audit of Glassnote’s accountings and payments to Glover, Glover determined that Glassnote had breached the License Agreement by failing to pay Glover his “share of digital transmission royalties” and by failing to fully pay Glover the share of the “Net Proceeds” to which he

was entitled under the License Agreement.[232] In his countersuit, Glover is seeking a full payment of the royalties Glassnote is alleged to owe and seeking a full accounting from Glassnote that includes any further monies earned from Glover's albums.[233] The case remains pending.

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[152] *See Am. Freedom Defense Initiative, et al. v. King County*, Case No. 17-35891 (9th Cir. Sep. 27, 2018).

[153] *See* Bill Donahue, *9th Cir. Strikes Down Seattle Ban On 'Disparaging' Bus Ads*, Law360 (Oct. 3, 2018), <https://www.law360.com/media/articles/1088992/9th-circ-strikes-down-seattle-ban-on-disparaging-bus-ads>.

[154] *See id.*

[155] *See San Diego Comic Convention v. Dan Farr Prods. et al.*, Case No. 3:14-cv-01865 (S.D. Cal. Aug. 7, 2014).

[156] *See* Shayna Posses, *San Diego Comic-Con Wins TM Use Ban, \$4M Fee Award*, Law360 (Aug. 24, 2018), <https://www.law360.com/media/articles/1076513/san-diego-comic-con-wins-tm-use-ban-4m-fee-award>.

[157] *See id.*

[158] *See id.*

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[159] See Ashley Cullins, *Hollywood Docket: Coachella Trademark Fight Settles*, The Hollywood Reporter (Oct. 12, 2018), <https://www.hollywoodreporter.com/thr-esq/hollywood-docket-coachella-trademark-fight-settles-1145285>.

[160] *See id.*

[161] *Cable News Network, Inc. et al. v. Trump et al.*, Case No. 1:18-cv-2610 (D.D.C Nov. 16, 2018) (Trans. of Mot. Hrg.).

[162] *Id.*

[163] *Id.*

[164] *Gubarev v. BuzzFeed, Inc.*, Case No. 1:17-cv-60426-UU, Dkt. No. 388 (S.D. Fla. Dec. 18, 2018).

[165] *Id.*

[166] *Id.*

[167] *Gubarev v. BuzzFeed, Inc.*, Case No. 1:17-cv-60426-UU, Dkt. No. 385 (S.D. Fla. Dec. 18, 2018).

[168] Petition for Writ of Certiorari, *Olivia de Havilland, DBE v. FX Networks, LLC*, No. 18-453.

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

[170] *de Havilland*, 21 Cal. App. 5th at 850.

[171] Petition for Writ of Certiorari, *Olivia de Havilland, DBE v. FX Networks, LLC*, No. 18-453.

[172] Opposition to Petition for Writ of Certiorari, *Olivia de Havilland, DBE v. FX Networks, LLC*, No. 18-453.

[173] Dominic Patten, *Olivia De Havilland Last Hope Petition Over ‘Feud’ Feud Denied By SCOTUS*, Deadline (Jan. 7, 2019), <https://deadline.com/2019/01/olivia-de-havilland-feud-us-supreme-court-petition-denied-ryan-murphy-1202530510/>

[174] *Ronnie Van Zant, Inc. v. Cleopatra Records, Inc.*, 906 F.3d 253 (2d Cir. 2018).

[175] *Id.* at 255.

[176] *Id.*

[177] *Id.*

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[178] *Id.* at 256.

[179] *Id.* at 257.

[180] *Id.*

[181] *Id.* at 258.

[182] *Daniels v. FanDuel, Inc.*, 109 N.E.3d 390, 393 (Ind. 2018).

[183] *Daniels v. FanDuel, Inc.*, 884 F.3d 672, 674 (7th Cir. 2018).

[184] *Id.*

[185] *Daniels*, 109 N.E.3d at 394.

[186] *Id.* at 396.

[187] *Daniels v. FanDuel, Inc.*, 909 F.3d 876, 877 (7th Cir. 2018).

[188] *Id.* at 878.

[189] *Solid Oak Sketches, LLC v. Visual Concepts, LLC*, Case No. 1:16-cv-00724-LTS-SDA, Dkt. 128.

[190] *Id.*

[191] *Id.*

[192] *Id.*, Dkt. 148.

[193] *Id.*

[194] Order Granting Defendant's Special Motion to Dismiss/Strike at 1, *Clifford v. Trump*, No. 18-6893 (C.D. Cal. Oct. 15, 2018).

[195] *Id.* at 1-2.

[196] The district court applied Texas law to Clifford's defamation claim and the Defendant's Special Motion to Dismiss/Strike because Clifford is domiciled in Texas. *Id.* at 4.

[197] *Id.* at 9-11.

[198] *Id.* at 11.

[199] *Id.* at 12.

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[200] Notice of Appeal, *Clifford v. Trump*, No. 18-6893 (C.D. Cal. Oct. 15, 2018).

[201] Matt Stevens, *Stormy Daniels Ordered to Pay Trump \$293,000 in Legal Fees*, The N.Y. Times (Dec. 11, 2018), <https://www.nytimes.com/2018/12/11/us/stormy-daniels-donald-trump.html>.

[202] Eriq Gardner, *Discovery Beats Defamation Lawsuit as Judge Ponders What's True in "Reality" Television*, The Hollywood Reporter (Nov. 5, 2018), <https://www.hollywoodreporter.com/thr-esq/discovery-beats-defamation-lawsuit-as-judge-ponders-whats-true-reality-television-1158089>.

[203] Order Granting Defendants' Motion for Summary Judgment at 1, *Lundin v. Discovery Commc'ns Inc.*, No. 16-cv-01568 (C.D. Cal. Nov. 2, 2018).

[204] *See, e.g., id.* at 13-14.

[205] *Id.* at 2.

[206] *Id.*

[207] Notice of Appeal, *Lundin v. Discovery Commc'ns Inc.*, No. 2:16-cv-01568 (C.D. Cal. Nov. 2, 2018).

[208] Ashley Cullins, *Defamation Lawsuit Against 'Hacksaw Ridge' Financier Revived by Appeals Court*, The Hollywood Reporter (Nov. 27, 2018), <https://www.hollywoodreporter.com/thr-esq/defamation-lawsuit-hacksaw-ridge-financier-revived-by-appeals-court-1164328>

[209] Order at 3, *Han v. Kylin Pictures, Inc.*, No. B282947 (Cal. Ct. App. Nov. 27, 2018).

[210] *Id.* at 4.

[211] *Id.*

[212] *Id.* at 10.

[213] *Id.* at 14.

[214] *Id.*

[215] *Id.* at 11-12.

[216] Complaint at 12-13, *La Liberte v. Reid*, No: 1:18-cv-5398 (E.D.N.Y. Sept. 25, 2018); *see also* Ashley Cullins, *MSNBC's Joy Reid at Center of Free-Speech Legal Fight Over Retweets*, The Hollywood Reporter (Nov. 6, 2018), <https://www.hollywoodreporter.com/thr-esq/msnbc-s-joy-reid-at-center-free-speech-legal-fight-retweets-1158266>.

[217] Complaint at 12-13, *La Liberte v. Reid*, No: 1:18-cv-5398 (E.D.N.Y. Sept. 25, 2018).

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[218] *Id.*

[219] *Id.* at 11.

[220] 47 U.S.C. § 230.

[221] Amended Complaint, *La Liberte v. Reid*, No: 1:18-cv-5398 (E.D.N.Y. Nov. 27, 2018); *see also* Eriq Gardner, *MSNBC's Joy Reid to Escape Libel Claim Over Retweet*, *The Hollywood Reporter* (Nov. 14, 2018), <https://www.hollywoodreporter.com/thr-esq/msnbcs-joy-reid-escape-libel-claim-retweet-1161090>.

[222] *Delorean v. Delorean Motor Co.*, No. CV 18-8212 (JLL), 2018 WL 4941790 (D.N.J. Oct. 12, 2018).

[223] *Id.*

[224] *Id.* at *4 (cleaned up).

[225] *Id.* at *2.

[226] *Id.* at *4.

[227] Compl., *Glassnote Entertainment Group, LLC, v. MC DJ Recording et al.*, 2018 WL 3327743 (S.D.N.Y. July 6, 2018).

[228] *Id.* ¶ 7.

[229] *Id.* ¶ 38.

[230] Countercompl. ¶ 37, *Glassnote Entertainment Group, LLC, v. MC DJ Recording et al.*, 1:18-cv-06167-LGS (Sept. 14, 2018).

[231] *Id.* ¶ 20.

[232] *Id.* ¶¶ 52–53.

[233] *Id.* ¶¶ 34–35.



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