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# How The Fight For Streaming Royalties Is Going Over The Top

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As on-demand streaming continues to upend the television industry, we have been waiting patiently to see how this realignment might manifest itself in the courtroom. Thus far, we have seen copyright fights in which broadcasters have taken down upstart streamer Aereo and industry groups have pursued pirate streaming sites like Popcorn Time. But one staple of the Hollywood legal diet, the profit participation (or royalties) dispute, has made few appearances in this new landscape. However, a recently filed case shows that this may finally be changing, and the industry would be wise to take note of how royalty fights may evolve as a result.

This bellwether lawsuit seeks to start a royalties rumble in a new venue — the WrestleMania ring. Last month, Rene Goguen, a pro wrestler who performs under the name Rene Dupree, filed a putative class action in the U.S. District Court for the District of Connecticut, seeking allegedly unpaid royalties for content that World Wrestling Entertainment (WWE) sold or licensed to both Netflix and to WWE Network, which is WWE's own "over-the-top" (i.e., stand-alone, nonbundled) channel.

According to the complaint, a booking contract signed by Goguen assigned to WWE ownership in Goguen's wrestling personality's likeness in exchange for a share of royalties that were to be divvied up among a class of wrestlers, including 25 percent of net receipts of licensed content. Oddly, almost as soon as the case was filed — a mere five days later — it was voluntarily dismissed without prejudice, perhaps because of the accuracy of reports that in 2011 Goguen had signed away his rights to future royalties in a buyout agreement with WWE. In any event, it seems unlikely that Goguen or his attorneys would have suddenly changed their view of the legal merits of the case, but rather found themselves facing an insurmountable threshold factual barrier (and the possibility of Rule 11 sanctions) and advised that Goguen throw himself out of the ring.

Despite the "blink and you missed it" nature of this specific suit, experience tells us that Goguen's lawyers will be back for another round, even if they are accompanied by different muscle. And so for now, this short-lived suit is a free lesson in (1) the challenges that both new and traditional over-the-top (OTT) licensors may face, and (2) how profit participant plaintiffs might seek to pursue networks and broadcasters for streaming royalties going forward.

**OTT Players Face New Challenges**

Goguen's lawsuit raises the question of whether, by going over the top, nontraditional broadcasters such as WWE are exposing themselves to royalties lawsuits in new ways. Streaming and its comparatively low barriers to entry have presented opportunities for entertainment organizations to go over the top, sidestepping traditional network and cable platforms to create their own streaming apps and subscription channels (such as WWE Network) or to license their content to third-party SVOD (subscription video on demand) platforms.

Live events, including sporting events, are natural candidates for their own stand-alone OTT channels, especially when there is a deep catalogue of older content to draw upon. And while doing so opens new and possibly lucrative revenue streams, these new deal structures may lead to unforeseen consequences. For instance, content creators-turned-OTT broadcasters may find themselves in much the same position as more traditional broadcasters, who developed and licensed successful programming only to see producers and talent pursue them for greater portions of revenue, even when on contractually shaky ground (as Goguen seems to have been).

Newcomers to broadcasting are not alone in facing the legal ramifications of licensing content to streaming services. Most if not all traditional network and cable television players have entered the on-demand streaming world by licensing new and catalogue content to third-party SVOD platforms (in some cases, multiple platforms under different rights agreements). And many of these traditional players have hung out streaming shingles of their own or have developed streaming apps.

**Profit Participants Keep Watch**

Both traditional broadcasters and newcomers (like WWE) may have different opinions than their production partners or talent about the best way to license content to streamers, and which streamer to sell them to in the first place. For example, networks (and SVOD services) often want to allow their viewers to quickly catch up on shows by airing all episodes of a current season in addition to all episodes of earlier seasons. "Stacking" episodes in this manner arguably strengthens audiences for franchises and has inherent value-adding "plus" factors — e.g., allowing new viewers to quickly become loyal veteran viewers — but profit participants might nevertheless disagree if they do not believe selling stacks would yield the highest aggregate price on paper. Making the calculation all the less scrutable are recent reports that the rerun cable syndication market is no longer as bankable has it had been, as viewers migrate online. As a result, profit participants are likely to be more closely scrutinizing royalty reports, or questioning the lack thereof.

Moreover, new OTT streamers like WWE may understandably prefer to retain their own material for their own streaming channel rather than licensing it to a third-party service. And the fact that WWE was alleged to have licensed the content featuring Goguen and others to its own network, rather than a third-party streamer, naturally raises additional issues regarding whether such licensing is at fair market value.

As a separate but related issue, most royalty clauses of the past few decades contain a "future media" — or, as in the Goguen suit, a "technology not yet created" clause — seeking to anticipate then-unforeseen industry changes. For Goguen, for instance, it was unlikely that when he signed his 2003 booking contract that either he or the WWE would have anticipated that WWE would host its own vertical, SVOD channel. There was a time, however, when contracts did not contain such "future media" clauses, and in the race for streamable content, the licensing of older programming (including sitcoms of the "Nick at Nite" vintage and classic sports, where the underlying contracts may lack such forward-looking language) is an attractive resource.

Finally, it is worth noting that Goguen's suit was brought solely against WWE, and did not also name Netflix, which was alleged to have aired some of the wrestling programming at issue. It would seem, though, that profit participation plaintiffs such as Goguen will be hard-pressed to assert claims against third-party SVOD services. Indeed, plaintiffs rarely pass up the opportunity to add a deep-pocketed defendant to a lawsuit if at all possible. So Goguen's decision not to suggests that such streamers should remain insulated against royalty claims from unaffiliated talent for a number of reasons, not the least of which is the lack of privity of contract between such parties.

**How Can Broadcasters Protect Themselves When Going Over the Top?**

While a profit participation dispute might seem the inevitable hallmark of a successful television show, there are steps that studios and licensors can take both to protect themselves and keep their partners informed. Being proactive in ensuring licensing decisions are well vetted and documented will be crucial as the television landscape continues to shift and licensors seek to increase the size of the pie available to all parties (including by going over the top in one way or another).

In determining which OTT or third-party platform(s) to license content to and in what form (e.g., a full or partial stack of episodes), licensors will be challenged to establish that they have followed a value-maximizing strategy that benefits all rights holders. This challenge is compounded by the novelty of OTT and SVOD deals, as well as the appearance of many new content buyers in the market. However, these challenges also apply to profit participants, who will face obstacles trying to establish that a licensor did not achieve fair market value when that market is so constantly changing.

As part of a well-considered vetting process for OTT and streaming sales, studios and licensors should remember to consider (and document) intangible, value-adding factors, such as building audience loyalty and market share through stacking — especially since such factors are not conducive to being displayed on a balance sheet. Such "plus" factors may be powerful evidence that licensors have adequately sought to maximize value for all involved, even when networks license content to affiliated on-demand apps and platforms. Such advice may sound familiar to traditional broadcasters, but as new players like WWE enter the world of streaming and don the mantle of broadcaster, they would be well-served to heed such advice at the outset — learning the lessons of past royalty disputes — lest they paint a target on their back as well.

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