

THE MEDIA AND
ENTERTAINMENT
LAW REVIEW

FOURTH EDITION

Editor
Benjamin E Marks

THE LAWREVIEWS

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This article was first published in December 2022
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Published in the United Kingdom
by Law Business Research Ltd
Holborn Gate, 330 High Holborn, London, WC1V 7QT, UK
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www.TheLawReviews.co.uk

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ISBN 978-1-80449-135-5

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following for their assistance throughout the preparation of this book:

ASSEGAF HAMZAH & PARTNERS

BIRD & BIRD

DELOITTE LLP

HALDANES

IWATA GODO

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PREFACE

I am pleased to serve as the editor and United States chapter author of this important survey work on the evolving state of the law around the world as affects the day-to-day operations of the media and entertainment industries.

The year 2022 has seen important developments for the media and entertainment industries as countries around the world emerge from the devastating effects of the covid-19 pandemic. Live concerts and music festivals have returned, and ticket sales are on pace to exceed pre-pandemic levels. Although digital music streaming flourished even during the pandemic, it too is surging as performing artists are again able to promote new releases with concert tours.

The movie industry continues to transition to a model in which digital platforms supplant movie theatres as the primary means of attracting viewers for the vast majority of movies, and there has never been a wider array of audiovisual content available for consumption at competitive market prices.

Conditions for press freedom in the United States have improved with the change in presidential administrations and, in late October, the US Department of Justice announced formal changes to its news media guidelines that, for the first time, expressly prohibit federal prosecutors from using subpoenas or other investigative tools against journalists who possess and publish classified information obtained in newsgathering, with only narrow exceptions. The media and entertainment industries, however, continue to face significant challenges. We continue to see increasing threats to press freedom by repressive government regimes and a rise in politically motivated violence directed at journalists.

Around the world, businesses, governments and legal regimes continue to respond to technological change, with the increased use of artificial intelligence and 'deep fakes' just a couple of examples at the forefront that both threaten the value of intellectual property rights and tread on important personal privacy interests.

This timely survey work provides important insights into the ongoing effects of the digital revolution and evolving (and sometimes contrasting) responses to challenges both in applying existing intellectual property laws to digital distribution and in developing legislative and regulatory responses that draw an appropriate balance between commercial interests and consumer protection needs. It 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 that are 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 their best judgement as to the topics to highlight, recognising

that space constraints required some selectivity. As will be plain to the reader, aspects of this legal terrain, particularly those 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

November 2022

UNITED STATES

*Benjamin E Marks*¹

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 out 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. 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. The final section, Section VI, 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 in respect of media and entertainment is the robust protection of free speech afforded by the First Amendment to the US Constitution and by state constitution equivalents. Although 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 oversight under many statutes of general application, 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 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

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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 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 legal regime governs a challenged entity’s conduct. Tensions frequently arise in connection with the pre-emptive reach of federal copyright law, which forecloses certain state law remedies if they overlap with federal copyright law and policy. Varying state regulation in certain areas can also create anomalous results for the media and entertainment industries, with activity clearly permissible in one jurisdiction expressly forbidden in another. For example, 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. This framework of regulation creates complications that are especially confounding in an increasingly interconnected digital world that blurs geographical borders and traditional lines of demarcation between the various sectors of the media and entertainment industries.

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 Although there may exist some categories that should be unprotected that the US Supreme Court has yet to identify, the 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.⁴

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 Regulation of speech in one of these categories may be permissible if the speech also falls within one of the previously recognised categorical exceptions. *See, e.g., United States v. Richards*, 755 F3d 269, 273-75 (Fifth Circuit 2014) (upholding statute that proscribed obscene depictions of animal cruelty).

False speech is protected unless it involves defamation, fraud or some other legally cognisable harm; falsity alone is not enough.⁵ 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’.⁶ 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’.⁷

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. Although it 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’,⁸ 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’.⁹

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.¹⁰ However, in *Sorrell v. IMS Health Inc.*,¹¹ 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’.¹² However, media and entertainment products are not commercial speech merely because they are distributed or sold as part of for-profit enterprises.¹³ Accordingly, even false media reports are generally not actionable under consumer protection laws.¹⁴

ii Newsgathering

Publishers have no special immunity from the application of general laws, and enforcement of these laws against the press ‘is not subject to stricter scrutiny than would be applied to enforcement against other persons or organizations’.¹⁵ Generally applicable laws ‘do not offend the First Amendment simply because their enforcement against the press has

5 *United States v. Alvarez*, 567 US 709, 719 (2012).

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

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

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

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

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

11 564 US 552 (2011).

12 *id.* at 566.

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

14 *See, e.g., Washington League for Increased Transparency & Ethics v. Fox News*, 19 Wash App 2d 1006 (2021) (affirming dismissal of claims brought under the Washington Consumer Protection Act to redress false statements about coronavirus because ‘allegations that the challenged statements are false and recklessly made simply cannot overcome the protections afforded speech on matters of public concern under the First Amendment’).

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

incidental effects on its ability to gather and report the news'.¹⁶ For example, the press may not with impunity break and enter into an office or dwelling to gather news, nor may the media disregard copyright laws when they publish material copyrighted by others or agree to restrain trade in violation of the antitrust laws. However, a publisher cannot be held liable for the unlawful procuring of information by a source if the publisher was not involved in the illegal conduct and accessed the information lawfully and where the information is of public concern.¹⁷

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 or inhumane conditions. In *Animal Legal Defense Fund v. Wasden*,¹⁸ 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.

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*,¹⁹ 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.²⁰ Any 'offensiveness of the alleged intrusion' was 'mitigated by the public interest in the news gathered'.²¹ 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'.²²

iii Freedom of access to government information

Access to federal government information is governed by the Freedom of Information Act,²³ which, inter alia, directs federal agencies to make records promptly available to any person on 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

16 id. at 669 (internal quotation marks omitted).

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

18 878 F3d 1184 (Ninth Circuit 2018).

19 306 F3d 806 (Ninth Circuit 2002).

20 id. at 814.

21 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.').

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

23 5 USC, Section 552.

expected to interfere with ongoing law enforcement proceedings.²⁴ States have their own freedom of information laws and processes for obtaining information about the workings of state government.²⁵

iv Protection of sources

Journalists do not have a First Amendment or common law right to refuse to comply with a grand jury subpoena,²⁶ even if doing so requires the disclosure of confidential sources.²⁷ 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.²⁸ 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 for communications with sources. The Second Circuit Court of Appeals, for example, has recognised a qualified privilege for both confidential and non-confidential information²⁹ and in both civil and criminal cases,³⁰ whereas the Fourth Circuit has struck a different balance between newsgathering and law enforcement, recognising a qualified privilege only in civil cases,³¹ and the Seventh Circuit has called into question the extension of the privilege to non-confidential sources.³²

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. These laws vary from state to state in terms of the scope of protection they provide.

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 (i.e., with knowledge of its falsity or reckless disregard for its truth).³³ In private figure cases, states are free to require a lesser showing of fault 'so long as they do not impose

24 id. at Section 552(b).

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

26 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.

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

28 See, e.g., *United States v. Sterling*, 724 F3d 482 (Fourth Circuit 2013); *In re Grand Jury Subpoena, Judith Miller*, 438 F3d 1141 (DC Circuit 2006).

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

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

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

32 See *McKevitt v. Pallasch*, 339 F3d 530 (Seventh Circuit 2003).

33 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).

liability without fault'.³⁴ To be actionable, a statement must be susceptible to being proved true or false,³⁵ and when a statement is of public concern, the plaintiff bears the burden of proving falsity.³⁶

The US 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.³⁷

The relief available in defamation actions generally is limited to compensatory damages. However, although some courts 'adhere to the traditional rule that defamation alone will not justify an injunction against future speech',³⁸ others have upheld narrowly drawn permanent injunctions against specified defamatory speech.³⁹ The trend in the courts and in legal scholarship is towards the view that such limited prior restraint injunctions are constitutional,⁴⁰ but they remain disfavoured, particularly where there are clear public policy interests at stake. For example, a recent effort by former President Trump's now deceased brother Robert to enforce a 2001 confidentiality agreement among Trump family members against his niece Mary to 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.⁴¹

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 from being implemented on due process grounds.⁴² 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 when he was still in office, in a viewpoint discriminatory manner.⁴³

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

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

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

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

38 *See, e.g., Kinney v. Barnes*, 443 SW3d 87, 96 (Texas 2014); *see also Sindi v. El-Moslimany*, 896 F3d 1, 30-35 (First Circuit 2018) (vacating injunction).

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

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

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

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

43 *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). The judgment concerning President Trump's Twitter feed, however, was vacated by the US Supreme Court with instructions to dismiss the case as moot following the change in presidential administrations. *See Biden v. Knight First Amendment Inst*, 141 S Ct 1220 (2021).

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.⁴⁴ The court, however, may be unwilling to 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 continued to seek disgorgement of Bolton's profits pursuant to the terms of the secrecy agreement before agreeing to dismiss the case with prejudice in 2021.

vii Anti-SLAPP statutes

To discourage the filing of meritless lawsuits against defendants exercising rights protected by the First Amendment and thereby reduce the chilling effect on protected speech that such lawsuits have, 31 states have adopted 'anti-SLAPP' laws. These laws vary widely from state to state but generally offer a way to dismiss at least some forms of strategic lawsuits against public participation (SLAPP) at the outset of the litigation. In some states, the anti-SLAPP statute only protects defendants from cases arising out of statements made by the defendant in the course of petitioning the government or participating in governmental proceedings.⁴⁵ In other states, the laws broadly protect speech made in connection with a public issue.⁴⁶ Forms of protection provided by such statutes may include (1) additional procedural means to dismiss the case prior to the commencement of discovery, (2) a stay of discovery while an anti-SLAPP motion is pending, (3) a right of immediate interlocutory appeal from the denial of an anti-SLAPP motion and (4) fee shifting that permits successful defendants to recover reasonable attorneys' fees and costs.

IV INTELLECTUAL PROPERTY

i Copyright and related rights

Copyright in the United States is governed by the Copyright Act of 1976 (the Copyright Act).⁴⁷ 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;

44 See, e.g., *Snepp v. United States*, 444 US 507 (1980); *United States v. Snowden*, No. 1:19-cv-1 197, 2019 WL 8333546 (ED Va Dec 17, 2019); *United States v. Bolton*, No. 1:20-cv-1580, 2020 WL 3401940 (DDC June 20, 2020).

45 See, e.g., Nebraska Revised Statutes Annotated, Section 25-21, 243(1) (Nebraska Anti-SLAPP statute); New Mexico Statutes Annotated, Section 38-2-9.1-2 (New Mexico Anti-SLAPP statute).

46 See, e.g., California Civil Procedure Code, Section 425.16 (California Anti-SLAPP statute) NY Civil Rights Law, Section 76 (New York Anti-SLAPP Statute); Uniform Public Expression Protection Act, 2021 Wash. Legis. Serv. Ch. 259 Section 2(2)(c) (Washington Anti-SLAPP statute).

47 17 USC, Section 101 *et seq.*

- g* sounds recordings; and
h architectural works.⁴⁸

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.⁴⁹ Although the exclusive rights attach immediately, the Supreme Court recently clarified that a claimant can commence a copyright lawsuit only 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.⁵⁰ 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 four particularly noteworthy areas of copyright disputes in recent years: (1) 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; (2) cases implicating the fair use doctrine, which provides an affirmative defence to copyright infringement; (3) cases implicating over-enforcement of copyrights in musical works; and (4) a recent split between federal appellate circuit courts on whether plaintiffs can seek recovery of damages for infringing acts that occurred more than three years prior to the commencement of suit as long as they sue within three years of first discovering the infringement.

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.

There is no shortage of cases illustrating the complexity of applying a generally pre-internet age copyright statute to current commercial settings. *Capitol Records, LLC v. ReDigi, Inc*⁵¹ provides one noteworthy example. The district court there addressed whether the first-sale doctrine embodied in Section 109 of the Copyright Act,⁵² which allows the lawful owner of a copyrighted work to sell or otherwise dispose 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.⁵³ 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 files but also the unauthorised creation of copies.⁵⁴ 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

48 *id.*, Section 102.

49 *id.*, Section 106.

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

51 934 F Supp 2d 640 (SDNY 2013), *aff’d*, 910 F3d 649 (Second Circuit 2018).

52 17 USC, Section 109.

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

54 *See Capitol Records*, 934 F Supp 2d at 654-55.

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.⁵⁵ The decision was affirmed on appeal.⁵⁶

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 United States, the Internet Archive created what it referred to as the National Emergency Library.⁵⁷ Although the Internet Archive shut down that aspect of its operations in June 2020 after the lawsuit was filed,⁵⁸ 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. In October 2022, following the close of discovery in the proceeding, the parties filed cross-motions for summary judgment. Those motions are pending.

Courts also have reached different conclusions on whether the practice of embedding images from third-party sites, rather than taking a licence to copy and display the image, violates the copyright holder's exclusive right of public display. The Ninth Circuit Court of Appeals has long held that, for purposes of copyright law, online content is publicly displayed by the entity that stores and serves the image, not by website operators that merely link to or embed that content. This 'server test' was adopted by the Ninth Circuit in *Perfect 10 v. Amazon.com, Inc.*⁵⁹ Addressing Google's practice of 'inline linking' of full-size copyrighted images hosted elsewhere on the internet, the court held that embedding such links did not constitute a public display within the meaning of the Copyright Act, even when those images were viewable within the Google search interface. The court distinguished between making and storing copies, which could lead to liability, and merely providing hypertext markup language (HTML) instructions that directed the user's browser to a different website that stored and displayed the full-size image. Numerous courts subsequently followed the server test and, following years without contrary authority, the practice of embedding links without taking separate licences has become widespread.

The apparent consensus was disrupted by a federal court in New York (which is not obligated to follow precedent from the Ninth Circuit) in *Goldman v. Breitbart News Network*.⁶⁰ The court there considered the liability of multiple news organisations for embedding into their websites links to a copyrighted photo of US football star Tom Brady on Twitter that had gone viral. The conduct challenged by the plaintiff did not involve any downloading, copying or storage of the photo on the part of the defendants. Instead, the defendants merely coded their websites to direct users' browsers to Twitter, where the content was hosted, to retrieve the image. The *Goldman* court expressly disagreed with the Ninth Circuit's server test, 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

55 id. at 655, 660.

56 See *Capitol Records, LLC v. ReDigi, Inc.*, 910 F3d 649 (Second Circuit 2018).

57 See blog.archive.org/national-emergency-library/ (last accessed 15 October 2022).

58 See id.

59 508 F3d 1146 (Ninth Circuit 2007).

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

be shown. In what might be seen as a philosophical departure from the strict adherence to statutory text reflected in *Capitol Records, LLC v. ReDigi*, the *Goldman* court noted that ‘mere technical distinctions invisible to the user should not be the lynchpin on which copyright lies’.⁶¹ 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.

A second federal court in New York also declined to follow the Ninth Circuit’s server test in July 2021. *Nicklen v. Sinclair Broadcast Group, Inc*, like *Goldman*, involved a news media defendant embedding a link to copyrighted material that had been posted on social media.⁶² The plaintiff, a filmmaker, had posted a video of an emaciated polar bear in the Canadian Arctic to his Instagram and Facebook pages. The video went viral and the defendant, Sinclair, published an article about the video going viral. The article contained an embedded link with HTML code that directed users to the video on Instagram or Facebook. Sinclair encouraged the court to follow the server test, but the court declined to do so, finding the test to be contrary to both the text and the legislative history of the Copyright Act by collapsing the display right into the reproduction right.

Most recently, a federal court in California reached the opposite conclusion from the *Goldman* and *Nicklen* courts on whether embedded links violate the exclusive right of public display. In *Hunley v. Instagram, LLC*, the court rejected the plaintiff’s attempt to hold Instagram secondarily liable for copyright infringement for enabling third-party websites to embed links to photographs posted by the plaintiff on her Instagram page.⁶³ The court declined the plaintiff’s invitation to treat the server test as limited to the particular facts presented in *Perfect 10* and rejected her reliance on *Nicklen*. Because the third-party websites were not directly liable for infringement, Instagram could not be secondarily liable. The court noted that the plaintiff was ‘free to present’ her argument that the server test misinterprets the Copyright Act to the Ninth Circuit or the US Supreme Court on appeal, but, as a lower court within the Ninth Circuit, it was ‘not free to artificially narrow or overrule binding precedent’.⁶⁴

Given the split between the courts in New York and California on an important issue affecting a common practice by media entities, more jurisprudence on this issue is sure to come.

Fair use

The function of US copyright law, as grounded in the Constitution, is to ‘promote the progress of science and useful arts’.⁶⁵ 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,⁶⁶ serves this balancing function. Courts evaluate

61 302 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).

62 *Nicklen v. Sinclair Broad Grp Inc*, 551 F Supp 3d 188 (SDNY 2021).

63 No. 21-cv-03778-CRB, 2021 WL 4243385 (ND Cal Sept. 17, 2021).

64 id. at *3.

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

66 17 USC, Section 107.

fair use on a case-by-case basis by assessing the four factors identified in Section 107 (and sometimes others, notably bad faith): (1) the purpose and character of the use, (2) the nature of the copyrighted work, (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole, and (4) the effect of the use on the potential market for or value of the copyrighted work. 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.⁶⁷ 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'.⁶⁸

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.⁶⁹ Although 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 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'.⁷⁰

The United States Supreme Court has taken up copyright fair use cases twice in recent years in an effort to bring more clarity to the metes and bounds of the defence. In 2021, in *Google, LLC v. Oracle America, Inc*, the Court addressed an infringement action brought by Oracle against Google arising out of Google's use of parts of Oracle's Java programming code in its Android operating system.⁷¹ Google copied roughly 11,500 lines of prewritten code for performing various standard functions from a Java application programming interface (API). The Federal Circuit had ruled in Oracle's favour,⁷² but the Supreme Court reversed, holding that Google's use of the Java API was protected as a transformative fair use. The Court found that the purpose and effect of Google's copying were to foster the creation of new products, 'consistent with that creative progress that is the basic constitutional objective of copyright

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

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

69 124 F Supp 3d 325 (SDNY 2015), *aff'd in part, rev'd in part*, 883 F3d 169 (Second Circuit 2018).

70 883 F3d at 177-80.

71 *Google LLC v. Oracle Am, Inc*, 141 S Ct 1183 (2021).

72 *Oracle Am, Inc v. Google LLC*, 886 F3d 1179 (Federal Circuit 2018).

itself'.⁷³ Though declining to rule directly on the question of API copyrightability, the Court found that the Java code was largely functional rather than expressive, with its value generated primarily by programmers using it 'to work in a new and transformative program'.⁷⁴

The Supreme Court returned to the question of fair use this year in a very different context to resolve a dispute between the photographer Lynn Goldsmith and the Andy Warhol Foundation for Visual Arts arising out of the famed artist's use of her photograph of the singer Prince as a reference for a series of pop art prints. The district court found for the Warhol Foundation on fair use grounds, finding that Warhol's silkscreen prints 'transformed Prince from a vulnerable, uncomfortable person' as seen in the original photograph 'to an iconic larger-than-life figure' by changing the original black and white image into highly colourful representations.⁷⁵ However, on appeal, the Second Circuit reversed, instead finding that Warhol's work retained 'essential elements' of the original photograph.⁷⁶ That court articulated a higher standard for derivative artistic works to qualify as transformative, holding that the bare assertion of a 'higher or different artistic use' was insufficient to render a work transformative.⁷⁷ The Supreme Court granted certiorari and heard oral argument on 12 October 2022. The case, which has potentially sweeping implications not only for transformative fair use as a defence in cases involving pop art, appropriation art and other forms of modern art but also for popular culture and copyright licensing markets more generally, is currently pending.

Over-enforcement of music copyrights

A recent trio of jury trials involving the copyrights of musical works has signalled a trend towards what critics argue is overprotection 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.⁷⁸ Thicke acknowledged that he was influenced by Gaye's work and that he had aimed to create a song with a similar sound but that 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.⁷⁹ She explained that although the songs share the same 'groove', a groove is just an idea and not a protectable element under US copyright law.⁸⁰

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.⁸¹ The trial court vacated the jury's verdict on the grounds that the eight-note ostinato in *Joyful Noise* was not original

73 *Google*, 141 S Ct at 1186.

74 *id.*

75 *Andy Warhol Found for the Visual Arts, Inc v. Goldsmith*, 382 F Supp 3d 312, 326 (SDNY 2019).

76 *Andy Warhol*, 11 F4th 26, 43 (Second Circuit 2021).

77 *id.* at 41.

78 *See* 895 F3d 1106 (Ninth Circuit 2018).

79 *id.* at 1138-51.

80 *id.* at 1140.

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

enough to be copyrightable and that, in any event, *Dark Horse* was not substantially similar as a matter of law.⁸² The Ninth Circuit affirmed on appeal.⁸³

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 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 that trial courts play in assessing, on post-trial motions, 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*⁸⁴ 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*.⁸⁵ 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*.⁸⁶ (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 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'.⁸⁷ Accordingly, the court held that the trial court did not err in declining to instruct the jury as to the inverse ratio rule.

Even more recently, pop singer Ed Sheeran has been accused of plagiarising portions of the melody, harmony and rhythm from Marvin Gaye's 1973 hit song *Let's Get It On* in his song *Thinking Out Loud*. The district court denied Sheeran's motion for summary

82 id. at *4-*13.

83 *Gray v. Hudson*, 28 F4th 87 (Ninth Circuit 2022).

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

85 952 F3d 1051 (Ninth Circuit 2020) (en banc), *cert denied*, 141 S Ct 453 (2020) (Mem).

86 id. at 1060-64; *see also Griffin v. Sheeran*, No. 17 Civ. 5221 (LLS), 2020 WL 5522835, *1 (SDNY Mar. 24, 2020) ('If what is implied is not in the Deposit Copy, it does not have the protection of copyright.').

87 *Skidmore*, 952 F3d at 1069.

judgment, finding that questions of fact on the substantial similarity between the two songs remained for a jury and citing disagreements between the parties' expert musicologists.⁸⁸ Rejecting Sheeran's argument that the combination of two unprotectable elements is not sufficiently numerous or original to constitute an original work, the court observed that there is 'no bright-line rule' for such questions.⁸⁹ The case comes just months after Sheeran won a copyright case against him in the United Kingdom for his 2017 hit *Shape of You*. In a short video released on Twitter following that decision, Sheeran criticised the trend of 'way too common' copyright lawsuits against mainstream musicians as 'really damaging to the songwriting industry', given the limited notes and chords commonly used in pop music and the tens of thousands of new songs released every day.⁹⁰

Availability of damages for infringing acts occurring more than three years prior to suit

Pursuant to the statute of limitations in Section 507(b) of the Copyright Act, a plaintiff in a civil copyright infringement action must bring suit within three years after the claims accrue.⁹¹ In *Petrella v. Metro-Goldwyn-Mayer, Inc*, the US Supreme Court held that the equitable defence of laches does not apply to claims seeking relief solely for conduct that occurred within the limitations period. The Court reasoned that, in Section 507(b), Congress barred relief for conduct occurring prior to the limitations period, and courts are not free to substitute their own judgment for Congress's judgment on the timeliness of suit.⁹² When an infringing act occurs within the limitations period, the application of *Petrella* is straightforward: laches do not apply, and there is no time-related bar to the recovery of damages. When an infringing act occurs prior to the limitations period, and the plaintiff was aware, or reasonably should have been aware, of the infringement prior to the limitations period, the application of Section 507(b) is also straightforward: the claim is barred. But what happens when infringing acts occur before the limitations period but the plaintiff does not discover those acts until later?

Most circuits, including every circuit to consider the question, apply the 'discovery rule' to determine when a claim for infringement accrues, such that the Copyright Act's statute of limitations does not begin to run until the plaintiff becomes aware, or reasonably should have been aware, of the infringement.⁹³ In 2020, in *Sohm v. Scholastic Inc*, the Second Circuit held that, even though the plaintiff first learnt of infringing acts during the limitations period, and thus his claims were not time-barred, he could not recover damages for acts occurring more than three years prior to the commencement of suit.⁹⁴ Earlier this year, the Ninth Circuit reached a different conclusion. In *Starz Entertainment, LLC v. MGM Domestic Television Distribution, LLC*, the Ninth Circuit held that, as long as a plaintiff brings suit within

88 *Structured Asset Sales, LLC v. Sheeran*, No. 18 CIV. 5839 (LLS), 2022 WL 4544479, at *3-4 (SDNY Sept. 29, 2022).

89 *id.* at *3.

90 https://twitter.com/edsheeran/status/1511631955238047751?ref_src=twsrc%5Etfw%7Ctwcamp%5Etrweetembed%7Ctwterm%5E1511631955238047751%7Ctwgr%5E47d9db087cc0ae6d82d6b86a7ad53d19566b101a%7Ctwnon%5Es1_&ref_url=https%3A%2F%2Ffew.com%2Fmusic%2Fed-sheeran-wins-shape-of-you-lawsuit%2F

91 17 U.S.C. § 507(b).

92 572 U.S. 663, 667 (2014).

93 *See Petrella*, 572 U.S. at 670 n.4; *Starz Entmt, LLC v. MGM Domestic Television Distrib, LLC*, No. 21-55379, 2022 WL 2733507, at *5 (9th Cir. July 14, 2022).

94 959 F.3d 39 (2d Cir. 2020).

three years of discovering infringing acts, it may seek damages regardless of when those acts occurred.⁹⁵ Until the circuit split is resolved, it will have a profound effect on where parties choose to litigate cases in which claim accrual will be determined by the discovery rule, rather than when the allegedly infringing acts occurred.⁹⁶

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.⁹⁷ 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).⁹⁸ 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' likenesses in creating 'historical 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.⁹⁹ 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'.¹⁰⁰ Video game manufacturers have defeated claims, however, where

95 39 F4th 1236 (Ninth Circuit 2022).

96 Lower courts in other circuits have also reached different conclusions on whether damages are available for infringing acts occurring more than three years prior to the filing of the complaint. Compare *Navarro v. Procter & Gamble Co*, 515 F. Supp. 3d 718, 760-62 (S.D. Ohio 2021) (holding that *Petrella* expressly limited damages to those that arose in three-year window) with *Mitchell v. Capitol Records, LLC*, 287 F. Supp. 3d 673, 677-78 (W.D. Ky. 2017) (holding that the plaintiff was not precluded from recovering damages for any claims that accrued within three years of the commencement of this action, regardless of the date of occurrence).

97 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.

98 Compare Wisconsin Statutes, Section 995.50 (2020) (confining right to 'any living person') with Indiana Code, Section 32-36-1-8 (2021).

99 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).

100 775 F3d at 1178.

the characters were not sufficiently recognisable as the plaintiff.¹⁰¹ Most recently, a series of plaintiffs, including Alfonso Ribeiro from the *Fresh Prince of Bel-Air* television programme, 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.*,¹⁰² 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 cases of this kind 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 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*,¹⁰³ 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.¹⁰⁴

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 a state's own borders. Collectively, these state and federal laws are intended to keep US markets open, free and competitive.¹⁰⁵

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

101 See, e.g., *Hamilton v. Speight*, 827 Fed Appx 238 (Third Circuit 2020); *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).

102 463 F Supp 3d 616(D Md May 2020).

103 248 US 215 (1918),

104 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).

105 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.

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 (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 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 FTC convened a wide-ranging series of public hearings in 2018 and 2019 to consider competition and consumer protection law in the 21st century, and the FTC issued its staff’s recommendations and report on the hearings in October 2020.¹⁰⁶ 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. Although 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 FTC announced new inquiries into Facebook and Amazon. 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. On 20 October 2020, the Department of Justice, joined by 11 states, sued Google, alleging that Google was unlawfully maintaining monopolies in the markets for general search services, search advertising and general search text advertising.¹⁰⁷

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

106 See The FTC’s Role in a Changing World: Staff Recommendations and Report, www.ftc.gov/system/files/documents/reports/commission-report-hearings-competition-consumer-protection-21st-century/p181201internationalhearingreport.pdf (last visited 26 September 2021); *see also* Hearings on Competition and Consumer Protection in the 21st Century, www.ftc.gov/policy/hearings-competition-consumer-protection (last visited 26 September 2021).

107 A copy of the complaint is available at <https://s3.documentcloud.org/documents/7273457/10-20-20-US-v-Google-Complaint.pdf> (last visited 26 September 2021).

remains ongoing.¹⁰⁸ This review was just the most recent in a series of periodic reviews of those decrees over the past 75 years. This latest 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. On 15 January 2021, on the eve of a change in presidential administration, the outgoing Assistant Attorney General for the Antitrust Division, Makan Delrahim, issued a statement closing the review without recommending any changes to the decrees.¹⁰⁹ In his remarks, Mr Delrahim recognised that any change in the regulatory framework governing ASCAP and BMI could have significant effects on the music licensing marketplace, given the historical and ongoing dominance of those two organisations in the United States, and he acknowledged the wide variety of perspectives on whether the decrees should be modified and, if so, how. To ensure that the decrees continue to achieve their objective of protecting competition and remaining current with developments in the marketplace, he recommended further reviews of the decrees every five years.

A third development worthy of note is the recent challenge by the Department of Justice to Penguin Random House's planned acquisition of Simon & Schuster on the ground that it would reduce competition in the book publishing marketplace. The case was tried in August 2022 and a decision is pending. This suit followed an unsuccessful effort of the Department of Justice in 2019 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 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.¹¹⁰

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

108 See Antitrust Consent Decree Review – ASCAP and BMI 2019, available at www.justice.gov/atr/antitrust-consent-decree-review-ascap-and-bmi-2019 (last visited 26 September 2021).

109 See Statement of the Department of Justice on the Closing of the Antitrust Division's Review of the ASCAP And BMI Consent Decrees, Remarks of Assistant Attorney General Makan Delrahim, January 15, 2021, available at <https://www.justice.gov/atr/page/file/1355391/download> (last visited 26 September 2021).

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

sounds in contract law and the plaintiff is remitted to contract remedies.¹¹¹ If the defendant has breached a condition to the licence, however, the plaintiff may seek copyright remedies.¹¹²

The 2018 case *Spinelli v. National Football League*¹¹³ highlights the interplay between breach of contract claims and copyright infringement claims. In *Spinelli*, a group of sports photographers sued the National Football League (NFL), the news agency that licenses 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 complimentary 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.¹¹⁴ 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.¹¹⁵ 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) or whether its complimentary license to the NFL exceeded the scope of its sublicensing authority (a claim for copyright infringement)'.¹¹⁶ '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.'¹¹⁷ 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.¹¹⁸ 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 work that was infringed. Following remand, the case settled.

111 See, e.g., *Sohm v. Scholastic Inc.*, 959 F3d 39, 45 (Second Circuit 2020) (citing *Graham v. James*, 144 F3d 229, 236 (Second Circuit 1998)).

112 id.

113 903 F3d 185 (2d Cir. 2018).

114 See *Spinelli v. Nat'l Football League*, No. 13-cv-7398 (RWS), 2017 WL 9618754 (SDNY Dec. 23, 2016).

115 See *Spinelli*, 903 F3d at 200-02.

116 id. at 202.

117 id.

118 id. at 203-04.

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ISBN 978-1-80449-135-5