

THE MEDIA AND  
ENTERTAINMENT  
LAW REVIEW

Editors

R Bruce Rich and Benjamin E Marks

THE LAWREVIEWS

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ENTERTAINMENT  
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# PREFACE

We are very pleased to serve as editors and US chapter authors of this important survey work on the ever-evolving state of the law globally as affects the day-to-day operations of the media and entertainment industries.

This work is especially timely given the ongoing challenges to press freedom at the instance of repressive governmental regimes – a phenomenon, it should be noted, that is also testing the strength of free speech traditions in the world’s most protective speech regime, the United States. It is equally well-timed in light of the ongoing digital revolution, which has created new challenges in both applying existing intellectual property laws, such as copyright, to the internet setting, and developing appropriate legislative and regulatory responses that meet current e-commerce, and rights holder and consumer protection needs.

This volume should be understood to serve, not as an encyclopaedic 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. Our contributors are subject field experts, whom we gratefully acknowledge for their efforts. Each has used his or her best judgement as to the topics to highlight, recognising that space constraints require selectivity. As will also become plain, aspects of this legal terrain, particularly as relate to the legal and regulatory treatment of digital commerce, is very much in a state of flux, with many open issues of the moment remaining for future clarification.

The usual caveat is in order: of necessity, 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 should continue to serve that function.

**R Bruce Rich and Benjamin E Marks**

Weil, Gotshal & Manges LLP

New York

November 2019

# UNITED STATES

*R Bruce Rich and Benjamin E Marks<sup>1</sup>*

## I OVERVIEW

The past year has seen significant judicial and regulatory developments affecting the media and entertainment industries in the United States.

Courts have continued to recognise the robust protections historically available in the United States for free speech and media access to government information in the face of a US Presidential administration more hostile to those ideals than any in recent history, and perhaps ever. Indeed, the news media are not only persisting, but thriving, in the face of efforts by numerous governmental actors to cast doubt on the credibility of professional journalists as reporters of objective facts. Courts have also continued to grapple with the effects of an increasingly interconnected, digital world on distribution and consumption of media and entertainment fare, with numerous decisions in recent years that help to define the contours of copyright law, rights of publicity and other relevant legal doctrines. We continue to see robust debate over whether courts are under- or over-enforcing intellectual property rights in the digital age.

Regulatory agencies have undertaken significant initiatives to ensure that their oversight function and regulatory activities are appropriately tailored for the modern, digital economy. For example, the US Federal Trade Commission (FTC) has undertaken an extensive review of its enforcement of federal antitrust and consumer protection laws, including many days of public hearings with dozens of witnesses and public comments from hundreds of additional stakeholders. While the FTC's review is not limited to the media and entertainment industries, there has been a particular emphasis on the impact of large technology companies, such as Amazon, Apple, Facebook and Google, whose impact on those industries in recent years cannot be overstated. The US Department of Justice is systematically reviewing some 1,300 antitrust consent decrees that regulate conduct across various sectors of the economy, but this review has already resulted in a decision to terminate a long-standing decree governing the practices of certain large film studios with respect to the distribution of films for theatrical release, and the decrees governing the organisations that license the public performance rights for most of the music available in the United States are under intense scrutiny as well.

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<sup>1</sup> R Bruce Rich is a senior partner and Benjamin E Marks is a partner at Weil, Gotshal & Manges LLP. The authors gratefully acknowledge the assistance of their colleagues, Jonathan Bloom, Liz McLean and Elena De Santis, in connection with the preparation of this chapter.

## **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 of constitutional dimension, state and federal statutes, government agency oversight and judicially evolved common law doctrines.

Perhaps the most distinguishing feature of US law with respect to media and entertainment is the robust protections for free speech and media freedom afforded under the First Amendment to the US Constitution and state constitution equivalents. While US media are not immune from libel and defamation 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 operative legal and regulatory framework 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 the 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 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 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 pre-empted. In others, such as rights of publicity, rights are only provided at the state-law level, and there is 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 mention is the combination in the United States of statutory and common law. For example, US copyright law is a creature of federal statute, whereas the hot news misappropriation doctrine is a judicially evolved concept derived from general principles of equity.

This at-times overlapping, patchwork approach sometimes leads to disputes over which legal regime governs a challenged entity's conduct. This frequently arises with respect to the pre-emptive reach of federal copyright law, which forecloses certain state law remedies viewed as overlapping 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 for 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’.<sup>2</sup> The few, limited categorical exceptions include obscenity, child pornography, defamation, fraud, incitement, true threats and speech integral to criminal conduct.<sup>3</sup> 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 cognizable harm’.<sup>4</sup> 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’.<sup>5</sup> 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’.<sup>6</sup>

In addition to rejecting new categories of unprotected speech, the US Supreme Court recently made it harder to restrict protected speech. While it has long been true that the First Amendment requires heightened scrutiny whenever the government creates regulation of speech ‘because of disagreement with the message it conveys’,<sup>7</sup> 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’.<sup>8</sup>

Commercial speech, which includes commercial advertising, promises and solicitations, is unprotected if false or misleading, and it is otherwise subject to regulation under an intermediate level of scrutiny.<sup>9</sup> However, in *Sorrell v. IMS Health Inc.*,<sup>10</sup> the 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 it 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’.<sup>11</sup> Media and entertainment products are not ‘commercial speech’ merely because they are distributed or sold as part of for-profit enterprises.

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

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).

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

8 *Reed v. Town of Gilbert*, 135 S Ct 2218, 2228 (2015).

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.

## 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 organizations'.<sup>12</sup> 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'.<sup>13</sup> 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 the publication is of public concern.<sup>14</sup>

Undercover reporting techniques have been the subject of several lawsuits challenging the constitutionality of state 'ag-gag' laws that criminalise the infiltration of agricultural production facilities to document illegal, unsanitary and inhumane conditions. In *ALDF v. Wasden*,<sup>15</sup> the Court struck down the provisions of an Idaho statute prohibiting making misrepresentations to access an agricultural production facility and unauthorised audio or video recording of the facility's operations on the ground that both provisions were content-based restrictions of protected speech that were broader than necessary to protect the property owner's interests.

In private tort actions, the legitimate newsgathering purpose of secret recording often outweighs the plaintiff's asserted privacy interests. In *Medical Laboratory Management Consultants v. American Broadcasting Companies*, for example, the appellate 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'.<sup>16</sup> There are limits to this principle, however. Journalists have no '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'.<sup>17</sup>

## iii Freedom of access to government information

Access to federal government information is governed by the Freedom of Information Act,<sup>18</sup> 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

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

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

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

15 878 F3d 1184 (Ninth Circuit 2018).

16 306 F3d 806, 814, 819 (Ninth Circuit 2002); see also *Shulman v. Grp W Prods, Inc*, 955 P2d 469, 493 (Cal 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.').

17 *Shulman*, 955 P2d at 471.

18 5 USC, Section 552.

be expected to interfere with ongoing enforcement proceedings. States have their own freedom of information laws and processes for obtaining information about the workings of state government.<sup>19</sup>

#### iv Protection of sources

Journalists do not have a First Amendment or common-law right to refuse to comply with a grand jury subpoena,<sup>20</sup> even if doing so requires the disclosure of confidential sources.<sup>21</sup> Courts relying on *Branzburg* have affirmed contempt orders against prominent journalists who refused to reveal their sources in criminal leak prosecutions.<sup>22</sup>

Outside the grand jury context, the 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,<sup>23</sup> and in both civil and criminal cases,<sup>24</sup> but the Fourth Circuit strikes a different balance between newsgathering and law enforcement. It recognises a qualified privilege only in civil cases.<sup>25</sup>

While 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. And 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 US Constitution, which, as judicially interpreted, imposes the requirement that public official or public figure plaintiffs prove that the statement was made with 'actual malice' (i.e., with knowledge of its falsity or reckless disregard for its truth).<sup>26</sup> In private figure cases, states are free to require a lesser showing of fault 'so long as they do not impose liability without fault'.<sup>27</sup> To be actionable, a statement must be susceptible to being proved true or false,<sup>28</sup> and when the statement is of public concern, the plaintiff bears the burden of proving falsity.<sup>29</sup>

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19 See, e.g., NY Public Officers' Law, Sections 84–90 (New York's Freedom of Information Law).

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

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

22 See *United States v. Sterling*, 724 F3d 482 (Fourth Circuit 2013); *In re Grand Jury Subpoena, Judith Miller*, 397 F3d 964 (DC Circuit 2005). Efforts to pass a federal shield law overturning these decisions have failed.

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

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

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

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

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

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

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

The US Supreme Court has declined to limit the foregoing First Amendment protections to the traditional, institutional media (the boundaries of which have, in any event, become blurred with the advent of the internet). They apply equally to individual speakers, including to bloggers.<sup>30</sup>

The relief available in defamation actions is generally limited to compensatory damages. The US Supreme Court has never addressed the issue, but most courts 'adhere to the traditional rule that defamation alone will not justify an injunction against future speech'.<sup>31</sup>

#### **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 allegedly disruptive behaviour, federal courts have enjoined those actions on due process grounds.<sup>32</sup> 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.<sup>33</sup>

### **IV INTELLECTUAL PROPERTY**

#### **i Copyright and related rights**

Copyright in the United States is governed by the Copyright Act of 1976.<sup>34</sup> 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.<sup>35</sup>

An author gains as many as six exclusive rights in a given work immediately upon its creation: the rights of:

- a* reproduction;
- b* distribution;
- c* public performance;
- d* public display;

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30 *Obsidian Fin Grp, LLC v. Cox*, 740 F3d 1284 (Ninth Circuit 2014).

31 *Kinney v. Barnes*, 443 SW3d 87 (2014).

32 See, e.g., *Karem v. Trump*, Civ Action No. 19-2514, 2019 WL 4169824 (DDC 3 Sept 2019) (granting preliminary injunction); see also Erik Wemple, 'Trump-appointed judge: Get CNN's Acosta back in White House', *Washington Post*, 16 Nov 2018.

33 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).

34 17 USC, Section 101 et seq.

35 17 USC, Section 102.

- e* creation of derivative works; and
- f* digital transmission.<sup>36</sup>

Although the exclusive rights attach immediately, the US 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.<sup>37</sup> The federal courts have exclusive jurisdiction over copyright lawsuits,<sup>38</sup> and lawsuits brought in state court that sound in copyright should be dismissed or removed to federal court.

There are three particularly noteworthy areas of copyright disputes in recent years:

- a* 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;
- b* cases implicating the fair use doctrine, which provides an affirmative defence to copyright infringement; and
- c* cases exemplifying a troubling trend toward 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 judicially evolved doctrines, such as fair use) with rapid technological advancements. It is no exaggeration to say that predicting outcomes in copyright litigation that implicates 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,<sup>39</sup> 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.<sup>40</sup> 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 digital file transfers implicated not merely potentially qualifying distributions of the files, but also reproductions of copies for which the possessors did not have the copyright owner's permission. 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 solely one copy remains following the digital transfer), but ruled that it was bound to follow the text of the law. The anomalous result was, the court concluded, a matter for Congress, not the courts, to correct. The decision was affirmed on appeal.<sup>41</sup>

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36 17 USC, Section 106.

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

38 28 USC, Section 1338.

39 17 USC, Section 109.

40 See 934 F Supp 2d 640 (SDNY 2013).

41 See 910 F3d 649 (Second Circuit 2018).

*Goldman v. Breitbart News Network, LLC* involved a test of the application of the public display right to ‘embedded’, or in-line linked, images.<sup>42</sup> 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, but instead the defendants coded their websites to direct a user’s browser to Twitter, where the content was hosted, to retrieve the image. The general view of the law up until this decision had been that the entity engaging in a public display is that hosting the content – in this instance, Twitter. The *Goldman* court disagreed, finding that the defendants’ embedding of the photo did constitute a public display within the meaning of the Copyright Act, insofar as they had taken active steps to put in place a process that allowed 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 court here noted that ‘mere technical distinctions invisible to the user should not be the lynchpin on which copyright lies’.<sup>43</sup> 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 US Constitution, is to ‘promote the progress of science and useful arts’.<sup>44</sup> Accomplishing this objective entails striking the proper balance between providing incentives to the creation of works of authorship while not unduly hampering uses of copyrighted materials considered beneficial to society, which thrives on accessing and building upon the storehouse of knowledge and information. The fair use doctrine, codified in Section 107 of the Copyright Act,<sup>45</sup> serves this balancing function. Acting as copyright’s ‘equitable rule of reason’, the doctrine is applied by the courts on a case-by-case basis, and principally entails an assessment of the four factors identified in Section 107.<sup>46</sup> Application of the fair use doctrine to particular fact settings has always been challenging and somewhat unpredictable. The advent of the digital age has exponentially 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 the 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 the searched-for terms.<sup>47</sup> Google provides the user with snippets of actual text from the books containing these terms. Even though Google could have sought, and generally would have been granted, a licence to reproduce and display text from these 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’ books without providing the public with a substantial substitute for matter protected by the Plaintiffs’ copyright interests in the original works or derivatives of them’.<sup>48</sup>

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42 See 302 F Supp 3d 585 (SDNY 2018).

43 *Goldman*, 302 F Supp at 595.

44 US Constitution, Article I, Section 8, Clause 8.

45 17 USC, Section 107.

46 *Sony Corp v. Universal Studios, Inc*, 464 US 417, 448 (1984) (quotation omitted).

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

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

*Fox News Network LLC v. TVEyes, Inc* involved 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 up to 10 minutes in length.<sup>49</sup> While TVEyes' search functionality was held by the courts to 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 complaining 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'.<sup>50</sup>

Also worthy of mention is the decade-long – and still ongoing – litigation between academic book publishers and Georgia State University,<sup>51</sup> 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. The case has had a tortured history, featuring to date two lower court opinions generally favourable to the university, each of which has been reversed by the Eleventh Circuit Court of Appeals and remanded for further proceedings. A third decision from the lower court is awaited. The case presents an elemental test of the latitude to be afforded copying in the educational setting, and at what cost to the affected publishers and their authors. It reflects, as do the *Google Books* and *TVEyes* cases, the challenges presented to the courts in the copyright setting of assaying the powerful impact of technology – its conveniences, knowledge expanding capabilities and the like – against the potential cost that undue fair use latitude can incur in terms of creation of works of authorship.

### ***Over-enforcement of music copyright***

A recent trio of jury trials involving the copyrights of musical works has signalled a trend towards what critics argue is over-enforcement of copyrights in musical works. In three recent cases, each involving celebrity defendants – Led Zeppelin, Katy Perry and Robin Thicke – juries determined that the defendants had infringed the copyrights of other songwriters.<sup>52</sup> US copyright experts generally agree that these cases appear to have been decided on the basis of superficial similarities between the works, and reflect either the jury's lack of the requisite musical knowledge to differentiate between protected, original elements of musical works and the unprotected chords and scales that are necessary building blocks to compositions, or the influence of other non-copyright factors on the outcome.

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

50 *TVEyes, Inc*, 883 F3d at 177–180.

51 See *Cambridge Univ Press v. Albert*, 906 F3d 1290 (Eleventh Circuit 2018) (vacating and remanding district court decision).

52 *Skidmore v. Zeppelin*, 905 F3d 1116 (Ninth Circuit) 28 September 2018; *Gray v. Perry* No. 2:15-cv-05642 (CD Cal 2019) ECF No. 470; *Williams v. Gaye*, 895 F3d 1150 (Ninth Circuit) 11 July 2018.

*Williams v. Gaye*, a case in which the jury determined that Robin Thicke's hit song *Blurred Lines* infringed Marvin Gaye's *Got to Give it Up*, illuminates this recent trend.<sup>53</sup> Thicke acknowledged that he was influenced by Gaye's work and had aimed to create a song with a similar sound, but the compositions have entirely different structures and their harmonies share no chords. Although an appellate court upheld the award 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 the two songs at issue.<sup>54</sup> The dissenting judge explained that although the songs share the same 'groove', a groove is just an idea and not a protectable element under US copyright law.<sup>55</sup>

Countless artists have been influenced by the works of their peers or predecessors to make works with a similar feel without infringing by copying protectable elements. These creative endeavours should be encouraged, rather than stifled. These recent cases, however, are likely to encourage additional lawsuits by songwriters against popular artists in the hopes of achieving similar victories or securing lucrative settlements from defendants seeking to avoid the uncertainty of a jury trial.

## 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 the states have recognised such a right. State laws sometimes contain express 'newsworthiness' exceptions, but even in the absence of such provisions, courts must consider whether the defendant's free-speech rights under the US Constitution's First Amendment outweigh the plaintiff's right of publicity.<sup>56</sup> State laws vary on the number of years in which publicity rights are recognised post-mortem, ranging from zero at the low end (New York) to 100 at the high end (Indiana).<sup>57</sup> Remedies also vary by state, but typically include injunctive relief, damages (including statutory damages) and attorneys' fees.

A recent focus of right-of-publicity 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' likenesses 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,

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53 See 885 F3d 1150 (Ninth Circuit 2018).

54 See *id.* at 1183–1195.

55 See *id.* at 1185.

56 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.

57 Compare NY Civ Rights § 50 with IN ST 32-36-1-8 (2019).

but the district court and Ninth Circuit Court of Appeals disagreed.<sup>58</sup> The appellate court 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'.<sup>59</sup> Video game manufacturers have defeated claims, however, where characters are not sufficiently recognisable as the plaintiff, notwithstanding some degree of similarity.<sup>60</sup> Most recently, a series of plaintiffs, including Alfonso Ribeiro from *The Fresh Prince of Bel-Air* television programme, rapper 2 Milly and Instagram and YouTube star Backpack Kid sued Epic Games, alleging that their rights were infringed as a result of characters in Epic's popular game, *Fortnite*, performing dances popularised by and associated with those performers. These publicity claims have not yet been adjudicated.

### iii Unfair business practices

Many states have recognised the tort of 'hot news' misappropriation in media disputes, although litigated outcomes on the merits of a dispute are rare. Hot news misappropriation arises when a publisher invests significant time and resources into gathering facts and data and, after publication, another outlet 'free rides' off of the original producer's work and promptly disseminates that same information to its own customers without incurring the costs associated with gathering the information. First recognised by the US Supreme Court more than 100 years ago in *International News Service v. Associated Press*,<sup>61</sup> the tort of hot news misappropriation has provided important protection to newspapers, wire services and other publishers of time-sensitive information. Efforts to apply the doctrine outside of the context of traditional news publishing have been less successful in recent years.<sup>62</sup>

## 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 (the 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 the state's own borders. Collectively, these state and federal laws are intended to keep US markets open, free and competitive.<sup>63</sup>

The Sherman Act outlaws all contracts, combinations and conspiracies that unreasonably restrain interstate and foreign trade. This includes, among others, agreements among competitors to fix prices, rig bids and allocate customers or territories. The Sherman

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58 See *Davis v. Elec Arts, Inc.*, No. 10-03328 RS, 2012 WL 3860819 at \*3 (ND Cal, 29 March 2012), *aff'd*, 775 F3d 1172 (Ninth Circuit 2015).

59 775 F3d at 1178.

60 See, e.g., *Hamilton v. Speight*, 2:17-cv-00169-AB, 2019 WL 4697485 at \*7 (ED Pa, 26 Sept 2019); *Gravano v. Take-Two Interactive Software, Inc.*, 142 AD3d 776, 37 NYS3d 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).

61 248 US 215 (1918).

62 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).

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

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 FTC to police violations of the Act.

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 FTC also has enforcement authority under a variety of specific consumer protection statutes that cover diverse 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 some industry self-regulation efforts, that 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 fair competition affecting the media and entertainment industries. First, the FTC convened a wide-ranging series of public hearings in 2018 and 2019 to consider competition and consumer protection law in the 21st century.<sup>64</sup> The multi-part, multi-day hearings addressed whether broad-based changes in the economy, evolving business practices, new technologies or international developments require adjustments to competition and consumer protection enforcement law, enforcement priorities and policy.<sup>65</sup> 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 of significant consequence to those industries, given the impact of companies such as Amazon, Apple, Facebook and Google 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 FTC announced new inquiries into Facebook and Amazon. Those entities have drawn recent scrutiny from state attorneys general as well.

Another significant development from the past year is the US 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.<sup>66</sup> 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 US.

A third development worthy of note is the unsuccessful effort of the US 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 distribution in the hands of too few individuals and lead to higher prices and

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64 See [www.ftc.gov/policy/hearings-competition-consumer-protection](http://www.ftc.gov/policy/hearings-competition-consumer-protection).

65 See *id.*

66 See [www.justice.gov/atr/antitrust-consent-decree-review-ascap-and-bmi-2019](http://www.justice.gov/atr/antitrust-consent-decree-review-ascap-and-bmi-2019).

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.<sup>67</sup>

## 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 the 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 that 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 the 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.<sup>68</sup> If the defendant has breached a condition to the licence, however, the plaintiff may seek copyright remedies.<sup>69</sup>

A recent case, *Spinelli v. National Football League*, highlights the interplay between breach of contract claims and copyright infringement claims.<sup>70</sup> In *Spinelli*, a group of sports photographers sued the NFL, the news agency that licensed photographs of NFL games and other events (the 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 complimentary licence to the NFL that purported to grant the 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.<sup>71</sup> The appellate court, 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.<sup>72</sup> Turning to the copyright claims, the appellate 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) or whether its complimentary license to the NFL exceeded the scope of its sublicensing authority (a claim for copyright infringement)’.<sup>73</sup> ‘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

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67 See *United States v. AT&T, Inc.*, 310 F Supp 3d 161 (DDC 2019), aff’d, 916 F3d 1029 (DC Circuit 2019).

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

69 id. at 237.

70 See 903 F3d 185 (Second Circuit 2018).

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

72 See 144 F3d at 200–202.

73 id. at 202.

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.<sup>74</sup> The appellate court found that plaintiffs had adequately pleaded the latter, restored their infringement claims as well, and remanded the case to the district court for further proceedings.<sup>75</sup> The potential economic significance of that determination cannot be overstated. The potential contract damages are limited 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 infringed. Following remand, the case settled.

## VII YEAR IN REVIEW

The year 2019 has seen intense scrutiny over the interplay between government actors and the media and entertainment industries. The most consequential of these developments have been:

- a* judicial reaffirmation of the robust protections traditionally available in the United States for free speech and a free press;
- b* government investigations into the business practices of certain of the largest technology companies, and hearings on whether existing antitrust and consumer protection laws are adequate to regulate their conduct and impact on the US economy; and
- c* government review of legacy antitrust consent decrees affecting the entertainment industry to determine whether those decrees stifle innovation and, therefore, no longer serve the public interest.

## VIII OUTLOOK

For the coming year, we expect to see continued focus on the effects of the increasingly interconnected, digital economy on the media and entertainment industries, and additional consideration of whether legal reforms are needed for those industries to continue to flourish. The long-term trend towards digital distribution of entertainment products will continue, and we anticipate that the significant litigation activity involving both intellectual property and contractual disputes arising out of this trend will continue as well. Music rights and music rates will also be at the forefront in 2020. The recent decisions finding popular songs infringing of older works will likely inspire additional lawsuits, and there are several significant rate-setting disputes with industry-wide impacts headed for trial next year, including a proceeding before the US Copyright Royalty Board to set the royalties paid by internet radio webcasters to the recorded music industry for the right to stream sound recordings, a proceeding in federal court in New York to set the rates paid by the traditional broadcast radio industry to BMI for the right to publicly perform the 10 million-plus copyrighted musical works in BMI's repertory, and another proceeding in federal court in New York involving the nation's leading concert promoters and BMI over the royalties applicable to live music events.

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74 *id.*

75 *id.* at 203–204.

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