

THE MEDIA AND ENTERTAINMENT LAW REVIEW

SECOND EDITION

Editor

Benjamin E Marks

THE LAW REVIEWS

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PREFACE

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By any measure, 2020 has been a highly unusual and especially challenging year, particularly for the media and entertainment industries, with large sectors devastated by the effects of the covid-19 pandemic. In many countries, live music, festivals, theatrical performances and sporting events were shut down entirely for much of the year (and, in many cases, remain so), ravaging the businesses that depend on in-person events for their success and the individuals that depend on them for their livelihoods. For other parts of the media and entertainment industries, the results have been uneven. The largest online distributors of books, for example, have generally fared quite well, while many independent bookstores that depend on foot traffic are in dire straits. In the music industry, touring artists, concert promoters, and theatre and venue operators have been particularly hard hit, but most streaming services, music publishers and record companies are continuing to flourish. It remains to be seen which changes to the media and entertainment industries are temporary and which will be permanent.

The pandemic is hardly the only global phenomenon accelerating changes to media and entertainment. We continue to see a rise in challenges to press freedom by repressive government regimes – a phenomenon, it should be noted, that has been testing the strength of free speech traditions in the world's most protective speech regime, the United States. The manifestations include increased censorship, reduced transparency, and more appalling acts of violence against journalists and editors. Around the world, businesses, governments and legal regimes continue to adapt to technological change, with the increased use of artificial intelligence and 'deep fakes' just a few of the examples at the forefront.

This timely survey work provides important insights into the ongoing effects of the digital revolution and evolving (and sometime contrasting) responses to challenges both in applying existing intellectual property laws to digital distribution and in developing appropriate legislative and regulatory responses that meet current e-commerce and consumer protection needs. It should be understood to serve, not as an encyclopedic resource covering the broad and often complex legal landscape affecting the media and entertainment industries but, rather, as a current snapshot of developments and country trends likely to be of greatest interest to the practitioner. Each of the contributors is a subject field expert, and their efforts here are gratefully acknowledged. Each has used his or her best judgment as to the topics to highlight, recognising that space constraints require some selectivity. As will be plain to the reader, aspects of this legal terrain, particularly as relating to the legal and regulatory

treatment of digital commerce, remain in flux, with many open issues that call for future clarification.

This work is designed to serve as a brief topical overview, not as the definitive or last word on the subject. You or your legal counsel properly should continue to serve that function.

Benjamin E Marks

Weil, Gotshal & Manges LLP

New York

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New York

November 2020

UNITED STATES

Benjamin E Marks¹

I OVERVIEW

This chapter addresses the fundamental legal protections for, and limits on, the media and entertainment industries in the United States. Section II sets forth the legal and regulatory framework that governs those industries, including the interplay between state and federal laws. Section III describes the robust protections in the United States for free speech and a free press, which persist – and, indeed, have continued to thrive – under a presidential administration more hostile to those ideals than any in recent history, and perhaps ever. In Section IV, we consider the predominant forms of intellectual property that both protect the creative output of the media and entertainment industries and limit what those industries can do with the creative output of others without first securing permission. Section V addresses the regulatory framework for preserving competition and protecting consumers, and the final section briefly touches on the nature of contractual disputes most common to the US media and entertainment industries. In each section, we highlight recent developments and legal trends of interest.

II LEGAL AND REGULATORY FRAMEWORK

The legal and regulatory framework that governs the media and entertainment industries in the United States is a patchwork of protections arising from federal and state constitutions, federal and state statutes, government agency oversight and evolving common law doctrines.

Perhaps the most distinguishing feature of US law with respect to media and entertainment is the robust protection of free speech afforded by the First Amendment to the US Constitution and by state constitution equivalents. While US media are not immune to defamation, invasion of privacy and related claims, and there are some restrictions on their ability to gather and report news and information, they enjoy considerably more latitude than is afforded to their counterparts in most other parts of the world.

Another noteworthy feature of the legal and regulatory framework for the media in the United States is the mix of state and federal government oversight. The media and entertainment industries are subject to general oversight under many statutes, such as state and federal laws that protect consumers and competitive markets. In some instances, they are also subject to narrower forms of regulation, such as oversight of broadcasters and other media and entertainment companies by the Federal Communications Commission, which

¹ Benjamin E Marks is a partner at Weil, Gotshal & Manges LLP. The author gratefully acknowledges the contributions of Bruce Rich, who co-authored a prior edition of this chapter.

regulates interstate and international communications by radio, television, wire, satellite, and cable. There are manifold issue-specific statutes that affect media and entertainment companies, ranging from the online collection of personally identifiable information about children to advertising of alcohol, tobacco and other products, to cite just a few examples. In some areas, such as copyright law, federal jurisdiction is exclusive, and state regulation is preempted. In others, such as rights of publicity, rights are provided only under state law, with no federal protection. And for many areas, such as antitrust and consumer protection, companies may be subject to regulation and oversight at both the state and federal levels. Also worthy of note is the combination in the United States of statutory and common law. For example, US copyright law is a creature of federal statute (which codifies certain common law doctrines such as fair use), whereas the ‘hot news’ misappropriation doctrine is judicially created and derived from general principles of equity.

This at-times overlapping, patchwork approach sometimes leads to disputes over which the legal regime governs a challenged entity’s conduct. Tensions frequently arise in connection with respect to the preemptive reach of federal copyright law, which forecloses certain state law remedies if they overlap with federal copyright law and policy. Varying state regulation (e.g., of rights of publicity) can also create anomalous results for the media and entertainment industries. Rights of publicity, which limit the use of an individual’s likeness for commercial purposes without permission, may survive post-mortem for 100 years in one state and not survive post-mortem at all in another. The complications this framework of regulation creates in an increasingly interconnected digital world that blurs geographic borders and traditional lines of demarcation between media industries can be confounding.

III FREE SPEECH AND MEDIA FREEDOM

i Protected forms of expression

The First Amendment to the US Constitution provides strong (but not absolute) protection to all forms of speech. As a general matter, ‘government has no power to restrict expression because of its message, its ideas, its subject matter, or its content’.² The few, limited categorical exceptions include obscenity, child pornography, defamation, fraud, incitement, true threats and speech integral to criminal conduct.³ The US Supreme Court has rejected recent legislative efforts to add violent video games, depictions of animal cruelty, lying about military honours and virtual child pornography to the list of unprotected categories.

False speech is protected unless it is made ‘for the purpose of material gain’ or causes ‘legally cogni[s]able harm’.⁴ Hate speech is also protected, reflecting the bedrock principle that the government ‘may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable’.⁵ The First Amendment affords special protection to ‘even hurtful speech’ when it concerns a public issue to ‘ensure that we do not stifle public debate’.⁶

In addition to rejecting new categories of unprotected speech, the US Supreme Court has recently made it more difficult for the government to restrict protected speech. While it

2 *Ashcroft v. Am Civil Liberties Union*, 535 US 564, 573 (2002) (internal quotation marks omitted).

3 See, e.g., *United States v. Stevens*, 559 US 460, 468 (2010).

4 *United States v. Alvarez*, 567 US 709 (2012).

5 *Texas v. Johnson*, 491 US 397, 414 (1989).

6 *Snyder v. Phelps*, 562 US 443, 461 (2011).

has long been true that the First Amendment requires the highest level of judicial scrutiny whenever the government regulates speech ‘because of disagreement with the message it conveys’,⁷ the Court more recently held that any law that (either on its face or by design) targets protected speech based on its communicative content is subject to strict scrutiny review ‘regardless of the government’s benign motive, content-neutral justification, or lack of animus toward the ideas contained in the regulated speech’.⁸

Commercial speech, which includes commercial advertising, promises and solicitations, is unprotected if it is false or misleading, and it is otherwise subject to regulation under an intermediate level of scrutiny.⁹ However, in *Sorrell v. IMS Health Inc*,¹⁰ the Supreme Court applied heightened scrutiny in striking down a Vermont law prohibiting the use of pharmacy records by pharmaceutical companies for marketing purposes on the ground that the law unconstitutionally discriminated based on the content of the speech and the identity of the speaker, rejecting the state’s argument that such judicial scrutiny was not warranted because the law was ‘a mere commercial regulation’.¹¹ However, media and entertainment products are not commercial speech merely because they are distributed or sold as part of for-profit enterprises.¹² Accordingly, even false media reports are generally not actionable under consumer protection laws.¹³

ii Newsgathering

The enforcement of general laws against the press ‘is not subject to stricter scrutiny than would be applied to enforcement against other persons or organi[s]ations’.¹⁴ Generally applicable laws ‘do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news’.¹⁵ However, a publisher cannot be held liable for the unlawful procuring of information by a source where the publisher was not involved in the illegal conduct and accessed the information lawfully and where the information is of public concern.¹⁶

Undercover reporting techniques have been the subject of several lawsuits challenging the constitutionality of so-called state ‘ag-gag’ laws that criminalise the infiltration of agricultural production facilities to document illegal, unsanitary or inhumane conditions. In *ALDF v. Wasden*,¹⁷ the court struck down the provisions of an Idaho statute prohibiting making a misrepresentation to access an agricultural production facility and unauthorised audio or video recording of the facility’s operations on the ground that these were content-based restrictions of protected speech that were broader than necessary to protect the property owner’s interests.

7 *Ward v. Rock Against Racism*, 491 US 781, 791 (1989).

8 *Reed v. Town of Gilbert*, 576 US 155, 165 (2015) (internal quotation marks omitted).

9 See *Cent Hudson Gas & Elec Corp v. Pub Serv Comm’n of New York*, 447 US 557 (1980).

10 564 US 552 (2011).

11 *id.* at 566.

12 *Time, Inc v. Hill*, 385 US 374, 397 (1967).

13 See, e.g., *Washington League for Increased Transparency & Ethics v. Fox Corp*, No. 20-2-07428-4 SEA, 2020 WL 2759011, *2-*3 (Wash Sup Ct May 27, 2020) (broadcasting false statements that coronavirus is a ‘hoax’ not subject to Washington Consumer Protection Act).

14 *Cohen v. Cowles Media Co*, 501 US 663, 670 (1991).

15 *id.* at 669 (internal quotation marks omitted).

16 *Bartnicki v. Vopper*, 532 US 514, 535 (2001).

17 878 F3d 1184 (Ninth Circuit 2018).

In private tort actions, the legitimate newsgathering purpose of secret recording often outweighs a plaintiff's asserted privacy interests. In *Medical Laboratory Management Consultants v. American Broadcasting Companies*,¹⁸ for example, the court held that the secret taping of a conversation concerning the business operations of a medical laboratory did not implicate a reasonable expectation of privacy because the information was 'at most, company confidential' and did not involve private and personal affairs of the lab owner. Any 'offensiveness of the alleged intrusion' was 'mitigated by the public interest in the news gathered'.¹⁹ There are limits to this principle, however. Journalists do not have a 'license to intrude in an objectively offensive manner into private places, conversations or matters merely because the reporter thinks he or she may thereby find something that will warrant publication or broadcast'.²⁰

iii Freedom of access to government information

Access to federal government information is governed by the Freedom of Information Act (FOIA),²¹ which, inter alia, directs federal agencies to make records promptly available to any person upon request. The statute exempts from disclosure nine categories of documents, including classified information, trade secrets, privileged inter-agency or intra-agency memoranda or letters, and law enforcement records or information if disclosure could reasonably be expected to interfere with ongoing law enforcement proceedings.²² States have their own freedom of information laws and processes for obtaining information about the workings of state government.²³

iv Protection of sources

Journalists do not have a First Amendment or common law right to refuse to comply with a grand jury subpoena,²⁴ even if doing so requires the disclosure of confidential sources.²⁵ Lower courts relying on the Supreme Court's decision in *Branzburg v. Hayes* have affirmed contempt orders against prominent journalists who refused to reveal their sources in criminal leak prosecutions.²⁶ Efforts to pass a federal shield law overturning these decisions have failed.

Outside the grand jury context, the federal circuit courts vary in the extent to which they recognise a reporter's privilege. The Second Circuit Court of Appeals, for example, has recognised a qualified privilege for both confidential and non-confidential information,²⁷

18 306 F3d 806 (Ninth Circuit 2002).

19 id. at 819; see also *Shulman v. Grp W Prods, Inc*, 18 Cal 4th 200, 237 (1998) ('Information collecting techniques that may be highly offensive when done . . . for purposes of harassment, blackmail, or prurient curiosity . . . may not be offensive to a reasonable person when employed by journalists in pursuit of a socially or politically important story').

20 *Shulman*, 18 Cal 4th at 242.

21 5 USC, Section 552.

22 id. at Section 552(b).

23 See, e.g., NY Public Officers Law, Sections 84-90 (NY Freedom of Information Law).

24 The purpose of a grand jury to determine whether there is probable cause to believe that a felony has been committed and criminal charges are warranted.

25 *Branzburg v. Hayes*, 408 US 665 (1972).

26 See, e.g., *United States v. Sterling*, 724 F3d 482 (Fourth Circuit 2013); *In re Grand Jury Subpoena, Judith Miller*, 397 F3d 964 (DC Circuit 2005).

27 See *Gonzales v. Nat'l Broad Co*, 194 F3d 29 (Second Circuit 1999).

and in both civil and criminal cases,²⁸ while the Fourth Circuit has struck a different balance between newsgathering and law enforcement, recognising a qualified privilege only in civil cases.²⁹

Although there is no federal shield law providing statutory protection to confidential sources, most states have enacted shield laws. The New York Civil Rights Law, Section 79-h, for instance, provides absolute protection for confidential sources and qualified protection for non-confidential sources.

v Private action against publication

Publication-based causes of action available to private persons include defamation, invasion of privacy and intentional infliction of emotional distress. Companies can sue media entities for defamation, trade libel, breach of a duty of confidentiality, disclosure of trade secrets and tortious interference. These torts, when based on claimed falsehoods, are limited by the First Amendment to the Constitution, which has been interpreted to impose on public official or public figure plaintiffs the requirement to prove that a statement was made with actual malice, that is, with knowledge of its falsity or reckless disregard for its truth.³⁰ In private figure cases, states are free to require a lesser showing of fault ‘so long as they do not impose liability without fault’.³¹ To be actionable, a statement must be susceptible to being proved true or false,³² and when a statement is of public concern, the plaintiff bears the burden of proving falsity.³³

The Supreme Court has declined to limit the foregoing First Amendment protections to the traditional, institutional media (the boundaries of which, in any event, have become blurred with the advent of the internet). Thus, the same First Amendment protections have been applied to individual speakers, including bloggers.³⁴

The relief available in defamation actions generally is limited to compensatory damages. However, while some courts ‘adhere to the traditional rule that defamation alone will not justify an injunction against future speech’,³⁵ others have upheld narrowly drawn permanent injunctions against specified defamatory speech.³⁶ The trend in the courts and in legal scholarship is toward the view that such limited prior-restraint injunctions are constitutional,³⁷ but they remain disfavoured, particularly where there are clear public policy interests at stake. For example, a recent effort by President Trump’s brother Robert to enforce a 2001 confidentiality agreement among Trump family members against his niece Mary to

28 See *United States v. Burke*, 700 F2d 70 (Second Circuit 1983).

29 See *Sterling*, 724 F3d 482; *LaRouche v. Nat'l Broad Co*, 780 F2d 1134 (Fourth Circuit 1986).

30 See *New York Times Co v. Sullivan*, 376 US 254 (1964) (libel); *Time, Inc v. Hill*, 385 US 374 (1967) (false light); *Hustler Magazine, Inc v. Falwell*, 485 US 46 (1988) (intentional infliction of emotional distress).

31 *Gertz v. Robert Welch, Inc*, 418 US 323, 347 (1974).

32 *Milkovich v. Lorain Journal Co*, 497 US 1, 20-21 (1990).

33 *Philadelphia Newspapers v. Hepps*, 475 US 767, 776 (1986).

34 See, e.g., *Obsidian Fin Grp, LLC v. Cox*, 740 F3d 1284 (Ninth Circuit 2014).

35 See, e.g., *Kinney v. Barnes*, 443 SW3d 87, 96 (Texas 2014).

36 See, e.g., *Balboa Island Village Inn, Inc v. Lemen*, 40 Cal 4th 1141 (2007).

37 See, e.g., Doug Rendleman, ‘The Defamation Injunction Meets the Prior Restraint Doctrine’, 56 *San Diego L Rev* 615 615 (2019); Eugene Volokh, ‘Anti-Libel Injunctions’, 167 *U Pa L Rev* 73 (2019).

prevent her from publishing a book about the president and her family failed on the grounds that the requested prior restraint would offend public policy and, in addition, would serve no purpose because the book had already been distributed.³⁸

vi Government action against publication

US courts are generally sceptical of government actions to punish the media based on the content of their publications. For example, when the White House has revoked the press passes of journalists based on assertedly disruptive behaviour, federal courts have enjoined those actions on due process grounds.³⁹ In 2019, multiple courts held that the First Amendment was violated when individuals were blocked from accessing official government social media accounts, such as President Trump's Twitter feed, in a viewpoint-discriminatory manner.⁴⁰

The government does not violate the First Amendment by enforcing secrecy agreements with government employees requiring prepublication review and clearance of manuscripts to prevent disclosure of classified information.⁴¹ The court, however, may be unwilling restrain publication, limiting the relief available. In *United States v. Bolton*, for example, the court refused to enjoin publication of the former National Security Adviser John Bolton's book about his service in the Trump administration because 200,000 copies had already been shipped. However, the government is seeking disgorgement of Bolton's profits pursuant to the terms of the secrecy agreement, as it is in the *Snowden* case.

IV INTELLECTUAL PROPERTY

i Copyright and related rights

Copyright in the United States is governed by the Copyright Act of 1976 (Copyright Act).⁴² The Copyright Act, as amended, sets out eight non-exclusive categories of works of authorship that fall within its ambit:

- a* literary works;
- b* musical works;
- c* dramatic works;
- d* pantomimes and choreographic works;
- e* pictorial, graphic and sculptural works;
- f* motion pictures and other audiovisual works;
- g* sounds recordings; and
- h* architectural works.⁴³

38 *Trump v. Trump*, 128 NYS3d 801, 821 (Sup Ct Dutchess Cty July 13, 2020).

39 See, e.g., *Karem v. Trump*, 404 F Supp 3d 302 (D.D.C. 2019) (granting preliminary injunction), aff'd in part, 960 F3d 656 (DC Circuit 2020).

40 See *Knight First Amendment Inst v. Trump*, 928 F3d 226 (Second Circuit 2019); *Davison v. Randall*, 912 F3d 666 (Fourth Circuit 2019); *Robinson v. Hunt Cty*, 921 F3d 440 (Fifth Circuit 2019).

41 See, e.g., *Snepp v. United States*, 444 US 507 (1980); *United States v. Snowden*, No. 1:19-cv-1197, 2019 WL 8333546 (E.D. Va. Dec 17, 2019); *United States v. Bolton*, No. 1:20-cv-1580, 2020 WL 3401940 (D.D.C. June 20, 2020).

42 17 USC, Sections 101 *et seq.*

43 *id.*, Section 102.

An author gains as many as six exclusive rights in a given work immediately upon its creation: the rights of reproduction, distribution, public performance, public display, creation of derivative works and digital transmission.⁴⁴ Although the exclusive rights attach immediately, the Supreme Court recently clarified that a claimant can only commence a copyright lawsuit after the Copyright Office issues a registration for the copyright (a generally ministerial, but not immediate, process); it does not suffice that an application for registration is pending.⁴⁵ The federal courts have exclusive jurisdiction over copyright lawsuits, and lawsuits brought in state court that sound in copyright should be dismissed or removed to federal court.

We address below three particularly noteworthy areas of copyright disputes in recent years: cases implicating the need to harmonise the statutory text of the Copyright Act with rapid technological advancements not contemplated at the time the Act was drafted; cases implicating the fair use doctrine, which provides an affirmative defence to copyright infringement; and cases implicating over-enforcement of copyrights in musical works.

Statutory interpretation in the face of new technologies

A dominant focus in relation to the development of US copyright law in recent years has been the harmonisation of the text of the Copyright Act (as well as judicial application of doctrines such as fair use) with rapid technological advancements. It is no exaggeration to say that predicting outcomes in copyright cases involving digital commerce has become quite challenging.

Two recent cases illustrate the complexity of applying a generally pre-internet age copyright statute to current commercial settings. *Capitol Records, LLC v. ReDigi, Inc* addressed whether the first sale doctrine embodied in Section 109 of the Copyright Act,⁴⁶ which allows the lawful owner of a copyrighted work to sell or otherwise dispose of possession of it without obligation to the copyright owner, protected transactions enabled by an internet service that allowed users to sell legally acquired digital musical files to other subscribers – in the process, relinquishing possession of the seller's own digital music file.⁴⁷ Distinguishing this practice from that of disposition of a tangible, physical CD, the district court answered in the negative, citing the technologically correct fact that such digital file transfers implicated not merely distributions of the files but also the unauthorised creation of copies. The court acknowledged the controversial nature of the issue (and to some, the anomaly of distinguishing the transfer of a physical versus a digital copy of a sound recording where presumably only one copy remained following the digital transfer), but it held that it was bound to follow the text of the statute. The anomalous result was, the court concluded, a matter for Congress, not the courts, to correct. The decision was affirmed on appeal.⁴⁸

Another recent case, *Goldman v. Breitbart News Network*, involved a test of the application of the public display right to embedded, or in-line linked, images.⁴⁹ The case considered the liability of news organisations for embedding onto their websites a copyrighted photo of US football star Tom Brady that had gone viral. The embedding did not involve any downloading, copying or storage of the photo on the part of the defendants. Instead, the defendants coded

⁴⁴ id., Section 106.

⁴⁵ *Fourth Estate Public Benefit Corp v. Wall-Street.com, LLC*, 139 S Ct 881 (2019).

⁴⁶ 17 USC, Section 109.

⁴⁷ See 934 F Supp 2d 640 (SDNY 2013).

⁴⁸ See 910 F3d 649 (Second Circuit 2018).

⁴⁹ See 302 F Supp 3d 585 (SDNY 2018).

their websites to direct users' browsers to Twitter, where the content was hosted, to retrieve the image. The prevailing law prior to *Goldman* had been that the entity engaging in a public display is that which is hosting the content – in this instance, Twitter. The *Goldman* court disagreed, finding that the defendants' embedding of the photo constituted a public display within the meaning of the Copyright Act insofar as the defendants had taken active steps to allow the image to be shown. In what might be seen as a philosophical departure from the strict adherence to statutory text reflected in *ReDigi*, the *Goldman* court noted that 'mere technical distinctions invisible to the user should not be the lynchpin on which copyright lies'.⁵⁰ Following the court's decision, most of the media defendants settled prior to trial, and the plaintiff voluntarily dismissed the case as to the remaining two defendants.

Fair use

The function of US copyright law, as grounded in the Constitution, is to 'promote the progress of science and useful arts'.⁵¹ Accomplishing this objective entails striking the proper balance between providing incentives to the creation of works of authorship while not unduly hampering productive uses of copyrighted materials that benefit society. The fair use doctrine, codified in Section 107 of the Copyright Act,⁵² serves this balancing function. Courts evaluate fair use on a case-by-case basis by assessing the four factors identified in Section 107 (and sometimes others, notably bad faith). Application of the fair use doctrine to particular facts has always been challenging and somewhat unpredictable, and the advent of the digital age has complicated the task, as the following examples demonstrate.

In the *Google Books* litigation, authors and publishers challenged Google's bold initiative of digitally copying, without permission of rights holders, the full texts of tens of millions of books for the purpose of enhancing a publicly available search engine that enables an internet user to identify books containing searched-for terms.⁵³ Google provides the user with snippets of actual text from books containing these terms. Even though Google could have sought, and generally would have been granted, a licence to reproduce and display text from such works in that manner, the reviewing courts found Google's practice to be a non-infringing fair use. Google's search function was held to be 'a transformative use, which augments public knowledge by making available information about Plaintiffs' book without providing the public with a substantial substitute for matter protected by the Plaintiffs' copyright interests in the original works or derivatives of them'.⁵⁴

Fox News Network LLC v. TVEyes, Inc involved the application of the fair use doctrine to the activities of an internet media company that, without the copyright holders' consent, recorded the content of numerous broadcast and cable radio and television channels into a database that subscribers could access to view, archive, download and share with others clips of up to 10 minutes in length.⁵⁵ While TVEyes' search functionality was held by the courts to

50 302 F Supp 3d at 595; see also *Am Broad Cos, Inc v. Aereo, Inc*, 573 US 431 (2014) (disregarding a technical distinction between cable system operators and an internet subscription service that 'means nothing' to subscribers and to broadcasters in holding an internet service liable for infringing television broadcaster plaintiffs' copyrights by enabling access to unauthorised internet streaming of broadcasters' content).

51 US Constitution, Article I, Section 8, clause 8.

52 17 USC, Section 107.

53 See *Authors Guild, Inc v. Google, Inc*, 804 F3d 202 (Second Circuit 2015) (*Google Books*).

54 id. at 206; see also *Authors Guild, Inc v. HathiTrust*, 755 F3d 87 (Second Circuit 2014).

55 See 124 F Supp 3d 325 (SDNY 2015), aff'd in part, rev'd in part, 883 F3d 169 (Second Circuit 2018).

be a fair use, the appellate court found that those aspects of the service enabling subscribers to watch, archive, download and email to others portions of the videos recorded exceeded fair use limits. The court found these offerings to be ‘somewhat transformative’ (i.e., to fulfil a role distinct from that served by the original content) but to be ‘radically dissimilar’ to the Google Books service insofar as the use of the plaintiff broadcast network’s content was far more extensive and risked impairment of a ‘plausibly exploitable market [by the copyright owner] for such access to televised content’.⁵⁶

Also worthy of mention is the decade-long – and still ongoing – litigation between academic book publishers and Georgia State University, which presents the issue of whether the fair use doctrine affords educational institutions protection from infringement liability when they copy in digital format, and distribute to entire classes of students, significant portions of the copyrighted works of publishers whose primary market consists of sales and the licensing of permissions to institutions of higher learning.⁵⁷ The case has had a tortured history, featuring to date three lower court opinions generally favourable to the University, the first two of which were reversed by the Eleventh Circuit Court of Appeals and remanded for further proceedings and the third of which has not yet been reviewed on appeal. The case tests the latitude for unauthorised copying of scholarly books in the educational setting. It reflects, as do the *Google Books* and *TVEyes* cases, the challenges courts face in copyright cases in evaluating the powerful impact of technology – its conveniences, knowledge-expanding capabilities and the like – against the potential cost that unlicensed copying can impose in terms eroding the economic incentive to create and disseminate new works of authorship.

Most recently, a group of leading US book publishers sued the Internet Archive, a digital library, in connection with the widespread, systematic and unauthorised digital reproduction and distribution of a vast number of copyrighted works. In March 2020, as the covid-19 pandemic was starting to cause significant disruption across the US, the Internet Archive created what it referred to as a National Emergency Library.⁵⁸ Although the Internet Archive shut down that aspect of its operations in June 2020 after the lawsuit was filed,⁵⁹ there remains a significant dispute over whether its practice of ‘controlled digital lending’, pursuant to which it distributes (without permission) digital copies of works for time-limited periods in a manner asserted to be equivalent to traditional library lending of physical copies, is infringing or defensible as a fair use under US copyright law. Trial has been tentatively set for November 2021.

Over-enforcement of music copyrights

A recent trio of jury trials involving the copyrights of musical works has signalled a trend toward what critics argue is over-protection by juries of copyrights in musical works in infringement disputes. In *Williams v. Gaye*, the jury determined that Robin Thicke’s hit song ‘Blurred Lines’ infringed Marvin Gaye’s ‘Got to Give it Up’, and the district court denied the defendants’ motion for judgment as a matter of law.⁶⁰ Thicke acknowledged that he was influenced by Gaye’s work and that he had aimed to create a song with a similar

56 883 F3d at 177-80.

57 See *Cambridge Univ Press v. Albert*, 906 F. d 1290 (Eleventh Circuit 2018) (vacating and remanding district court decision).

58 See blog.archive.org/national-emergency-library/ (last accessed 13 October 2020).

59 See *id.*

60 See 895 F3d 1106 (Ninth Circuit 2018).

sound, but the compositions have entirely different structures, and their harmonies share no chords. Although the Ninth Circuit Court of Appeals upheld the judgment given the highly deferential standard on appeal from a jury determination (the finding must be against the clear weight of the evidence) and on narrow grounds, the dissenting judge identified a lack of sufficient similarity between protectable elements of the two songs.⁶¹ He explained that although the songs share the same ‘groove’, a groove is just an idea and not a protectable element under US copyright law.⁶²

In *Gray v. Perry*, the jury’s verdict that Katy Perry’s hit song ‘Dark Horse’ infringed the plaintiffs’ song ‘Joyful Noise’ did not survive the court’s review.⁶³ The trial court vacated the jury’s verdict on the grounds that the eight-note ostinato in ‘Joyful Noise’ was not original enough to be copyrightable and that, in any event, ‘Dark Horse’ was not substantially similar as a matter of law.⁶⁴ The plaintiffs’ appeal is pending.

US copyright experts generally agree that the jury verdicts in *Perry* and *Gaye* appear to have relied on superficial similarities between the works and that they reflect either the jury’s lack of the requisite musical knowledge to differentiate between protected, original elements of musical works and the unprotected chords, scales and other elements that are necessary building blocks to compositions. These cases demonstrate the crucial role trial courts play in assessing, on post-trial motion, whether the jury’s verdict in music infringement cases is legally and factually supportable.

As *Gaye* illustrates, artists are influenced by the works of their peers or predecessors to make works with a similar feel. Such creative endeavours should be encouraged rather than stifled. Cases like *Gaye*, however, are likely to encourage lawsuits by songwriters against popular artists in the hopes of obtaining similar victories or lucrative settlements from defendants who opt to avoid the uncertainty of a jury trial. The Supreme Court’s holding in *Petrella v. Metro-Goldwyn-Mayer, Inc*⁶⁵ that laches is not available as a defence in copyright infringement actions opened the door to such claims against the owners of songs released many years earlier that remain popular and profitable.

A notable case in this vein, which was recently conclusively resolved in favour of the defendants, is *Skidmore v. Zeppelin*.⁶⁶ In *Skidmore*, the full Ninth Circuit Court of Appeals vacated a prior panel decision and reinstated the district court’s judgment, following a jury verdict, that the legendary rock anthem ‘Stairway to Heaven’ was not substantially similar to, and thus did not infringe, ‘Taurus’, an obscure unpublished instrumental composition, notwithstanding that ‘Stairway to Heaven’ composer Jimmy Page acknowledged that he owned a recording of ‘Taurus’. In so ruling, the appellate court resolved an issue left open in *Gaye* and held that, under the 1909 Copyright Act (which applied because ‘Taurus’ was published prior to 1 January 1978), the plaintiff’s copyright was circumscribed by the sheet music deposited with the Copyright Office and did not extend to the recorded version of ‘Taurus’.⁶⁷ (This issue does not exist for post-1972 sound recordings registered under the 1976 Copyright Act.) The Court also overruled its own precedent recognising the inverse

61 id. at 1138-51.

62 id. at 1140.

63 No.: 2:15-CV-05642-CAS-JCx, 2020 WL 1275221 (CD Cal Mar. 16, 2020).

64 id. at *4-*13.

65 *Petrella v. Metro-Goldwyn-Mayer, Inc*, 572 US 663 (2014).

66 952 F.3d 1051 (9th Cir. 2020) (en banc), cert denied, -- S Ct --, 2020 WL 5883816 (Mem).

67 id. at 1060-64; see also *Griffin v. Sheeran*, No. 17 Civ. 5221 (LLS), 2020 WL 5522835 (SDNY Mar. 24, 2020).

ratio rule, under which a lower standard of substantial similarity applies where a high degree of access to a plaintiff's work is shown. Agreeing with the majority of circuits that have addressed the issue, the Court pointed out that in addition to its lack of clarity, the inverse ratio rule unfairly favours the most popular, accessible works, and it stated that access 'does not obviate the requirement that the plaintiff must demonstrate that the defendant actually copied the work'.⁶⁸ Accordingly, the Court held that the trial court did not err in declining to instruct the jury as to the inverse ratio rule.

ii Personality rights

In the United States, the right of publicity protects against the misappropriation of an individual's name, image, likeness, voice or some other indicia of identity for a commercial purpose without permission. There is no federal statute governing the right of publicity, but over half of US states have recognised such a right in some form. State laws sometimes contain express 'newsworthiness' exceptions, but even in the absence of such provisions, courts must consider whether a defendant's free speech rights under the First Amendment outweigh a plaintiff's right of publicity.⁶⁹ State laws vary in terms of the number of years for which publicity rights are recognised post-mortem, ranging from zero (e.g., Wisconsin) to 100 (e.g., Indiana).⁷⁰ Remedies also vary by state but typically include injunctive relief, damages (including statutory damages) and attorneys' fees.

A recent focus of publicity rights litigation has involved video game characters. For example, in 2010, three retired National Football League (NFL) players filed a class action lawsuit against Electronic Arts (EA) alleging that EA, without authorisation, used retired players' likeness in creating 'historic teams' containing the players' positions, years in the NFL, approximate height and weight, and relative skill levels in different aspects of the game. EA asserted that its use of players' likenesses was entitled to First Amendment protection, but the district court and Ninth Circuit Court of Appeals disagreed.⁷¹ The Ninth Circuit Court of Appeals held that EA did not establish that its use of the likeness was permissible because '[n]either the individual players' likenesses nor the graphics and other background content [were] transformed'.⁷² Video game manufacturers have defeated claims, however, where the characters were not sufficiently recognisable as the plaintiff.⁷³ Most recently, a series of plaintiffs, including Alfonso Ribeiro from the *Fresh Prince of Bel-Air* television programme,

68 *Skidmore*, 952 F3d at 1069.

69 The test used varies by jurisdiction. The two most commonly used tests are the 'transformative use' test and the 'relatedness' test. The transformative use test provides that the First Amendment protects only uses of a person's likeness that 'add[] significant creative elements so as to be transformed into something more than a mere celebrity likeness or imitation'. *Comedy III Prods, Inc v. Gary Saderup, Inc*, 25 Cal 4th 387, 391 (2001). Under the relatedness test, the use of a person's likeness is protected only if the underlying work is wholly unrelated to the individual or constitutes a disguised advertisement for the sale of goods or services. *Rogers v. Grimaldi*, 875 F2d 994 (Second Circuit 1989). Other courts apply their own variations of balancing tests in determining whether a use is protected by the First Amendment.

70 Compare Wisconsin Statutes, Section 995.50 (2019) with Indiana Code, Section 32-36-1-8 (2019).

71 See *Davis v. Electronic Arts, Inc*, No. 10-03328 RS, 2012 WL 3860819 (ND Cal Mar. 29, 2012), aff'd, 775 F3d 1172 (Ninth Circuit 2015).

72 775 F3d at 1178.

73 See, e.g., *Hamilton v. Speight*, 2:17-cv-00169-AB, 2019 WL 4697485, at *7 (ED Pa Sept. 26, 2019); *Gravano v. Take-Two Interactive Software, Inc* 37 NYS 3d 20 (NY App Div 2016), aff'd sub nom. *Lohan v. Take-Two Interactive Software, Inc*, 97 NE3d 389 (2018), and aff'd, 97 NE3d 396 (2018).

rapper 2 Milly, Instagram and YouTube star Backpack Kid, and former college basketball players sued Epic Games alleging that various of their rights were infringed as a result of characters in Epic's video game Fortnite performing dances popularised by and associated with those performers. In *Brantley v. Epic Games, Inc.*,⁷⁴ the court held that the publicity rights claims (and others) asserted by two former University of Maryland basketball players against Epic arising out of alleged usurpation of their 'Running Man' dance move were preempted by the Copyright Act.

iii Unfair business practices

Many states have recognised the tort of hot news misappropriation in media disputes, although litigated outcomes in such cases are rare. Hot news misappropriation arises when a publisher invests significant time and resources in gathering facts and data and, after publication, another outlet 'free rides' off of the original producer's work and promptly disseminates the same information to its own customers without incurring the costs associated with gathering it. First recognised by the US Supreme Court in *International News Service v. Associated Press*,⁷⁵ the hot news misappropriation tort has provided important protection to newspapers, wire services and other publishers of time-sensitive information. Efforts to apply the doctrine outside the context of traditional news publishing have been less successful in recent years.⁷⁶

V COMPETITION AND CONSUMER RIGHTS

Competition and consumer protection in the United States are protected through a combination of overlapping state and federal laws. The three principal federal laws that protect competition are the Sherman Act, the Clayton Act and the Federal Trade Commission Act (FTC Act). States have their own counterparts to the federal antitrust laws; those laws generally prohibit the same types of conduct but focus on conduct that occurs solely within a state's own borders. Collectively, these state and federal laws are intended to keep US markets open, free and competitive.⁷⁷

The Sherman Act outlaws all contracts, combinations and conspiracies that unreasonably restrain interstate and foreign trade. This includes, among other things, agreements among competitors to fix prices, rig bids, and allocate customers or territories. The Sherman Act also makes it a crime to monopolise any part of interstate commerce. The Clayton Act prohibits mergers and acquisitions that may substantially lessen competition, and the federal government has the ability to challenge those mergers that it believes are likely to result in higher prices for consumers or present other harms to consumer welfare. The Clayton Act also prohibits certain forms of price discrimination. The FTC Act prohibits unfair methods of competition in interstate commerce and authorises the Federal Trade Commission to police violations of the Act.

⁷⁴ No.: 8:19-cv-594, 2020 WL 2794016 (D Md May 29, 2020),

⁷⁵ 248 US 215 (1918),

⁷⁶ See, e.g., *Barclays Capital, Inc v. Theflyonthewall.com*, 650 F3d 876 (Second Circuit 2011) (reversing district court); *Nat'l Basketball Ass'n v. Motorola, Inc.*, 105 F3d 841 (Second Circuit 1997).

⁷⁷ There is an overlapping network for antitrust enforcement that includes the Antitrust Division of the US Department of Justice, the Federal Trade Commission, state attorneys general and aggrieved parties who have been harmed by antitrust violations, as some antitrust laws provide for private rights of action to recover damages.

There are also a variety of state and federal laws that protect consumers against other unfair trade practices. Section 5(a) of the FTC Act declares that ‘unfair or deceptive acts or practices in or affecting commerce’ are unlawful and, in addition to its general enforcement authority under Section 5, the Federal Trade Commission also has enforcement authority under a variety of specific consumer protection statutes that cover topics such as unsolicited telephone marketing, children’s online privacy, and credit and lending practices. As with the federal antitrust laws, the FTC Act has state law counterparts that prohibit unfair and deceptive acts and practices and are enforced by state attorneys general. There are also some privacy laws that provide for private rights of action, and industry self-regulation efforts are part of the regulatory framework as well.

The federal government has been particularly active in recent years in re-evaluating the proper role for federal oversight to ensure competition affecting the media and entertainment industries. First, the Federal Trade Commission convened a wide-ranging series of public hearings in 2018 and 2019 to consider competition and consumer protection law in the 21st century.⁷⁸ The multi-part, multi-day hearings addressed whether broad-based changes in the economy, evolving business practices, new technologies and international developments require adjustments to competition and consumer protection enforcement law, enforcement priorities and policy. See *id.* While the hearings were by no means limited to issues affecting media and entertainment companies, their focus on the economic changes in the era of big tech and big data are on Apple, Facebook and Google, and on how media and entertainment products are distributed and consumed. In the wake of those hearings, in June 2019, the US Department of Justice announced new antitrust investigations of Apple and Google, and the Federal Trade Commission announced new inquiries into Facebook and Amazon, while on 29 July 2020, the chief executive officers of Apple, Amazon, Facebook and Google testified at a virtual hearing before the antitrust subcommittee of the House Judiciary Committee, which subsequently issued a report proposing sweeping changes to US antitrust law. These entities also have drawn recent scrutiny from state attorneys general.

Another significant recent development is the Department of Justice’s commencement of a review of the antitrust consent decrees that govern the practices of ASCAP and BMI, the two largest music performance rights organisations in the United States, a review that remains ongoing.⁷⁹ This review started in 2019, garnered nearly 900 sets of public comments from interested parties and included a two-day public workshop in late July 2020, but as of the time of writing has not been concluded. This review is just the most recent in a series of periodic reviews of these decrees over the past 75 years, but any change in that regulatory framework could have significant effects on the marketplace, given the historic and ongoing dominance of those two organisations over music licensing in the United States.

A third development worthy of note is the unsuccessful effort of the Department of Justice to block the merger of AT&T and Time Warner. The federal government had expressed concern that the merger would place too much power over video programming and video

78 See Hearings on Competition and Consumer Protection in the 21st Century, <https://www.ftc.gov/policy/hearings-competition-consumer-protection> (last visited 13 October 2020).

79 See Antitrust Consent Decree Review – ASCAP and BMI 2019, www.justice.gov/atr/antitrust-consent-decree-review-ascap-and-bmi-2019 (last visited 13 October 2020).

distribution in the hands of too few individuals and lead to higher prices and less innovation. The Department of Justice sued to block the merger under the Clayton Act, but the district court refused to enjoin the transaction and the appellate court affirmed the denial.⁸⁰

VI CONTRACTUAL DISPUTES

Contractual disputes in the media and entertainment industry are common in the United States, and frequently litigated issues include underpayment of royalties, breaches of exclusivity, carriage disputes and other aspects of supplier–distributor relationships. Breaches of contract are governed by state law and frequently litigated in state courts, but they may be litigated in federal court if there is some independent basis for federal jurisdiction over a dispute. Of course, contracting parties frequently include arbitration provisions in their agreements, so media and entertainment disputes are often resolved in private forums.

One area of recent litigation has involved the intersection of copyright law and contract law in cases arising out of claims that a defendant's exploitation of a copyrighted work goes beyond the scope of a licence from the plaintiff. Because copyright law provides for statutory damages and discretionary awards of attorneys' fees, plaintiffs often try to frame licence disputes as copyright claims rather than contract claims. If a defendant has merely failed to pay royalties owed under a licence or breached some other contractual covenant, the case sounds in contract law and the plaintiff is remitted to contract remedies.⁸¹ If the defendant has breached a condition to the licence, however, the plaintiff may seek copyright remedies.⁸²

A recent case, *Spinelli v. National Football League*, highlights the interplay between breach of contract claims and copyright infringement claims.⁸³ In *Spinelli*, a group of sports photographers sued the National Football League (NFL), the news agency that licences photographs of NFL games and other events (Associated Press (AP)) and an online store that sold NFL photographs for copyright infringement and breach of contract, among other claims. The plaintiff photographers alleged that AP had exceeded the bounds of its contracts with the photographers by granting a complementary licence to the NFL that purported to grant rights to exploit thousands of plaintiffs' photographs without paying royalties for that use.

Based on its reading of the complaint and the contract terms at issue, the district court granted the defendants' motion to dismiss for failure to state a claim.⁸⁴ The court of appeals, however, reversed. The appellate court first found the plaintiffs' theory of contract liability plausible and the lower court's dismissal of the contract claims premature.⁸⁵ Turning to the copyright claims, the court noted that '[i]t is a separate question, however, whether the AP simply violated a contractual promise to pay royalties (a claim for breach of contract)

80 See *United States v. AT&T, Inc*, 310 F Supp 3d 161 (D.D.C. 2019), aff'd, 916 F3d 1029 (DC Circuit 2019).

81 See, e.g., *Graham v. James*, 144 F3d 229, 236 (Second Circuit 1998).

82 *id.* at 237.

83 See 903 F.3d 185 (2d Cir. 2018).

84 See *Spinelli v. Nat'l Football League*, 13-cv-7398 (RWS), 2017 WL 9618754 (SDNY Dec. 23, 2016).

85 See 903 F3d at 200-02.

or whether its complimentary license to the NFL exceeded the scope of its sublicensing authority (a claim for copyright infringement).⁸⁶ ‘If the former’, the court reasoned:

AP would be liable for breach of contract, but the NFL’s license would be valid, and the NFL would not be liable for copyright infringement. If the latter, the complimentary license itself would be invalid, and plaintiffs would have a claim for copyright infringement against AP for impermissibly distributing plaintiffs’ photographs and against the NFL for its various displays and reproductions of the photographs.⁸⁷

The appellate court found that the plaintiffs had adequately pleaded the latter, restored their infringement claims and remanded the case to the district court for further proceedings.⁸⁸ The potential economic significance of that determination cannot be overstated: the potential contract damages are cabined by the applicable royalty rates that AP and the photographers had negotiated, whereas the availability of statutory damages for copyright infringement under US copyright law enabled the plaintiffs to seek up to US\$150,000 per photograph that was infringed. Following remand, the case settled.

⁸⁶ id. at 202.

⁸⁷ id.

⁸⁸ id. at 203-04.

Appendix 1

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