Hot Issues in Entertainment

Friday, February 1, 2019 | 8:00am to 9:00 am and 11:00 am to 12:00 pm
Saturday, February 2, 2019 | 11:30 am to 12:30 pm

Program Description

The past year has seen a number of groundbreaking decisions on entertainment issues. We discuss developments and trends in: Music (status of the Music Modernization Act, trends post-Stairway to Heaven and Blurred Lines, pre-1972 works including the Ninth Circuit’s reversal in CBS Radio); Television, Movies, and Games (right of publicity issues post- O. de Havilland and M. Ali; names/Empire; NFL and NCAA cases); Politics (songwriters versus political campaigns, and updates on Trump cases); and Graffiti cases.

Lead Facilitator

Robb Harvey, Waller Landsen Dortch & Davis | Nashville, TN

Facilitators

- Jonathan Anschell, CBS, Inc. | Los Angeles, CA
- Lincoln Bandlow, Fox Rothschild | Los Angeles, CA
- Scott Edelman, Gibson Dunn | Los Angeles, CA
- David Fink, Kelley Drye & Warren | Los Angeles, CA
- Gloria Franke Shaw, Katten Muchin and Rosenman | Los Angeles,
- Leah Monsanto, Discovery, Inc. | Silver Spring, MD
- Joel M. Tantalo, Tantalo & Adler | Los Angeles, CA
- Dori Hanswirth, Arnold & Porter Kaye Scholer LLP | New York, NY

Program Materials

Copyright, Right of Publicity, Prior Restraint, and Trademark
2019 ABA Forum on Communications Law -- Entertainment Panel

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David Fink, Kelley Drye & Warren LLP, Los Angeles, CA

Additional Contributors

Copyright

1. Embedding Tweets Violates the Exclusive Display Right

In February 2018, U.S. District Judge Katherine B. Forrest determined on summary judgment that embedding a photo on a social media platform constitutes a “display” of work under Section 106(5) of the Copyright Act of 1976. The plaintiff snapped a candid photo of Tom Brady, the Patriots’ quarterback, and Danny Ainge, the Boston Celtics’ general manager, walking in the Hamptons that quickly went viral, “rapidly moving from Snapchat to Reddit to Twitter—and finally . . . onto the websites of the defendants, who embedded the Tweet alongside articles they wrote about Tom Brady actively helping the Boston Celtics recruit basketball player Kevin Durant.”

The court noted that copyright law has “developed in response to significant changes in technology,” and that Congress “cast a very wide net” in considering the display right. Congress did “not intend to freeze the scope of copyrightable subject matter at the present stage

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1 Thank you to the following people for their time and assistance in creating this outline for the Entertainment session: Karolyn Perry, Waller Lansden/Nashville & NathaniEl L. Bach, Gibson Dunn, Los Angeles, CA.


3 Id. at *2.

4 Id. at *3 (quoting Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417, 430 (1984)).

5 Id. at *4.
of communications technology” when it passed the Copyright Act, and that its drafters intended it to broadly encompass new, not yet developed, technologies.6

After framing the case as requiring the “the Court [to] construe how images shown on one website but stored on another website’s server implicate an owner’s exclusive display right,”7 the court rejected application of and criticized the “Server Test,” a test deployed by the Ninth Circuit in Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146 (2007), noting that it has not been widely used outside of the Ninth Circuit.8 The Court noted that under the Server Test, direct liability for infringement turns “entirely on whether the image is hosted on the publisher’s own server, or is embedded or linked from a third-party server.”9 Here, however, the court focused on the fact that the defendants “actively took steps to ‘display’ the image.”10 The court found support in the Supreme Court’s decision in American Broadcasting Cos., Inc. v. Aereo Inc. for the proposition that “liability should not hinge on invisible, technical processes imperceptible to the viewer.”11

But, the case is not over yet. The court explained:

In this case, there are genuine questions about whether plaintiff effectively released his image into the public domain when he posted it to his Snapchat account. Indeed, in many cases there are likely to be factual questions as to licensing and authorization. There is also a very serious and strong fair use defense, a defense under the Digital Millennium and Copyright Act, and limitations on damages from innocent infringement.12

Following its ruling, and recognizing that this is a “high-profile, high-impact copyright case” with possible precedential effects, Judge Forrest certified the ruling for interlocutory appeal to the Second Circuit.13 However, on July 17, 2018, the Second Circuit denied defendants’ request to take up the ruling.14

2. TVEyes Video Clip Search Engine Is Not Fair Use

In February 2018, the Second Circuit held that TVEyes’s service could not be justified as fair use, reversing a summary judgment ruling.15 As we wrote in our 2016 Mid-Year Update reporting on the summary judgment rulings, TVEyes provides a service that continuously records television programming and indexes it into a text-searchable database, “allowing its clients to search for and watch (up to) ten-minute video clips that mention terms of interest to the

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6 Id. at *3 (quoting H.R. Rep. 94–1476, 47, 51 (1976)).
7 Id. at *1.
8 Id. at *5.
9 Id.
10 Id. at *8.
11 Id. at *9.
12 Id. at *10.
14 Heavy, Inc. v. Goldman, Case No. 18-910, Dkt. 35 (2d Cir. July 17, 2018).
clients.” The district court had issued two summary judgment rulings, deeming a fair use TVEyes’s “functions enabling clients of TVEyes to search for videos by term, to watch the resulting videos, and to archive the videos on the TVEyes servers” a fair use, but holding that functions “enabling TVEyes’s clients to download videos to their computers, to freely e-mail videos to others, or to watch videos after searching for them by date, time, and channel (rather than by keyword)” were not fair use.17

While the Second Circuit found that TVEyes’s service served a modest transformative purpose, isolating relevant television programing and allowing it to be accessed in a convenient manner, it further found that the fact that the service makes available, in its original form, almost all of Fox’s content undermines its transformative value.18 The court also found that TVEyes’s service deprives Fox of licensing revenues and/or an ability to exploit the market itself.19 On balance, therefore, the court concluded that “TVEyes’s service is not justifiable as a fair use” because “[a]t bottom, TVEyes is unlawfully profiting off the work of others by commercially re-distributing all of that work that a viewer wishes to use, without payment of license.”20 On May 14, 2018, the Second Circuit denied TVEyes’s petition for rehearing en banc,21 and TVEyes filed a petition for writ of certiorari with the U.S. Supreme Court on September 12, 2018.22

3. Copying/Piracy

a. Disney and Redbox Tussle over Resale Rights

On November 30, 2017, Disney, Lucasfilm, and Marvel filed suit in the District Court for the Central District of California, arguing that Redbox’s practice of reselling the digital download codes packaged with plaintiffs’ movie “Combo Packs” violates the user license terms and constitutes copyright infringement.23 Disney moved for a preliminary injunction, which the court denied, finding that the license restriction constituted copyright misuse.24 Specifically, licensing language on the website where Disney’s digital movie downloads are redeemed states that the downloder must be the owner of “the physical product that accompanied the digital code at the time of purchase.”25 According to Judge Pregerson, this constitutes an “improper leveraging of Disney’s copyright” and “conflicts with public policy enshrined in the Copyright Act” because it forces users to “forego their statutorily-guaranteed right to distribute their physical copies of that same movie as they see fit.”26

16 TVEyes, 883 F.3d at 173–74.
17 Id. at 174
18 Id. at 174, 176–79.
19 Id. at 174, 180.
20 Id. at 180, 181.
25 Id. at 17.
26 Id. at 18.
Disney subsequently updated the license terms, amended its complaint, and renewed its motion for a preliminary injunction. Disney asserts that the new language, which instead requires the digital downloader to have received the code as part of the Combo Pack, rather than to be the current owner of the physical copies, satisfies the court’s concerns regarding copyright misuse. Redbox counters that this change does not cure the misuse because it forces the preceding owner of the Combo pack to “forgo[] the first sale rights associated with the DVD and Blu-ray discs” or otherwise render the digital code “worthless.” On August 30, 2018, the Court granted Disney’s motion for preliminary injunction, ordering Redbox to cease selling digital download codes of certain Disney films, finding the new clickwrap (i.e., the license language) sufficient, and writing that Disney “is likely to succeed on its claim that Redbox encouraged Redbox customers to infringe Disney’s copyrights by redeeming Codes in violation of the license terms set forth on the redemption sites.”

b. Wolfgang’s Vault Found Liable for Streaming Recordings of Live Performances

In April 2018, U.S. District Judge Edgardo Ramos found that Wolfgang’s Vault, a collection of thousands of live concert performances, and its owners had committed a large-scale copyright infringement by streaming its collection to the public, but stopped short of issuing an injunction, finding that the availability of the recordings is in the public interest, while suggesting a licensing deal could remedy the injury to plaintiffs.

In 2015, plaintiffs (music publishers and other rights holders) alleged that Wolfgang’s Vault lacked the requisite mechanical licenses to stream a collection of works. Judge Ramos held that Defendants had failed to properly license 206 concert videos, pursuant to Section 115 of the U.S. Copyright Act. Judge Ramos rejected the Defendants’ argument that certain contracts entered into with three major record labels were proof of the necessary consent needed. To this same point, Judge Ramos underscored the fact that Defendants could not produce a single performance agreement. A pending trial will explore whether the copyright infringement was willful, meaning that Plaintiffs could be entitled to statutory damages of up to $150,000 per work.

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32 Id.
34 Id. at *12-15; see also Gardner, supra note 30.
35 Gardner, supra note 30.
36 Id.
4. **DMCA**

a. **Safe Harbor from Unfair Competition Claims**

In March 2018, the District Court for the Southern District of New York dismissed most of Capital Records’ state-law unfair competition claims against video-hosting website Vimeo, claims based on users’ posts to Vimeo’s site that are alleged to infringe pre-1972 copyrighted works. Previously, in June 2016, on an interlocutory appeal from a summary judgment order in the Southern District of New York, the Second Circuit held that the safe harbor provisions of the DMCA protect internet service providers from claims of infringement when users post works protected by state copyright law.\(^{37}\) After the Supreme Court denied plaintiffs’ petition for a writ of certiorari in March 2017,\(^{38}\) the district court considered Vimeo’s motion to dismiss and found that Capital Records’ unfair competition claims, which are based on Vimeo’s alleged infringement, were also foreclosed by the safe harbor of the DMCA.\(^{39}\) The court reasoned that “[a]pplying the DMCA safe harbor to unfair-competition claims founded on copyright infringement ensures that service providers are aware of the infringing activity that forms the basis for the claims brought against them.”\(^{40}\) The court denied the motion to dismiss as to the instances in which Capital Records alleges that Vimeo had “red-flag knowledge” of the underlying infringement that would negate the protections of the DMCA safe harbor.\(^{41}\) Motions for summary judgement are still pending.

b. **DMCA May Protect ISPs Without a Written Takedown Policy**

In March 2018, a Ninth Circuit panel ruled that a website hosting user-uploaded pornography was protected by the Digital Millennium Copyright Act’s safe harbor provisions, even though it lacked a written policy to terminate users who repeatedly infringed copyrights.\(^{42}\) Back in 2011, pornography producer Ventura Content sued Motherless, alleging claims of direct, vicarious and contributory copyright infringement and of unlawful, unfair and fraudulent business practices in violation of California Business and Professions Code for allowing its users to upload clips of movies that Ventura Content had created and had not licensed to Motherless.\(^{43}\) In response, Motherless claimed that it qualified for protection under the DMCA’s § 512 safe harbor provision, even though it did not have a written policy to terminate users who repeatedly infringed copyrights.\(^{44}\) Motherless is owned and operated by a single person who reviewed videos individually for infringement, and described his policy as a “gut decision.”\(^{45}\) The divided panel found that Motherless did adhere to a policy, even if it was unwritten, to get rid of users who repeatedly uploaded infringing copyright of porn producers, and therefore qualified for the

\(^{37}\) *Capitol Records, LLC v. Vimeo, LLC*, 826 F.3d 78 (2d Cir. 2016).


\(^{40}\) *Id.* at *4.

\(^{41}\) *Id.* at *6.


\(^{43}\) *Id.*

\(^{44}\) *Id.*

\(^{45}\) *Id.*
safe harbor provision of the DMCA. On August 20, 2018, Ventura filed a petition for writ of certiorari with the U.S. Supreme Court.  

5. Substantial Similarity  
a. “Blurred Lines” and a Narrow Ruling at 9th Circuit  

In March 2018, in a hotly awaited decision, the Ninth Circuit upheld on narrow grounds a 2015 jury’s finding that Robin Thicke and Pharrell Williams’s song “Blurred Lines” infringed the copyright of Marvin Gaye’s “Got to Give It Up.” In the appeals court’s 2-1 decision, the majority focused largely on questions of procedure and trial strategy in declining to review a summary judgment motion, noting a full jury trial had taken place and Thicke and Williams’ lawyers had not preserved the issue by filing a motion. The majority explained that after a jury trial, a court must measure the verdict against the weight of the evidence and such verdict may only be overturned in “an absolute absence of evidence supporting the jury’s verdict.” With this, the majority upheld the damages award of $5.3 million.  

In dissent, Judge Jacqueline Nguyen sharply criticized the majority and did not hesitate to engage with the substantive legal issues and industry concerns that the trial court result created, writing that, “[t]he majority allows the Gayes to accomplish what no one else has before: copyright a musical style.” In doing so, she wrote, “[t]he majority establishes a dangerous precedent that strikes a devastating blow to future musicians and composers everywhere.” Judge Nguyen concluded that the two songs differ in melody, harmony, and rhythm, and Gaye’s expert witness “. . . identified four similar elements, none of which is protectable: (a) each phrase begins with repeated notes; (b) the phrases have three identical pitches in a row in the first measure and two in the second measure; (c) each phrase begins with the same rhythm; and (d) each phrase ends on a melisma (one word sung over multiple pitches).” She would have concluded that such evidence is not appropriate to support an infringement verdict. Nguyen seemed to encourage courts to appoint their own experts when the parties’ experts seem to have “starkly different” assessments of the works’ similarity. The majority, in rebutting Nguyen’s dissent, stated that “[t]he dissent’s position violates every controlling procedural rule involved in this case” and “improperly tries, after a full jury trial has concluded, to act as judge, jury and

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46 Id.  
51 Williams, 2018 WL 3382875, at *23.  
52 Id.  
53 Id. at *27.  
54 Id. at *31-32.  
55 Id. at *33, n.14.
executioner.” On July 11, the Ninth Circuit declined to rehear the case *en banc* and issued an amended opinion.

Right of Publicity

1. “Simpsonized” Character Is Not Actionable

In February 2018, a California appeals court affirmed the dismissal of a lawsuit filed by Frank Sivero against Twentieth Century Fox for misappropriation of his name and likeness in *The Simpsons*. On October 21, 2014, Sivero filed the complaint, alleging common law infringement of right of publicity, misappropriation of name and likeness, misappropriation of ideas, interference with prospective economic advantage, and unjust enrichment.

Fox moved to strike the complaint under California’s anti-SLAPP statute. The appeals court found that the cause of action arose from protected activity within the meaning of the anti-SLAPP statute, and that Sivero then failed to carry his burden to prove the merits of his claim.

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56 Id. at *19.
59 *Sivero*, 2018 WL 833696, at *1.
60 Id. at *2.
61 Id.
Here, the court found that Sivero’s character had been “Simpsonized,” and thus contained “significant transformative content,” insulating it against a right of publicity claim. The court explained: Louie, the alleged look-a-like, “is a cartoon character with yellow skin, a large overbite, no chin, and no eyebrows. Louie has a distinctive high-pitched voice which, as the trial court pointed out, has ‘no points of resemblance to [Sivero].’” The court concluded that this was not a “trivial variation,” but rather, the creators had created something “recognizably [their] own.” Like in Lindsay Lohan’s case in New York, the California court gave weight to the difference between the depicted character and the plaintiff alleging misappropriation.

2. Celebrities entangled with photographers. Increasingly, rights of publicity asserted by celebrities are butting up against photographers’ or “advertisers’” rights.

In some recent cases, celebrities have posted photographs taken of them on their Instagram or Twitter accounts. Then, the photographers have sued alleging copyright infringement and violations of the DMCA for removal of “copyright management information.” Gigi Hadid, Khloe Kardashian and others have been sued. See http://www.thefashionlaw.com/home/lawsuits-over-instagram-images-raise-celebrity-questions-over-right-of-publicity

These cases follow on the heels of Katherine Heigl’s lawsuit against Duane Reade, after the NY-based pharmacy/retailer posted a picture on Facebook and Twitter. The settlement stated that a contribution had been made to a nonprofit designated by Ms. Heigl. https://www.hollywoodreporter.com/thr-esq/katherine-heigl-ends-lawsuit-duane-728552

3. Indiana Supreme Court finds that newsworthy exception in Indiana’s right of publicity statute includes online fantasy sports statistics

On October 24, 2018, the Indiana Supreme Court answered a certified question from the U.S. Court of Appeals for the Seventh Circuit asking, “[w]hether online fantasy-sports operators that condition entry on payment, and distribute cash prizes, need the consent of players whose names, pictures, and statistics are used in the contests, in advertising the contests, or both.”

The Indiana Supreme Court answered that “online fantasy sports operators that condition entry to contests on payment and distribute cash prizes do not violate the Indiana right of publicity statute when those organizations use the names, pictures, and statistics of players without their consent because the use falls within the meaning of “material that has newsworthy value,” an exception under the statute.”

Indiana’s right of publicity statute provides that “a person may not use an aspect of a personality’s right of publicity for a commercial purpose without having obtained previous written consent.” Ind. Code § 32-36-1- 8(a). Indiana law defines the scope of a person’s right of

63 Id.
64 Id.
publicity as a personality’s property interest in his/her (1) name; (2) voice; (3) signature; (4) photograph; (5) image; (6) likeness; (7) distinctive appearance; (8) gestures; or (9) mannerisms. Ind. Code § 32-36-1-7. The law exempts such claims when the material has “political or newsworthy” value. The Court’s order focused on the scope of this exception.

Plaintiff-Appellants Akeem Daniels, Cameron Stingily, and Nicholas Stoner were collegiate student-athletes between 2014-2016. Their on-field performances were collected as numerical statistics and published by various fantasy sports website operators including Defendants-Appellees DraftKings, Inc. and FanDuel, Inc. For a fee, consumers could access detailed information such as Plaintiffs’ names, images, and statistics, assess the athletes’ weekly performances, and assemble a virtual team of real-life athletes to compete against other users’ teams on Defendants’ websites.

Plaintiffs filed a class action complaint alleging that Defendants “used their names and likenesses in operating and promoting online fantasy sports contests without Plaintiffs’ consent, in violation of their right of publicity.” Defendants removed the case to the U.S. District Court for the Southern District of Indiana and moved to dismiss, arguing that Plaintiffs failed to state a claim because the use of Plaintiffs’ names and statistics fell under certain statutory exceptions to the right of publicity. The District Court dismissed the suit, finding no violation of Plaintiffs’ right of publicity because the use of their likenesses was in material that had newsworthy value and was a matter of public interest under the exceptions in Indiana law. Plaintiffs appealed to the Seventh Circuit Court of Appeals, which certified the question of Indiana law to the Court in Daniels v. FanDuel, Inc., 884 F.3d 672, 674 (7th Cir. 2018).

In its order, the Indiana Supreme Court made clear that it was maintaining a narrow focus on the certified question by limiting its opinion to the “newsworthy value” exception. Specifically, the Court analyzed the spectrum of “material that has newsworthy value” and concluded that the use of players’ names, pictures, and statistics in fantasy sports contests does not violate the right of publicity in Indiana.

In doing so, the Court rejected Plaintiffs’ arguments that the statutory exception for newsworthiness does not apply in the context of commercial use. First, the Court found that the statute itself does prohibit the use of a person’s right of publicity “for a commercial purpose” and therefore, the Court declined to read such a requirement into the otherwise clear language of the statute. Second, the Court held that whether Defendants are media companies or news broadcasters is immaterial in the context of the newsworthiness exception. The plain language of the statute only speaks to the use of a personality’s right of publicity in “[m]aterial that has political or newsworthy value.” Ind. Code § 32-36-1-1(c)(1)(B). Finally, the Court noted that Plaintiffs’ information is not stripped of its newsworthy value simply because it is placed behind a paywall or used in the context of a fantasy sports game. “On the contrary, fantasy sports operators use factual data combined with a significant, creative component that allows consumers to interact with the data in a unique way” and “Defendants’ use of the players’ names, images, and statistics in conducting fantasy sports competitions bears resemblance to the publication of the same information in newspapers and websites across the nation.” The Court agreed with Defendants that, “it would be strange law that a person would not have a first amendment right to use information that is available to everyone.” Thus, the Court held that
Indiana’s right of publicity statute contains an exception for material with newsworthy value that includes online fantasy sports. The case is *Akeem Daniels, Cameron Stingily, and Nicholas Stoner v. FanDuel, Inc. and DraftKings, Inc.*, 18S-CQ-134.

4. **California Court Of Appeal Applies First Amendment To End Feud Over “Feud”**

World famous actresses Betty Davis and Joan Crawford were known to have been at odds with each other for many years. This feud was the subject of an eight-part docudrama aired on the FX Network in March of 2017 titled “Feud: Bette and Joan.” As the California Court of Appeals described it, the central theme of the docudrama was “that powerful men in Hollywood pressured and manipulated women in the industry into very public feuds with one another to advance the economic interests of those men and the institutions they headed.” In addition, the docudrama contained a secondary theme that the court described as being “as timely now as it was in the 1960’s,” that is, “the poor treatment by Hollywood of actresses as they age.”

Betty Davis was portrayed by actress Susan Sarandon and Joan Crawford was played by actress Jessica Lange. The docudrama also included portions that related to the famous actress Olivia de Havilland, who was portrayed by actress Kathryn Zeta-Jones. The de Havilland character was shown primarily in two ways: (1) giving a fictitious interview in which she talks about the treatment of women in Hollywood and the Davis/Crawford rivalry; and (2) interacting with Davis, showing their close friendship. As the court noted, the “de Havilland character is portrayed as beautiful, glamorous, self-assured, and considerably ahead of her time in her views on the importance of equality and respect for women in Hollywood.” *Feud* was nominated for 18 Emmy awards.

De Havilland, however, was not so happy about the docudrama. In June 2017, she filed a lawsuit against the series, asserting claims for common law right of publicity, Civil Code Section 3344 right of publicity, false light invasion of privacy and “unjust enrichment.” Her right of publicity claims hinged on her contention that she “did not give [her] permission to the creators of ‘Feud’ to use [her] name, identity[,] or image in any manner.” As for her false light claim, de Havilland complained that the “interview” portion depicted her calling her sister a “bitch” when, in fact, she had called her a “dragon lady” and that another portion depicted her accusing Frank Sinatra of drinking all the alcohol in a green room for a production.
FX filed an anti-SLAPP motion seeking to have the case thrown out and to be awarded attorneys’ fees. In connection with this motion, FX provided declarations from the creators of *Feud* who stated that they created the “imagined interviews” as a framing devise to introduce viewers to central themes of the series, such as “the unfair treatment of women in Hollywood” and that these imagined interviews were based on actual interviews given by de Havilland over the years. In addition, FX submitted various books, newspaper and magazine articles, as well as videos of de Havilland giving interviews, that showed de Havilland talking about various actors over the years.

In response to the anti-SLAPP motion, de Havilland submitted a declaration by Mark Roesler, who runs a company that licenses rights to various living and deceased celebrities, who stated that the market value of de Havilland’s “rights” to appear in the docudrama were between 1.28 and 2.1 million dollars. In addition, de Havilland submitted declarations from David Ladd and Cort Casady, who stated they had many years in the entertainment industry and that it was “standard practice” in the film and television industry to obtain consent from any “well-known living person” before using them in a film or television project.

The trial court denied the anti-SLAPP motion as to all causes of action. In language that likely resulted in a spike in EMT and ambulance services being sent to motion picture and television producers around the country to treat them for heart attacks, the trial court relied on the Ladd and Casady declarations and held that “it is standard in the industry … to negotiate compensation prior to the use of a person’s likeness” in any docudrama or related project. Moreover, the trial court held that there was nothing “transformative” about Zeta-Jones’ portrayal of de Havilland because the producers were trying to “make the appearance of [de Havilland] as real as possible.” As for the false light claim, the trial court held that these claims survived because de Havilland had not given the interview depicted in the docudrama, she had not called her sister a “bitch,” and she had never said that Frank Sinatra must have drank all the alcohol in a dressing room. The trial court held that this was enough for a jury to find that de Havilland was falsely portrayed as “a gossip who uses vulgar terms about other individuals.”

The Court of Appeals reversed and the opinion right out of the blocks showed the court’s concern about the speech restrictive implications of the trial court’s ruling:

Authors write books. Filmmakers make films. Playwrights craft plays. And television writers, directors, and producers create television shows and put them on the air – or, in these modern times, online. The First Amendment protects these expressive works and the free speech rights of their creators. Some of these works are fiction. Some are factual. And some are a combination of fact and fiction. That these creative works generate income for their creators does not diminish their constitutional protection. The First Amendment does not require authors, filmmakers, playwrights, and television producers to provide their creations to the public at no charge.

Books, films, plays, and television shows often portray real people. Some are famous and some are just ordinary folks. Whether a person portrayed in one of

65 De Havilland did not dispute that *Feud* related to a matter of public concern and thus the first prong of the anti-SLAPP statute was met.
these expressive works is a world-renowned film star -- “a living legend” -- or a person no one knows, she or he does not own history. Nor does she or he have the legal right to control, dictate, approve, disapprove, or veto the creator’s portrayal of actual people.

The court first noted that it was not sure that Feud or any other docudrama was a “product or merchandise” that was even subject to Civil Code Section 3344. The statute requires a showing of a use in “products, merchandise, or goods” or for the purpose of advertising or selling “products, merchandise, goods, or services.” The court noted that “[b]ooks, films, and television shows are ‘things’ but are they ‘merchandise’ or ‘products’?” The court also noted the recent Ninth Circuit decision in Sarver v. Chartier, 813 F.3d 891 (9th Cir. 2016) involving a right of publicity claim by a soldier who alleged his life story was depicted in the motion picture The Hurt Locker which had stated that motion pictures are “not speech proposing a commercial transaction.” Ultimately, however, the court held that it did not need to decide this question because “Feud is constitutionally protected in any event.” This brief reference to the question, however, seems to have been subtly saying that the Court is interested in somebody teeing this issue for a decision in the future.

The court went on to hold that the use of de Havilland’s identity in Feud was protected by the First Amendment. The court liberally cited the concurring opinion by Justice Bird in Guglielmi v. Spelling-Goldberg Productions, (1979) 25 Cal.3d 860 in which she held that a docudrama about screen star Rudolph Valentino was protected by the First Amendment and which rejected very similar claims by the Valentino estate as those made by de Havilland. In Guglielmi, the California Supreme Court held that “Valentino was a Hollywood star. His life and career are part of the cultural history of an era … His lingering persona is an apt topic for poetry or song, biography or fiction. Whether [the producers] work constitutes a serious appraisal of Valentino’s stature or mere fantasy is a judgment left to the reader or viewer, not the courts.”

The court in de Havilland agreed and pointed out that for “nearly four decades since, our Supreme Court and courts of appeal have continued to cite Guglielmi with approval.” The court pointed out that Feud was “as constitutionally protected as was the film in Sarver, The Hurt Locker.” In so holding, the court cited to the language in Sarver which held that the First Amendment “safeguards the storytellers and artists who take the raw materials of life – including the stories of real individuals, ordinary or extraordinary – and transforms them into art, bit it articles, books, movies, or plays.”

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66 The Sarver decision has been seen as potentially problematic because it appears to have reasoning within it that is somewhat inconsistent. On the one hand, it contains reasoning that seems to indicate that the reason the Court of Appeals believed Sarver had no claim was because he was a private person who was not motivated to create a marketable persona and therefore he did not have a cognizable right of publicity. On the other hand, after laying out that reasoning, the Court of Appeals went on to hold that his claim was barred by the First Amendment using the language quoted above, which implicitly, if not explicitly, holds that claims such as these against works of film or television are barred by the First Amendment, regardless of whether a plaintiff is a private person or is a famous celebrity (i.e., regardless of whether the person depicted is “ordinary or extraordinary”). In other words, the question after Sarver has been: which part of the reasoning are future courts going to rely on? The holding in de Havilland is a good sign that the far more speech protective reasoning of Sarver may be the part that sticks.
The court also rejected the notion that there is some “industry standard” to always get permission before depicting someone in a film or television work:

Producers of films and television programs may enter into agreements with individuals portrayed in those works for a variety of reasons, including access to the person’s recollections or “story” the producers would not otherwise have, or a desire to avoid litigation for a reasonable fee. But the First Amendment simply does not require such acquisition agreements. … The creators of *The People v. O.J. Simpson,* *American Crime Story* can portray trial judge Lance Ito without acquiring his rights. *Fruitvale Station*’s writer and director Ryan Coogler can portray Bay Area Transit officer Johannes Mehserle without acquiring his rights. HBO can portray Sarah Palin in *Game Change* without acquiring her rights. There are myriad additional examples.

The court also rejected de Havilland’s argument that by putting a character of her in the docudrama, this gave the impression of de Havilland’s endorsement of the work, finding that there was “no case authority to support this novel argument.”

Finally, the court found that *Feud*’s portrayal of de Havilland was transformative. The court first went over the history of the creation of the transformative use test, noting that although this test seemed to make sense when “applied to products and merchandise” it was a test that courts have “struggled mightily, however, to figure out how to apply it to expressive works such as films, plays, and television programs.” Indeed, the court held that the trial court itself had problems with applying the test to *Feud,* noting that the trial court held that because FX wanted to make de Havilland appear “as real as possible …, there is nothing transformative about the docudrama” and even “imagined conversations for the sake of being creative” were not transformative.

The court of appeal disagreed, holding that the docudrama told a complex story, the use of de Havilland’s identity was merely one of the raw materials from which the work was synthesized, and that the work’s marketability and economic value derived from the creativity and skill of the creators and actors in *Feud.*

Finally, the court rejected the false light claim. The court first questioned whether a reasonable viewer would even interpret *Feud* as making entirely factual statements. “Viewers are generally familiar with dramatized, fact-based movies and miniseries in which scenes, conversations, and even characters are fictionalized and imagined.” Moreover, even if the alleged statements were interpreted as ones of provable fact, they were not defamatory nor would they highly offend a reasonable person. “Granting an interview at the Academy Awards is not conduct that would subject a person to hatred, contempt, ridicule, or obloquy.” In fact, rather than being portrayed negatively, the court found that de Havilland was portrayed as a “wise, witty, sometimes playful woman” and Zeta-Jones’s portrayal of her was “overwhelmingly positive.” Nor was her being portrayed stating that Sinatra drank all the alcohol in a dressing room once an actionable statement: “Sinatra’s fondness for alcohol was well known” and thus de
Havilland’s character saying this to the Davis character would not subject de Havilland to hatred or ridicule. Finally, the court held that de Havilland’s character stating that her sister was a “bitch” was not actionable because de Havilland had called her sister a “dragon lady” and the court found there was no material difference between those terms. The court held it would be improper “to dissect the creative process.”

Even if any of the alleged false light statements were actionable, de Havilland could not demonstrate they were made with actual malice. The court noted that when “the expressive work at issue is fiction, or a combination of fact and fiction, the ‘actual malice’ analysis takes on a further wrinkle.” De Havilland argued that because the producers conceded that the interview depicted in the docudrama did not happen, that she never said “bitch” (but, rather, “dragon lady”), and that she never actually said the line about Sinatra drinking all the alcohol, they had conceded that the statements were “knowingly false” and thus actual malice was met. The court disagreed: “[F]iction is by definition untrue. It is imagined, made-up. Put more starkly, it is false. Publishing a fictitious work about a real person cannot mean the author, by virtue of writing fiction, has acted with actual malice.”

Thus, in such a circumstance, the plaintiff has to show that the defendant intended to convey a defamatory impression. Here, the evidence was that the producers intended to portray de Havilland as “a wise, respectful friend and counselor to Bette Davis, and a Hollywood icon with a unique perspective on the past” and thus the claim failed. 67

The court concluded like it started – with strong language protecting First Amendment protected speakers:

The trial court’s ruling leaves authors, filmmakers, playwrights, and television producers in a Catch-22. If they portray a real person in an expressive work accurately and realistically without paying that person, they face a right of publicity lawsuit. If they portray a real person in an expressive work in a fanciful, imaginative -- even fictitious and therefore “false” -- way, they face a false light lawsuit if the person portrayed does not like the portrayal. “[T]he right of publicity cannot, consistent with the First Amendment, be a right to control the celebrity’s image by censoring disagreeable portrayals.” … FX’s evidence here -- especially the docudrama itself -- establishes as a matter of law that de Havilland cannot prevail.

A petition for review was filed by de Havilland with the California Supreme Court, but it was rejected. On October 5, 2018, de Havilland filed a cert. petition with the U.S. Supreme Court. Her counsel stated that the decision used “the First Amendment to immunize Hollywood businesses when they knowingly publish unconsented falsehoods about living people in commercial productions” The U.S. Supreme Court has not yet ruled on the petition.

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67 The court held that de Havilland’s “unjust enrichment” claim failed because it is simply a remedy for other claims and was not an independent cause of action.
Prior Restraint

1. Injunction Against Release of Biopic Concerning Lynyrd Skynyrd Airplane Crash Reversed by Second Circuit

   a. Factual background. In 1977, a plane crash killed several persons, including two members of the band Lynyrd Skynyrd (among other hits, “Sweet Home Alabama” and “Free Bird”). In 2017, surviving members of the band heirs of the other two band members brought suit to enjoin the production and distribution of the biopic “Street Survivors: The True Story of the Lynyrd Skynyrd Plane Crash.” The plaintiffs claimed that they learned about the biopic through the press in 2016, and made a cease and desist demand.

      According to the lawsuit, the remaining band members and the widows of the others made a “blood oath” not to capitalize on the tragedy. In 1987, however, the surviving band members reunited for a tribute tour, leading to litigation which resulted in a consent order. The suit alleged that the consent order imposed restrictions on the parties’ use of the band name and the right to tell the story of the band.

      The complaint stated: “If filming does not cease, and if the motion picture is completed and distributed, it will dilute the marketplace for a film about Lynyrd Skynyrd made consistent with the terms of the consent order — in contrast to defendants' prospective film, which may contain a potentially inaccurate or skewed portrayal of Lynyrd Skynyrd's story as filtered solely through the eyes of Pyle masquerading as the ‘True Story’ of a defining moment in the band's history.” The Plaintiffs also complained that the surviving band member who was working with the film production company had a sordid history, which they felt tarnished the band’s history. That band member had been involved in the film, acting as an advisor and writing music for the film.

   b. District Court’s injunction. After a two-day bench trial conducted less than three months after the complaint was filed, federal district judge Robert Sweet issued a broad order enjoining production and distribution of the film. Judge Sweet’s ruling stated that the cooperating band member had "willingly bargained away" the right to allow the production company to make the film. If not for the consent decree, Judge Sweet stated, the production company "would be as 'free as a bird' to make and distribute its work." Judge Sweet also rejected what he considered a “clearly excessive” attorney’s fee request of nearly $700K.

      After the issuance of Judge Sweet’s order, there was some procedural skirmishing regarding whether the order could be applied to the production company, which was not named as a party. The district court held that the injunction applied to all those acting “in concert” with the named defendants.

   c. Amicus support for Defendants. Two groups of amici -- free speech and journalism amici represented by the Reporters Committee for Freedom of the Press and movie studios represented by Davis Wright Tremaine -- challenged the injunction as a classic prior restraint. The RCFP argued that "if this Court were to permit an injunction permanently preventing the publication of speech in this instance, such a precedent could be used to
permanently enjoin the press from publishing information from a source on the basis of the source’s agreements with other entities."

d. Second Circuit reverses injunction. In October 2018, the Court of Appeals for the Second Circuit in an unsigned opinion ruled that the film could cover the surviving member’s “experience” but not the “history” of the band. The Second Circuit stated: "That crash is part of the 'history' of the band, but it is also an 'experience' of Pyle with the band, likely his most important experience ….. Provisions ... that both prohibit a movie about such a history and also permit a movie about such an experience are sufficiently inconsistent, or at least insufficiently specific, to support an injunction." The court ruled that the language of the decades-old consent order was vague.

The Second Circuit declined to adopt the amici position that the case presented a classic prior restraint. The court stated: "Appellants here, supported by several journalism and entertainment organizations, see this case as a classic First Amendment violation involving an unlawful prior restraint. It is not…No government entity has obtained a court order to prevent the making or release of the film."

The defendants and amici praised the Second Circuit’s reversal of the injunction.

**Trademark**

1. New York Federal Judge denies Beyoncé’s request for injunction against Texas company selling “Feyoncé” merchandise

On September 30, 2018, the U.S. District Court for the Southern District of New York, denied Beyoncé’s motion for partial summary judgment and entry of a permanent injunction against Feyonce, Inc., a Texas company selling merchandise using the brand name “FEYONCE,” which defendants market to people engaged to be married (fiancés).

In April 2016, Beyoncé sued defendants alleging trademark infringement and dilution, unfair competition. The complaint alleges that defendants “willfully traded upon the goodwill and notoriety of Beyoncé, arguably one of the most famous musical artists and entrepreneurs in the world” and that defendants were using her trademark to sell products featuring the word “Feyoncé” and sometimes with the phrase “put a ring on it.” The complaint requested an injunction to stop Feyoncé from selling t-shirts, sweatshirts, mugs and other merchandise as well as the company’s profits, damages and attorney fees.

In denying Beyoncé’s request for an injunction, the Court acknowledged that “[t]here can be no dispute that in marketing to fiancé purchasers, defendants chose the formation “FEYONCE” in order to capitalize off of the exceedingly famous BEYONCE mark.” However, the Court held that this fact alone does not establish likelihood of confusion as required under the Lanham Act. “Rather, a critical question is whether a rational consumer would mistakenly believe FEYONCE products are sponsored by or affiliated with BEYONCE products.”
The Court held that by replacing the “B” with an “F,” defendants created a mark that sounds like “fiancé,” and thus “FEYONCE” was “a play on words.” The Court found that the fact that this use constituted a ‘pun’ “could dispel consumer confusion that might otherwise arise due to its facial similarity.” Similarly, on Beyoncé’s unfair competition claim, the Court held that because defendants did not merely co-opt the BEYONCE mark, but rather repurposed it in a way that can be distinguished from the original, a reasonable factfinder could also conclude that there is little risk of dilution. The Court concluded that “[e]ven when such association was intended, when a defendant does so imperfectly, so as to convey the simultaneous message that it was not in fact a source” of the famous mark’s products, the risk of blurring may be minimal.”

The parties are currently in settlement discussions. The case is Knowles-Carter et al v. Maurice et al, U.S. District Court, Southern District of New York, No. 16-02532.