

IN-DEPTH

Media And Entertainment Law

EDITION 6

Contributing editor

Benjamin E Marks

Weil, Gotshal & Manges



LEXOLOGY

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In-Depth: Media and Entertainment Law (formerly The Media and Entertainment Law Review) is a practical overview of the legal and regulatory frameworks governing the media and entertainment industry – including print, broadcast and online – in major jurisdictions worldwide. With a focus on prominent recent trends and developments, it examines issues including free speech and media freedom; IP rights; competition and consumer rights; common contractual disputes; and much more.

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Editor's Preface

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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 companies in the media and entertainment industries.

Markets for media and entertainment products around the world remain robust, with continued growth reported for recorded music, music publishing, audio-visual streaming, book publishing, and live concert industries. While live concerts and music festivals remain as popular than ever, and there remains a vibrant market for printed books, the transformation for other forms of entertainment to digital platforms is by now largely complete in major markets.

The media and entertainment industries, however, continue to face significant challenges. We continue to see threats to press freedom by repressive government regimes and a rise in politically motivated violence directed at journalists. Even in a relatively media-friendly jurisdiction like the United States, we see increases in repressive efforts in some states to ban books, or at least restrict access to them through schools and public libraries, particularly when the content touches on themes of racial or social justice, sexuality, or racial or gender identity. Perhaps most consequentially, content creators and distributors must adapt to significant advances in generative artificial intelligence models that are capable of delivering increasingly sophisticated text and images in response to simple prompts, with advancements in text-to-video coming as well. The potential impact of these technological developments cannot be overstated on matters as varied as the value of intellectual property rights, personal privacy interests, opportunities for political misinformation, and the future of the workforce in media and entertainment industries. Legislative, regulatory and judicial bodies around the world are racing to adapt to a rapidly changing technological landscape but struggling with how best to do so.

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 should continue to serve that function.

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Introduction

This chapter addresses the fundamental legal protections for, and limits on, the media and entertainment industries in the United States under various sections. The 'Year in review' section provides a brief review of the most notable developments over the past year affecting regulation of the US media and entertainment industries. Under 'Legal and regulatory framework' we set out the legal and regulatory framework that governs those industries, including the interplay between state and federal laws. 'Free speech and media freedom' describes the robust protections in the United States for free speech and a free press. In the section on 'Intellectual property', 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. 'Competition and consumer rights' addresses the regulatory framework for preserving competition and protecting consumers. 'Contractual disputes' briefly touches on the nature of contractual disputes most common to the US media and entertainment industries. In each of these sections, we highlight recent developments and legal trends of interest. The final section, 'Outlook and conclusions', provides an outlook for the year ahead.

Year in review

The year 2024 marks another year of consequential developments for the impact of artificial intelligence (AI) on the media and entertainment industries in the United States. While AI is hardly new and has been affecting media and entertainment in myriad ways for years, the release of numerous, incredibly sophisticated generative AI models portends significant disruption for how content across a variety of industries is created, distributed and licensed. These technological advancements continue to spur significant legislative and regulatory attention and new lawsuits by the holders of intellectual property rights in cases where their works were used without permission to train generative AI models.

Some developers of generative AI tools have committed to using third-party copyrights only on a permissioned basis and are taking aggressive steps to prevent the use of their tools for 'deepfakes,' political misinformation, and other forms of malfeasance. Others have taken the position that the use of copyrighted materials to train a generative AI model is defensible as a fair use of copyrighted materials, even though numerous reproductions are made during the training process, so long as the outputs of the model are not substantially similar to any particular input, and that they should not in any event be held responsible for any misuse by third-party end users of the tools they provide. Others yet are licensing content from some rightsholders while using content from other rightsholders without permission. While courts have not yet issued dispositive guidance on the core copyright question, there have been numerous high-profile, publicly reported deals between content owners and AI model developers in 2024 to permit and facilitate these types of training uses and, in at least some cases, to provide rights to display copyrighted content in outputs generated by the model. The US Copyright Office continues to press forward with its major initiative to study generative AI, first launched in 2023, that generated more than 10,000 responses from affected businesses, industry groups,

copyright scholars and concerned citizens. The Copyright Office has hosted numerous public listening sessions and enlisted a variety of experts for working groups to aid in its evaluation and recommendations. The Office is releasing a report on generative AI in parts, and the first part of the report, which dealt with digital replicas, was issued at the end of July 2024. Congress continues to hold hearings on generative AI and more are expected as elected officials weigh up whether additional legislation is needed to regulate these developing technologies. And state legislatures around the country are active as well, particularly in attempting to address pernicious uses of deepfakes to mislead consumers or perpetrate sexual harassment.

There were also numerous other interesting developments. To name just a few:

1. resolving a split among lower courts, the US Supreme Court held that the three-year statute of limitations in the Copyright Act does not prevent plaintiffs from recovering damages that accrued more than three years prior to the commencement of the suit as long as the suit was brought within three years after the plaintiff discovered the infringement;^[1]
2. the US Supreme Court declined to resolve whether state laws regulating content moderation by social media companies violate the First Amendment's protections for free speech, instead vacating and remanding lower court cases that had reached different outcomes back to those courts for reconsideration;^[2]
3. trial and appellate courts have grappled with how to apply the US Supreme Court's 2023 decision in *Warhol v Goldsmith*^[3] when addressing fair use defences to claims of copyright infringement returned again to the question of the fair use defence to copyright infringement;^[4] and
4. authors and publishers have continued to face an onslaught of efforts to restrict access to certain books in schools and public libraries, particularly for books that touch on themes of racial and social justice, sexuality, and racial and gender identity,^[5] but courts to date largely have recognised the significant intrusion on free speech rights these censorial efforts entail.^[6]

These developments and others are addressed in greater detail in the sections that follow.

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 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.

Free speech and media freedom

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'.^[7] The few limited categorical exceptions include obscenity, child pornography, defamation, fraud, incitement, true threats and speech integral to criminal conduct.^[8] 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.^[9]

False speech is protected unless it involves defamation, fraud or some other legally cognisable harm; falsity alone is not enough.^[10] 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'.^[11] 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'.^[12] The First Amendment also protects entities from compelled speech. Thus, government generally cannot force speakers to deliver a message with which they disagree,^[13] and the First Amendment 'offers protection when an entity engaged in compiling and curating others' speech into an expressive product of its own is directed to accommodate messages it would prefer to exclude'.^[14]

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',^[15] 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 towards the ideas contained in the regulated speech'.^[16]

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.^[17] However, in *Sorrell v. IMS Health Inc.*,^[18] 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'.^[19] Media and entertainment products are not considered commercial speech merely because they are distributed or sold as part of for-profit enterprises.^[20] Accordingly, even provably false media reports are generally not actionable under consumer protection laws.^[21]

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 organisations'.^[22] Generally applicable laws 'do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news'.^[23] 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 if the information is of public concern.^[24]

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*,^[25] 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*,^[26] 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.^[27] Any 'offensiveness of the alleged intrusion' was 'mitigated by the public interest in the news gathered'.^[28] 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'.^[29]

Freedom of access to government information

Access to federal government information is governed by the Freedom of Information Act,^[30] 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 expected to interfere with ongoing law enforcement proceedings.^[31] States have their own freedom of information laws and processes for obtaining information about the workings of state government.^[32]

Protection of sources

Journalists do not have a First Amendment or common law right to refuse to comply with a grand jury subpoena,^[33] even if doing so requires the disclosure of confidential sources.^[34] 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.^[35] 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 information^[36] and in both civil and criminal cases,^[37] whereas the Fourth Circuit has struck a different balance between newsgathering and law enforcement, recognising a qualified privilege only in civil cases,^[38] and the Seventh Circuit has called into question the extension of the privilege to non-confidential sources.^[39]

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.

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).^[40] In private figure cases, states are free to require a lesser showing of fault 'so long as they do not impose liability without fault'.^[41] To be actionable, a statement must be susceptible to being proved true or false,^[42] and when a statement is of public concern, the plaintiff bears the burden of proving falsity.^[43]

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.^[44]

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',^[45] others have upheld narrowly drawn permanent injunctions against specified defamatory speech.^[46] The trend in the courts and in legal scholarship is towards the view that such limited prior restraint injunctions are constitutional,^[47] 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.^[48] A subsequent decision confirmed that money damages would instead be the 'proper remedy for harm springing from' breach of contract.^[49]

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.^[50] 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.^[51] Not every social media account operated by a public official, however, is considered a government account. Officials have some leeway to exclude people from 'unofficial' accounts or accounts related to private activity, such as those created in connection with a political campaign.^[52] A public official's social-media activity constitutes state action 'only if the

official (1) possessed actual authority to speak on the State's behalf, and (2) purported to exercise that authority when he spoke on social media.^[53] The appearance and function of the social-media activity are relevant at the second step, but they cannot overcome a lack of state authority at the first.^[54]

The government does not violate the First Amendment by enforcing secrecy agreements with government employees requiring pre-publication review and clearance of manuscripts to prevent disclosure of classified information.^[55] Courts, 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.

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, 33 states and the District of Columbia 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.^[56] In other states, the laws broadly protect speech made in connection with an issue of public interest.^[57] 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.

Intellectual property

Copyright and related rights

Copyright in the United States is governed by the Copyright Act of 1976 (the Copyright Act).^[58] The Copyright Act, as amended, sets out eight non-exclusive categories of works of authorship that fall within its ambit:

1. literary works;
2. musical works;
3. dramatic works;
4. pantomimes and choreographic works;
5. pictorial, graphic and sculptural works;

6. motion pictures and other audiovisual works;
7. sounds recordings; and
8. architectural works.^[59]

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.^[60] Although the exclusive rights attach immediately, the US 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) or refuses registration; it does not suffice that an application for registration is pending.^[61] 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) how the Copyright Act's three-year statute of limitations affects claims by plaintiffs who did not first discover the infringement until more than three years after it occurred.

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. Accurately predicting outcomes in copyright cases involving digital commerce is often challenging, even for experts in the field.

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.*^[62] provides one noteworthy example. The district court there addressed whether the first-sale doctrine embodied in Section 109 of the Copyright Act,^[63] 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.^[64] 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.^[65] The court acknowledged the controversial nature of the issue (and, to some, the anomaly of distinguishing the transfer of a physical versus a digital copy of a sound recording where presumably only one copy remained following the digital transfer), but it held that it was bound to follow the text of the statute. The anomalous result was, the court concluded, a matter for Congress, not the courts, to correct.^[66] The decision was affirmed on appeal.^[67]

More 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.^[68] Although the Internet Archive shut down that aspect of its operations in June 2020 after the lawsuit was filed,^[69] it continued to litigate whether its practice of 'controlled digital lending', pursuant to which it had distributed (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. The Second Circuit Court of Appeals recently affirmed that the practice was infringing and the Internet Archive had failed to establish fair use.^[70]

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.*^[71] 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*.^[72] 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 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'.^[73] 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.^[74] 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.

Federal courts in California, however, have reached the opposite conclusion from the *Goldman* and *Nicklen* courts on whether embedded links violate the exclusive right of public display and continue to embrace the server test. In *Hunley v. Instagram, LLC*, the district 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.^[75] The district court concluded it had to reach that decision because it (unlike the New York courts in *Goldman* and *Nicklen*) was bound by the Ninth Circuit's decision in *Perfect 10*.^[76] On appeal, the Ninth Circuit affirmed both the lower court decision and its embrace of *Perfect 10* and the server test. The appellate court declined to limit the holding of *Perfect 10* to the factual context of search engines, and it rejected Hunley's contentions that the text of the Copyright Act and policy considerations warranted a different outcome in this setting.^[77]

Most recently, in *Bowery v. Sites*, a district court in Utah, which is in the Tenth Circuit and not bound by the Ninth Circuit's decision in *Hunley*, declared that it found the server test unpersuasive and held that the defendants, by embedding links to photographs hosted on a third-party server in an article they published on an internet website, had infringed the plaintiff's exclusive right of display.^[78] Given the split between lower courts around the country 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'.^[79] 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,^[80] serves this balancing function. Courts evaluate fair use on a case-by-case basis by assessing the four factors identified in Section 107 (and sometimes others, notably bad faith): (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.^[81] 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'.^[82]

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.^[83] 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'.^[84]

The United States Supreme Court has taken up copyright fair use cases twice in recent years although, given the fact-specific, case-by-case nature of the inquiry, it is not clear the Court has brought meaningfully 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.^[85] 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,^[86] 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 itself'.^[87] 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'.^[88]

The Supreme Court returned to the question of fair use in 2023 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.^[89] However, on appeal, the Second Circuit reversed, instead finding that Warhol's work retained 'essential elements' of the original photograph.^[90] 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.^[91] It found that all four statutory fair use factors favoured Goldsmith. The Supreme Court granted certiorari and addressed the singular issue of whether the first factor – the purpose and character of the use – weighed

in favour of fair use.^[92] The Court carefully circumscribed its opinion to the specific use challenged: the Warhol Foundation's licensing of one of the prints derived from Goldsmith's photograph for the cover of a special edition magazine commemorating Prince shortly after his untimely passing. The Court found Warhol's artistic transformation of the original photograph insufficient to establish fair use in that context, holding that '[a]s portraits of Prince used to depict Prince in magazine stories about Prince, the original photograph and AWF's copying use of it share substantially the same purpose.'^[93] The Court also observed that the use 'copying use' in question was of a commercial nature. Accordingly, '[e]ven though Orange Prince [Warhol's work] adds new expression to Goldsmith's photograph . . . in the context of the challenged use, the first fair use factor still favors Goldsmith.'^[94] As noted above, lower courts have struggled with how to apply the *Warhol* ruling to other factual contexts.^[95]

Over-enforcement of music copyrights by juries

Recent jury trials involving the copyrights of musical works reflects 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.^[96] 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.^[97] 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.^[98]

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.^[99] The trial court vacated the jury's verdict on the grounds that the eight-note ostinato in *Joyful Noise* was not original enough to be copyrightable and that, in any event, *Dark Horse* was not substantially similar as a matter of law.^[100] The Ninth Circuit affirmed on appeal.^[101]

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*^[102] 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*.^[103] 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*.^[104] (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'.^[105] 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 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.^[106] 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.^[107] At trial, Sheeran persuaded the jury that the similar elements between *Thinking Out Loud* and *Let's Get It On* were common to dozens, if not hundreds, of other songs and not reflective of unlawful copying of protectable elements of Gaye's work. Sheeran has been outspoken in criticising 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.^[108] While he was successful at trial, other artists may be less willing to take the risk of an unfavourable jury decision and more willing to settle a non-meritorious claim.

Application of the 'discovery rule' and 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.^[109] 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.^[110] 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.^[111] The US Supreme Court, however, has never addressed the issue and, in other contexts, has declined to recognise unwritten exceptions to the plain language of statutes of limitation. Moreover, even where lower courts agreed that the discovery rule applied, a dispute emerged as to whether the statute of limitations affects the period for which damages are available. 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.^[112] In 2023, 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 three years of discovering infringing acts, it may seek damages regardless of when those acts occurred.^[113] Lower courts in other circuits also had reached different conclusions on whether damages are available for infringing acts occurring more than three years prior to the filing of the complaint.^[114] Earlier this year, however, the US Supreme Court resolved the issue. Assuming without deciding that a copyright claim is timely if brought within three years of when the plaintiff discovered the infringement, the Court held that a copyright plaintiff can recover damages for any timely copyright claim, no matter when the infringement occurred, rejecting the argument that damages should be limited to the three-year period prior to the filing of the suit.^[115]

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.^[116] 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).^[117] 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.^[118] 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'.^[119] Video game manufacturers have defeated claims, however, where the characters were not sufficiently recognisable as the plaintiff.^[120] More 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.*,^[121] 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 pre-empted by the Copyright Act. For sufficiently original choreography that is copied in connection with a video game, however, relief under the Copyright Act may be available.^[122]

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*,^[123] 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.^[124]

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.^[125]

The Sherman Act outlaws all contracts, combinations and conspiracies that unreasonably restrain interstate and foreign trade. This includes, among other things, agreements among competitors to fix prices, rig bids and allocate customers or territories. The Sherman Act also makes it a crime to monopolise any part of interstate commerce. The Clayton Act prohibits mergers and acquisitions that may substantially lessen competition, and the federal government has the ability to challenge those mergers that it believes are likely

to result in higher prices for consumers or present other harms to consumer welfare. The Clayton Act also prohibits certain forms of price discrimination. The FTC Act prohibits unfair methods of competition in interstate commerce and authorises the Federal Trade Commission (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 twenty-first century, and the FTC issued its staff's recommendations and report on the hearings in October 2020.^[126] 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.

Second, 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.^[127] A group of 35 states, along with Guam, Puerto Rico, and the District of Columbia, filed a nearly identical suit at that time. Both suits were tried before a federal judge in the fall of 2023 and the decision is pending. More recently, on 24 January 2024, the Department of Justice, joined by eight states, filed another civil antitrust suit against Google, this time for monopolising multiple digital advertising technology products. In its complaint, the Department of Justice alleged that Google's anti-competitive conduct has included acquiring competitors, forcing adoption of Google's tools, distorting advertising auction competition, and manipulating auction mechanics.^[128]

Third, the Department of Justice undertook a sweeping 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.^[129] 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.^[130] 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.

Fourth, both the Department of Justice and the FTC have been active in oversight of merger activity in the media and entertainment industries. For example, the Department of Justice challenged Penguin Random House's planned acquisition of Simon & Schuster on the ground that it would reduce competition in the book publishing marketplace. Following a bench trial in August 2022, the district court enjoined the proposed merger.^[131] This suit followed an earlier 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.^[132] The FTC has been particularly active in addressing competition and consumer protection in the video game industry, filing an administrative complaint against the merger between Microsoft and Activision Blizzard, the creator and publisher of Call of Duty and World of Warcraft, that remains pending^[133] and bringing an enforcement action against Epic Games arising out alleged violations of children's privacy and the use of so-called 'dark patterns' to trick players into making unwanted purchases rack up unauthorised charges that resulted in settlements providing more than US\$500 million in relief.^[134]

Contractual disputes

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

One area of recent litigation has involved the intersection of copyright law and contract law in cases arising out of claims that a defendant's exploitation of a copyrighted work goes beyond the scope of a licence from the plaintiff. Because copyright law provides for statutory damages and discretionary awards of attorneys' fees, plaintiffs often try to frame

licence disputes as copyright claims rather than contract claims. If a defendant has merely failed to pay royalties owed under a licence or breached some other contractual covenant, the case sounds in contract law and the plaintiff is remitted to contract remedies.^[135] If the defendant has breached a condition to the licence, however, the plaintiff may seek copyright remedies.^[136]

The 2018 case *Spinelli v. National Football League*^[137] 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.^[138] 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.^[139] 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)'.^[140] '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.'^[141] 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.^[142] 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.

Outlook and conclusions

The continuing evolution of increasingly sophisticated generative AI technologies, the growth of licensing markets related to those technologies, judicial clarification of whether and to what extent pre-existing intellectual property may be used without permission to train such tools, and regulatory oversight over their creation and use will almost certainly be the most important developments affecting the media and entertainment industries over the coming year. To be sure, we are only at the cusp of a wave of litigation arising out of generative AI, and definitive jurisprudential guidance may still be years away. There are already cases filed at the intersection of generative AI and a wide array of legal doctrines, including copyright, trademark, rights of publicity, data privacy, unfair competition and libel.

Deepfakes, in particular, are the subject of increasing legislative scrutiny at both the state and federal levels.

The outlook for press freedoms may well depend on the outcome of this year's presidential election given former President Trump's unusually antagonistic approach to dealing with press criticism and investigative reporting and aggressive attempts to curtail some press freedoms during his administration. While the US press will almost certainly remain at least substantially free regardless of who wins, some presidential administrations have been tangibly more hostile to the press than others, with Trump's prior administration at the top of the list, at least in recent decades.

The presidential election may also have important consequences for federal oversight of competitive markets in the media and entertainment industries, as the current administration has been particularly aggressive in challenging both market consolidation and assertedly monopolistic practices in everything from book publishing to video games to mobile applications to digital advertising.

Endnotes

- 1 *Warner Chappell v. Nealy*, 114 S Ct 1135 (2024). [^ Back to section](#)
- 2 *Moody v. Netchoice, LLC*, 144 S Ct 2383 (2024). [^ Back to section](#)
- 3 598 US 508 (2023) (affirming a lower court determination that the Andy Warhol Foundation had infringed a photographer's copyright in a photograph of Prince by licencing Warhol's artistic transformation of the photograph for use on the cover of a magazine). [^ Back to section](#)
- 4 See, e.g., *Hachette Book Grp, Inc v. Internet Archive*, No. 23-1260, 2024 WL 4031751 (Second Circuit 4 Sept 2024); *Whyte Monkee Prods, LLC v. Netflix*, 97 F 4th 699 (Tenth Circuit 2024), vacated by 101 F 4th 787 (Tenth Circuit 2024); *Philpot v. Independent Journal Review*, 92 F 4th 252 (Fourth Circuit 2024). [^ Back to section](#)
- 5 See generally, 'Banned in the USA: The Mounting Pressure to Censor,' PEN America (available at <http://pen.org/report/book-bans-pressure-to-censor/>). [^ Back to section](#)
- 6 See, e.g., *Book People, Inc v. Wong*, No 1:23-cv-000858-ADA, 2023 WL 6060045 (WD TX 18 Sept., 2023) (preliminarily enjoining Texas state law that restricted access in public school libraries to books deemed 'sexually explicit' or 'sexually relevant'); *Fayetteville Public Library v Crawford Cty*, No. 5:23-CV-05086 (TLB), 2023 WL 4845636 (WD Arkansas 29 July 2023) (preliminarily enjoining Arkansas state law imposing new criminal penalty on librarians, booksellers and others and mandating procedures that libraries must follow when evaluating citizens' requests to censor library books). [^ Back to section](#)
- 7 *Ashcroft v. Am Civil Liberties Union*, 535 US 564, 573 (2002) (internal quotation marks omitted). [^ Back to section](#)

- 8 See, e.g., *United States v. Stevens*, 559 US 460, 468 (2010). [^ Back to section](#)
- 9 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). [^ Back to section](#)
- 10 *United States v. Alvarez*, 567 US 709, 719 (2012). [^ Back to section](#)
- 11 *Texas v. Johnson*, 491 US 397, 414 (1989). [^ Back to section](#)
- 12 *Snyder v. Phelps*, 562 US 443, 461 (2011). [^ Back to section](#)
- 13 See, e.g., *West Virginia State Bd of Educ v. Barnette*, 319 US 624 (1943) (invalidating compulsory flag salute law in public schools). [^ Back to section](#)
- 14 *Moody*, 144 S Ct at 2401; see also *id.* at 2399–2402 (discussing cases). [^ Back to section](#)
- 15 *Ward v. Rock Against Racism*, 491 US 781, 791 (1989). [^ Back to section](#)
- 16 *Reed v. Town of Gilbert*, 576 US 155, 165 (2015) (internal quotation marks omitted). [^ Back to section](#)
- 17 See *Cent Hudson Gas & Elec Corp v. Pub Serv Comm'n of New York*, 447 US 557 (1980). [^ Back to section](#)
- 18 564 US 552 (2011). [^ Back to section](#)
- 19 *id.* at 566. [^ Back to section](#)
- 20 *Time, Inc v. Hill*, 385 US 374, 397 (1967). [^ Back to section](#)
- 21 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'). [^ Back to section](#)
- 22 *Cohen v. Cowles Media Co*, 501 US 663, 670 (1991). [^ Back to section](#)
- 23 *id.* at 669 (internal quotation marks omitted); see also *Nat'l Press Photographers Assoc v. McCraw*, 90 F 4th 770, 787-88 (Fifth Circuit 2024). [^ Back to section](#)
- 24 *Bartnicki v. Vopper*, 532 US 514, 535 (2001). [^ Back to section](#)

- 25 878 F3d 1184 (Ninth Circuit 2018). [^ Back to section](#)
- 26 306 F3d 806 (Ninth Circuit 2002). [^ Back to section](#)
- 27 *id.* at 814. [^ Back to section](#)
- 28 *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. . . . The mere fact the intruder was in pursuit of a “story” does not, however, generally justify an otherwise offensive intrusion.'). [^ Back to section](#)
- 29 *Shulman*, 18 Cal 4th at 242. [^ Back to section](#)
- 30 5 USC, Section 552. [^ Back to section](#)
- 31 *id.* at Section 552(b). [^ Back to section](#)
- 32 See, e.g., NY Public Officers Law, Sections 84-90 (New York Freedom of Information Law). [^ Back to section](#)
- 33 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. [^ Back to section](#)
- 34 *Branzburg v. Hayes*, 408 US 665 (1972). [^ Back to section](#)
- 35 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). [^ Back to section](#)
- 36 See *Gonzales v. Nat'l Broad Co*, 194 F3d 29 (Second Circuit 1999). The Second Circuit has further explained that '[a] person need not be a credentialed reporter working for an established press entity to establish entitlement to the privilege' so long as the person, in collecting the information, was acting in the role of the independent press, i.e., in the role favoured by the public interest that motivates the privilege. *Chevron Corp v. Berlinger*, 629 F3d 297, 307 (Second Circuit 2011). [^ Back to section](#)
- 37 See *United States v. Burke*, 700 F2d 70 (Second Circuit 1983). [^ Back to section](#)
- 38 See *Sterling*, 724 F3d 482; *LaRouche v. Nat'l Broad Co*, 780 F2d 1134 (Fourth Circuit 1986). [^ Back to section](#)
- 39 See *McKevitt v. Pallasch*, 339 F3d 530 (Seventh Circuit 2003). [^ Back to section](#)

- 40** 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). ^ [Back to section](#)
- 41** *Gertz v. Robert Welch, Inc*, 418 US 323, 347 (1974). ^ [Back to section](#)
- 42** *Milkovich v. Lorain Journal Co*, 497 US 1, 20-21 (1990). ^ [Back to section](#)
- 43** *Philadelphia Newspapers v. Hepps*, 475 US 767, 776 (1986). ^ [Back to section](#)
- 44** See, e.g., *Obsidian Fin Grp, LLC v. Cox*, 740 F3d 1284 (Ninth Circuit 2014). ^ [Back to section](#)
- 45** 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). ^ [Back to section](#)
- 46** See, e.g., *Balboa Island Village Inn, Inc v. Lemen*, 40 Cal 4th 1141 (2007). ^ [Back to section](#)
- 47** See, e.g., Doug Rendleman, 'The Defamation Injunction Meets the Prior Restraint Doctrine', 56 *San Diego L. Rev.* 615 615 (2019); Eugene Volokh, 'Anti-Libel Injunctions', 167 *U Pa L Rev* 73 (2019). ^ [Back to section](#)
- 48** *Trump v. Trump*, 128 NYS3d 801, 821 (Sup Ct Dutchess Cty, 13 July 2020). ^ [Back to section](#)
- 49** *Trump v. Trump*, 192 NYS3d 891, 906 (Sup Ct New York Cty, 9 June 2023). ^ [Back to section](#)
- 50** See, e.g., *Karem v. Trump*, 404 F Supp 3d 302 (DDC 2019) (granting preliminary injunction), aff'd in part, 960 F3d 656 (DC Circuit 2020). ^ [Back to section](#)
- 51** 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). ^ [Back to section](#)
- 52** See, e.g., *Campbell v. Reisch*, 986 F3d 822 (Eighth Circuit 2021). ^ [Back to section](#)
- 53** *Lindke v. Freed*, 601 US 187, 198 (2024). ^ [Back to section](#)
- 54** id. ^ [Back to section](#)

- 55** See, e.g., *Snepp v. United States*, 444 US 507 (1980); *United States v. Snowden*, 611 F Supp 3d (ED Va 2019); *United States v. Bolton*, 468 F Supp 3d 1 (DDC 2020). [^ Back to section](#)
- 56** See, e.g., Nebraska Revised Statutes Annotated, Section 25-21, 243(1) (2019) (Nebraska Anti-SLAPP statute); New Mexico Statutes Annotated, Section 38-2-9.1-2 (2019) (New Mexico Anti-SLAPP statute). [^ Back to section](#)
- 57** 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). [^ Back to section](#)
- 58** 17 USC, Section 101 et seq. [^ Back to section](#)
- 59** id., Section 102. [^ Back to section](#)
- 60** id., Section 106. [^ Back to section](#)
- 61** *Fourth Estate Public Benefit Corp v. Wall-Street.com, LLC*, 139 S Ct 881 (2019). [^ Back to section](#)
- 62** 934 F Supp 2d 640 (SDNY 2013), aff'd, 910 F3d 649 (Second Circuit 2018). [^ Back to section](#)
- 63** 17 USC, Section 109. [^ Back to section](#)
- 64** See 934 F Supp 2d 640 (SDNY 2013). [^ Back to section](#)
- 65** See *Capitol Records*, 934 F Supp 2d at 654-55. [^ Back to section](#)
- 66** id. at 655, 660. [^ Back to section](#)
- 67** See *Capitol Records, LLC v. ReDigi, Inc*, 910 F3d 649 (Second Circuit 2018). [^ Back to section](#)
- 68** See blog.archive.org/national-emergency-library/ (last accessed 15 October 2022). [^ Back to section](#)
- 69** See id. [^ Back to section](#)
- 70** *Hachette Book Group, Inc*, 2024 WL 4031751. [^ Back to section](#)
- 71** 508 F3d 1146 (Ninth Circuit 2007). [^ Back to section](#)
- 72** See 302 F Supp 3d 585 (SDNY 2018). [^ Back to section](#)

- 73** 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). [^ Back to section](#)
- 74** *Nicklen v. Sinclair Broad Grp Inc*, 551 F Supp 3d 188 (SDNY 2021). [^ Back to section](#)
- 75** No. 21-cv-03778-CRB, 2021 WL 4243385 (ND Cal 17 September 2021). [^ Back to section](#)
- 76** *id.* at *3. [^ Back to section](#)
- 77** *Hunley v. Instagram, LLC*, 73 F4th 1060 (Ninth Circuit 2023). [^ Back to section](#)
- 78** *Bowery v. Sites*, No. 2:21-cv-00567-DBB-JCB, 2024 WL 3416038, *9-*11 (D Utah 15 July 2024). [^ Back to section](#)
- 79** US Constitution, Article I, Section 8, Clause 8. [^ Back to section](#)
- 80** 17 USC, Section 107. [^ Back to section](#)
- 81** See *Authors Guild, Inc v. Google, Inc*, 804 F3d 202 (Second Circuit 2015) (*Google Books*). [^ Back to section](#)
- 82** *id.* at 206; see also *Authors Guild, Inc v. HathiTrust*, 755 F3d 87 (Second Circuit 2014). [^ Back to section](#)
- 83** 124 F Supp 3d 325 (SDNY 2015), *aff'd in part, rev'd in part*, 883 F3d 169 (Second Circuit 2018). [^ Back to section](#)
- 84** 883 F3d at 177-80. [^ Back to section](#)
- 85** *Google LLC v. Oracle Am, Inc*, 141 S Ct 1183 (2021). [^ Back to section](#)
- 86** *Oracle Am, Inc v. Google LLC*, 886 F3d 1179 (Federal Circuit 2018). [^ Back to section](#)
- 87** *Google*, 141 S Ct at 1186. [^ Back to section](#)
- 88** *ibid.* [^ Back to section](#)
- 89** *Andy Warhol Found for the Visual Arts, Inc v. Goldsmith*, 382 F Supp 3d 312, 326 (SDNY 2019). [^ Back to section](#)
- 90** *Andy Warhol*, 11 F4th 26, 43 (Second Circuit 2021). [^ Back to section](#)

- 91** id. at 41. [^ Back to section](#)
- 92** Andy Warhol, 143 S Ct 1258 (2023). [^ Back to section](#)
- 93** id. at 1273. [^ Back to section](#)
- 94** *ibid.* [^ Back to section](#)
- 95** See, e.g., *Whyte Monkee Prods, LLC v. Netflix*, 101 F 4th 787 (Tenth Circuit 2024) vacating 97 F 4th 699 (Tenth Circuit 2024). [^ Back to section](#)
- 96** See 895 F3d 1106 (Ninth Circuit 2018). [^ Back to section](#)
- 97** id. at 1138-51. [^ Back to section](#)
- 98** id. at 1140. [^ Back to section](#)
- 99** No. 2:15-CV-05642-CAS-JCx, 2020 WL 1275221 (CD Cal 16 March 2020). [^ Back to section](#)
- 100** id. at *4-*13. [^ Back to section](#)
- 101** *Gray v. Hudson*, 28 F4th 87 (Ninth Circuit 2022). [^ Back to section](#)
- 102** *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 US 663 (2014). [^ Back to section](#)
- 103** 952 F3d 1051 (Ninth Circuit 2020) (*en banc*), cert denied, 141 S Ct 453 (2020) (Mem). [^ Back to section](#)
- 104** 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.'). [^ Back to section](#)
- 105** *Skidmore*, 952 F3d at 1069. [^ Back to section](#)
- 106** *Structured Asset Sales, LLC v. Sheeran*, No. 18 CIV. 5839 (LLS), 2022 WL 4544479, at *3-4 (SDNY 29 September 2022). [^ Back to section](#)
- 107** id. at *3. [^ Back to section](#)
- 108** https://twitter.com/edsheeran/status/1511631955238047751?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E1511631955238047751%7Ctwgr%5E47d9db087cc0ae6d82d6b86a7ad53d19566b101a%7Ctwcon%5Es1_&ref_url=https%3A%2F%2Ffew.com%2Fmusic%2Fed-sheeran-wins-shape-of-you-lawsuit%2F. [^ Back to section](#)
- 109** 17 USC, Section 507(b). [^ Back to section](#)

110 572 US 663, 667 (2014). [^ Back to section](#)

111 See *Petrella*, 572 US at 670 n.4; *Michael Grecco Prods, Inc v. RADesign, Inc.*, No. 23-1078, 2024 WL 3836578, *1 (Second Circuit 16 Aug 2024) (holding that discovery rule determines when an infringement claim accrues and declaring there is no 'sophisticated plaintiff' exception to rule); *Starz Entm't, LLC v. MGM Domestic Television Distrib, LLC*, No. 21-55379, 2022 WL 2733507, at *5 (Ninth Circuit 14 July 2022). [^ Back to section](#)

112 959 F.3d 39 (Second Circuit 2020). [^ Back to section](#)

113 39 F.4th 1236 (Ninth Circuit 2022). [^ Back to section](#)

114 Compare *Navarro v. Procter & Gamble Co.*, 515 F. Supp. 3d 718, 760-62 (SD 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 (WD 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). [^ Back to section](#)

115 *Warner Chappell Music, Inc v. Nealy*, 601 US 366, 368 (2024). [^ Back to section](#)

116 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 F.2d 994 (Second Circuit 1989). Other courts apply their own variations of balancing tests in determining whether a use is protected by the First Amendment. [^ Back to section](#)

117 Compare Wisconsin Statutes, Section 995.50 (2020) (2020) (confining right to 'any living person') with Indiana Code, Section 32-36-1-8 (2021). [^ Back to section](#)

118 See *Davis v. Electronic Arts, Inc.*, No. 10-03328 RS, 2012 WL 3860819 (ND Cal 29 March 2012), *aff'd*, 775 F.3d 1172 (Ninth Circuit 2015). [^ Back to section](#)

119 775 F.3d at 1178. [^ Back to section](#)

120 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). [^ Back to section](#)

121 463 F Supp 3d 616 (D Md May 2020). [^ Back to section](#)

- 122** *Hanagawi v. Epic Games, Inc.*, 85 F.4th 931 (Ninth Circuit 2023) (reversing dismissal of copyright claim and remanding for further proceedings). [^ Back to section](#)
- 123** 248 US 215 (1918). [^ Back to section](#)
- 124** 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). [^ Back to section](#)
- 125** There is an overlapping network for antitrust enforcement that includes the Antitrust Division of the US Department of Justice, the FTC, state attorneys general and aggrieved parties who have been harmed by antitrust violations, as some antitrust laws provide for private rights of action to recover damages. [^ Back to section](#)
- 126** 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 8 September 2024); see also Hearings on Competition and Consumer Protection in the 21st Century, www.ftc.gov/policy/hearings-competition-consumer-protection (last visited 8 September 2024). [^ Back to section](#)
- 127** A copy of the complaint is available at <https://s3.documentcloud.org/documents/7273457/10-20-20-US-v-Google-Co-complaint.pdf> (last visited 8 September 2024). [^ Back to section](#)
- 128** A copy of the complaint is available at <https://www.justice.gov/opa/press-release/file/1563746/dl> (last visiting 8 September 2024). [^ Back to section](#)
- 129** 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). [^ Back to section](#)
- 130** 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, 15 January 2021, available at <https://www.justice.gov/atr/page/file/1355391/download> (last visited 8 September 2024). [^ Back to section](#)
- 131** *United States v. Bertelsmann SE & Co KGaA*, No. n1-2886-FYP, 2022 WL 16949715 (D DC 15 November 2022). [^ Back to section](#)
- 132** See *United States v. AT&T, Inc.*, 310 F Supp 3d 161 (DDC 2019), aff'd, 916 F3d 1029 (DC Circuit 2019). [^ Back to section](#)

- 133** A redacted public version of the complaint is available at https://www.ftc.gov/system/files/ftc_gov/pdf/D09412MicrosoftActivisionAdministrativeComplaintPublicVersionFinal.pdf (last visited 8 September 2024). [^] [Back to section](#)
- 134** See <https://www.ftc.gov/news-events/news/press-releases/2022/12/fortnite-video-game-maker-epic-games-pay-more-half-billion-dollars-over-ftc-allegations> (last visited 8 September 2024). The administrative complaints are available at https://www.ftc.gov/system/files/ftc_gov/pdf/2223087EpicGamesComplaint.pdf (last visited 8 September 2024) and https://www.ftc.gov/system/files/ftc_gov/pdf/1923203EpicGamesComplaint.pdf (last visited 8 September 2024). [^] [Back to section](#)
- 135** 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)). [^] [Back to section](#)
- 136** id. [^] [Back to section](#)
- 137** 903 F3d 185 (Second Circuit 2018). [^] [Back to section](#)
- 138** See *Spinelli v. Nat'l Football League*, No. 13-cv-7398 (RWS), 2017 WL 9618754 (SDNY 23 December 2016). [^] [Back to section](#)
- 139** See *Spinelli*, 903 F3d at 200-02. [^] [Back to section](#)
- 140** id. at 202. [^] [Back to section](#)
- 141** id. [^] [Back to section](#)
- 142** id. at 203-04. [^] [Back to section](#)

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