Annual Spring Meeting 2019

Entertainment Arts & Sports Law Section

May 15, 2019

Bracewell LLP

1251 Avenue of the Americas

(49th-50th Streets), 49th Floor, New York, NY

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Accessing the Online Electronic Course Materials

Program materials will be distributed exclusively online in PDF format. It is strongly recommended that you save the course materials in advance, in the event that you will be bringing a computer or tablet with you to the program.

Printing the complete materials is not required for attending the program.

The course materials may be accessed online at:
http://www.nysba.org/EASLSpring19Materials/

A hard copy NotePad will be provided to attendees at the live program site, which contains lined pages for taking notes on each topic, speaker biographies, and presentation slides or outlines if available.

Please note:

- You must have Adobe Acrobat on your computer in order to view, save, and/or print the files. If you do not already have this software, you can download a free copy of Adobe Acrobat Reader at https://get.adobe.com/reader/
- If you are bringing a laptop, tablet or other mobile device with you to the program, please be sure that your batteries are fully charged in advance, as electrical outlets may not be available.
- NYSBA cannot guarantee that free or paid Wi-Fi access will be available for your use at the program location.

MCLE INFORMATION

Program Title: **EASL Annual Spring Meeting 2019**

Date: Wednesday, May 15, 2019   Location: Bracewell LLP, NYC

Evaluation: https://nysba.co1.qualtrics.com/jfe/form/SV_1IgAQlhJv65vyyF

This evaluation survey link will be emailed to registrants following the program.

Total Credits: **3.0 New York CLE credit hours**

Credit Category:

3.0 Areas of Professional Practice

This course is approved for credit for **both** experienced attorneys and newly admitted attorneys (admitted to the New York Bar for less than two years). Newly admitted attorneys attending via webcast should refer to Additional Information and Policies regarding permitted formats.

Attendance Verification for New York MCLE Credit

In order to receive MCLE credit, attendees must:

1) **Sign in** with registration staff

2) Complete and return a **Verification of Presence form** (included with course materials) at the end of the program or session. For multi-day programs, you will receive a separate form for each day of the program, to be returned each day.

Partial credit for program segments is not allowed. Under New York State Continuing Legal Education Regulations and Guidelines, credit shall be awarded only for attendance at an entire course or program, or for attendance at an entire session of a course or program. Persons who arrive late, depart early, or are absent for any portion of a segment will not receive credit for that segment. The Verification of Presence form certifies presence for the entire presentation. Any exceptions where full educational benefit of the presentation is not received should be indicated on the form and noted with registration personnel.

Program Evaluation

The New York State Bar Association is committed to providing high quality continuing legal education courses, and your feedback regarding speakers and program accommodations is important to us. Following the program, an email will be sent to registrants with a link to complete an online evaluation survey. The link is also listed above.

Additional Information and Policies

Recording of NYSBA seminars, meetings and events is not permitted.

Accredited Provider

The New York State Bar Association's **Section and Meeting Services Department** has been certified by the New York State Continuing Legal Education Board as an accredited provider of continuing legal education courses and programs.

Credit Application Outside of New York State

Attorneys who wish to apply for credit outside of New York State should contact the governing body for MCLE in the respective jurisdiction.

MCLE Certificates

MCLE Certificates will be emailed to attendees a few weeks after the program, or mailed to those without an email address on file. **To update your contact information with NYSBA**, visit www.nysba.org/MyProfile, or contact the Member Resource Center at (800) 582-2452 or MRC@nysba.org.

Newly Admitted Attorneys—Permitted Formats

In accordance with New York CLE Board Regulations and Guidelines (section 2, part C), newly admitted attorneys (admitted to the New York Bar for less than two years) must complete **Skills** credit in the traditional live classroom setting or by fully interactive videoconference. **Ethics and Professionalism** credit may be completed in the traditional live classroom setting; by fully interactive videoconference; or by simultaneous transmission with synchronous interactivity, such as a live-streamed webcast that allows questions during the program. **Law Practice Management** and **Areas of Professional Practice** credit may be completed in any approved format.

Tuition Assistance

New York State Bar Association members and non-members may apply for a discount or scholarship to attend MCLE programs, based on financial hardship. This discount applies to the educational portion of the program only. Application details can be found at www.nysba.org/SectionCLEAssistance.

Questions

For questions, contact the NYSBA Section and Meeting Services Department at SectionCLE@nysba.org, or (800) 582-2452 (or (518) 463-3724 in the Albany area).

NEW YORK STATE BAR ASSOCIATION
ENTERTAINMENT ARTS & SPORTS LAW SECTION

ANNUAL SPRING MEETING

Presented by the Entertainment Arts & Sport Law Section (EASL)

Wednesday, May 15, 2019

Bracewell LLP | 1251 Avenue of the Americas (49th–50th Streets), 49th Floor, New York, NY

2:00–5:00 p.m. | CLE Program | 3 Credit Hours of CLE in Areas of Professional Practice
5:00–6:30 p.m. | Networking Reception

Program Co-Chairs: Ethan Bordman, Esq. | Robert Seigel, Esq. | Marc Jacobson, Esq.

A 3 hour Continuing Legal Education (CLE) Program, immediately followed by a Networking Reception, EASL's 2019 Spring Meeting will touch on three of life's certainties: death, taxes and our annual review of entertainment litigation by Stan Soocher, Esq., long-term EASL friend and editor-in-chief of Entertainment Law & Finance.

Stan's presentation will be followed by two panels. The first will focus on tax issues, including an overview and discussion of the latest tax law changes relevant to the media and entertainment industries, as well as New York State film and television tax incentives.

The second panel will touch on related trusts and estates matters, including practical tips regarding estate planning and copyright terminations, as well as an update on recently proposed legislative changes to New York's right of publicity statutes.

AGENDA

2:00 – 2:10 p.m.	**Welcome and Introduction** by Barry Skidelsky, Esq. (EASL Chair)
2:10 – 3:00 p.m.	**Entertainment Litigation Annual Review** **Speaker:** Stan Soocher, Esq., Editor-in-Chief, Entertainment Law & Finance
3:00 – 3:10 p.m.	**Break**
3:10 – 4:00 p.m.	**Tax Panel** **Speakers:** Michele Alexander, Esq., Bracewell LLP, New York, NY Fred Siegel, CPA, Fred Siegel CPA, New York, NY
4:00 – 4:10 pm	**Break**
4:10 – 5:00 p.m.	**Trusts and Estates Panel** **Speakers:** Tracy Landauer, Esq. (Culhane Meadows PLLC, New York, NY) Marc Jacobson, Esq. (Marc Jacobson PC, New York, NY) Jeremy Sheff, Esq. (Director, Intellectual Property Law Center, St. Johns Law School, Queens, NY)
5:00 – 6:30 p.m.	**Networking Reception, with food and alcoholic beverages**

Lawyer Assistance Program 800.255.0569

NYSBA

Q. What is LAP?

A. The Lawyer Assistance Program is a program of the New York State Bar Association established to help attorneys, judges, and law students in New York State (NYSBA members and non-members) who are affected by alcoholism, drug abuse, gambling, depression, other mental health issues, or debilitating stress.

Q. What services does LAP provide?

A. Services are **free** and include:

- Early identification of impairment
- Intervention and motivation to seek help
- Assessment, evaluation and development of an appropriate treatment plan
- Referral to community resources, self-help groups, inpatient treatment, outpatient counseling, and rehabilitation services
- Referral to a trained peer assistant – attorneys who have faced their own difficulties and volunteer to assist a struggling colleague by providing support, understanding, guidance, and good listening
- Information and consultation for those (family, firm, and judges) concerned about an attorney
- Training programs on recognizing, preventing, and dealing with addiction, stress, depression, and other mental health issues

Q. Are LAP services confidential?

A. Absolutely, this wouldn't work any other way. In fact your confidentiality is guaranteed and protected under Section 499 of the Judiciary Law. Confidentiality is the hallmark of the program and the reason it has remained viable for almost 20 years.

Judiciary Law Section 499 Lawyer Assistance Committees Chapter 327 of the Laws of 1993

Confidential information privileged. The confidential relations and communications between a member or authorized agent of a lawyer assistance committee sponsored by a state or local bar association and any person, firm or corporation communicating with such a committee, its members or authorized agents shall be deemed to be privileged on the same basis as those provided by law between attorney and client. Such privileges may be waived only by the person, firm or corporation who has furnished information to the committee.

Q. How do I access LAP services?

A. LAP services are accessed voluntarily by calling **800.255.0569** or connecting to our website **www.nysba.org/lap**

Q. What can I expect when I contact LAP?

A. You can expect to speak to a Lawyer Assistance professional who has extensive experience with the issues and with the lawyer population. You can expect the undivided attention you deserve to share what's on your mind and to explore options for addressing your concerns. You will receive referrals, suggestions, and support. The LAP professional will ask your permission to check in with you in the weeks following your initial call to the LAP office.

Q. Can I expect resolution of my problem?

A. The LAP instills hope through the peer assistant volunteers, many of whom have triumphed over their own significant personal problems. Also there is evidence that appropriate treatment and support is effective in most cases of mental health problems. For example, a combination of medication and therapy effectively treats depression in 85% of the cases.

Personal Inventory

Personal problems such as alcoholism, substance abuse, depression and stress affect one's ability to practice law. Take time to review the following questions and consider whether you or a colleague would benefit from the available Lawyer Assistance Program services. If you answer "yes" to any of these questions, you may need help.

1. **Are my associates, clients or family saying that my behavior has changed or that I don't seem myself?**
2. **Is it difficult for me to maintain a routine and stay on top of responsibilities?**
3. **Have I experienced memory problems or an inability to concentrate?**
4. **Am I having difficulty managing emotions such as anger and sadness?**
5. **Have I missed appointments or appearances or failed to return phone calls? Am I keeping up with correspondence?**
6. **Have my sleeping and eating habits changed?**
7. **Am I experiencing a pattern of relationship problems with significant people in my life (spouse/parent, children, partners/associates)?**
8. **Does my family have a history of alcoholism, substance abuse or depression?**
9. **Do I drink or take drugs to deal with my problems?**
10. **In the last few months, have I had more drinks or drugs than I intended, or felt that I should cut back or quit, but could not?**
11. **Is gambling making me careless of my financial responsibilities?**
12. **Do I feel so stressed, burned out and depressed that I have thoughts of suicide?**

There Is Hope

CONTACT LAP TODAY FOR FREE CONFIDENTIAL ASSISTANCE AND SUPPORT

The sooner the better!

1.800.255.0569

N E W Y O R K S T A T E B A R A S S O C I A T I O N

Join Our Section

☐ As a NYSBA member, **PLEASE BILL ME $35 for Entertainment, Arts, & Sports Law Section dues.** (law student rate is $17.50)

☐ I wish to become a member of the NYSBA (please see Association membership dues categories) and the Entertainment, Arts & Sports Law Section. **PLEASE BILL ME for both.**

☐ I am a Section member — please consider me for appointment to committees marked.

Name ______________________________

Address ______________________________

____

City ____________ State ____ Zip ____________

The above address is my ☐ Home ☐ Office ☐ Both

Please supply us with an additional address.

Name ______________________________

Address ______________________________

City ____________ State ____ Zip ____________

Office phone (______) ____________________

Home phone (______) ____________________

Fax number (______) ____________________

E-mail address ______________________________

Date of birth ______ / ______ / ______

Law school ______________________________

Graduation date ____________

States and dates of admission to Bar: ____________________

Please return this application to:
MEMBER RESOURCE CENTER,
New York State Bar Association, One Elk Street, Albany NY 12207
Phone 800.582.2452/518.463.3200 • FAX 518.463.5993
E-mail mrc@nysba.org • www.nysba.org

Join a Entertainment, Arts & Sports Law Section Committee(s)

Please designate the committees in which you are interested. You are assured of at least one committee appointment, however, all appointments are made as space permits.

__ Alternative Dispute Resolution (EASL3100)
__ Copyright and Trademark (EASL1300)
__ Digital Media (EASL3300)
__ Diversity (EASL3800)
__ Ethics (EASL3600)
__ Fashion Law (EASL3200)
__ Fine Arts (EASL1400)
__ In-house Counsel (EASL3700)
__ International (EASL3900)
__ Law Student Liaisons (EASL4200)
__ Legislation (EASL1030)
__ Literary Works and Related Rights (EASL1500)
__ Litigation (EASL2500)
__ Membership (EASL1040)
__ Motion Pictures (EASL1600)
__ Music and Recording Industry (EASL1700)
__ Not-for-Profit (EASL4100)
__ Phil Cowan Memorial Scholarship (EASL3500)
__ Pro Bono Steering (EASL3000)
__ Publications (EASL2000)
__ Publicity, Privacy and the Media (EASL1200)
__ Sports (EASL1800)
__ Television and Radio (EASL1100)
__ Theatre and Performing Arts (EASL2200)
__ Website (EASL4000)
__ Young Entertainment Lawyers (EASL2300)

2019 ANNUAL MEMBERSHIP DUES

Class based on first year of admission to bar of any state. Membership year runs January through December.

ACTIVE/ASSOCIATE IN-STATE ATTORNEY MEMBERSHIP	
Attorneys admitted 2011 and prior	$275
Attorneys admitted 2012-2013	185
Attorneys admitted 2014-2015	125
Attorneys admitted 2016 - 3.31.2018	60
ACTIVE/ASSOCIATE OUT-OF-STATE ATTORNEY MEMBERSHIP	
Attorneys admitted 2011 and prior	$180
Attorneys admitted 2012-2013	150
Attorneys admitted 2014-2015	120
Attorneys admitted 2016 - 3.31.2018	60
OTHER	
Sustaining Member	$400
Affiliate Member	185
Newly Admitted Member*	FREE

DEFINITIONS

Active In-State = Attorneys admitted in NYS, who work and/or reside in NYS
Associate In-State = Attorneys not admitted in NYS, who work and/or reside in NYS
Active Out-of-State = Attorneys admitted in NYS, who neither work nor reside in NYS
Associate Out-of-State = Attorneys not admitted in NYS, who neither work nor reside in NYS
Sustaining = Attorney members who voluntarily provide additional funds to further support the work of the Association
Affiliate = Person(s) holding a JD, not admitted to practice, who work for a law school or bar association
*Newly admitted = Attorneys admitted on or after April 1, 2018

NYSBA

Entertainment Litigation Annual Review

Stan Soocher, Esq.
Editor-in-Chief, Entertainment Law & Finance

ENTERTAINMENT LITIGATION ANNUAL REVIEW
PRESENTED TO
THE ENTERTAINMENT, ARTS & SPORTS LAW SECTION
OF THE NEW YORK STATE BAR ASSOCIATION

May 15, 2019

By STAN SOOCHER, ESQ.

Stan Soocher is the long-time Editor-in-Chief of *Entertainment Law & Finance*, and an award-winning entertainment attorney and entertainment law journalist. He is also Professor of Music & Entertainment Industry Studies at the University of Colorado's Denver Campus. Stan is author of the books *Baby You're a Rich Man: Suing the Beatles for Fun & Profit* and *They Fought the Law: Rock Music Goes to Court*, the latter which is available in an updated, expanded edition in Amazon's Kindle Store. He has spoken to the New York State Bar Association EASL Section on a number of well-received occasions. He can be reached at 303-315-7454 or Stan.Soocher@ucdenver.edu. Website: www.stansoocher.com.

CELEBRITY CRYPTOCOLLECTIBLE CONCEPT DENIED TRADE SECRET PROTECTION

The U.S. District Court for the Southern District of California denied a preliminary injunction to a company claiming a trade secret in enabling athlete and entertainers to "commoditize themselves, fund their projects, and create a new type of asset … by launching a regulated [blockchain] token." *Founder Starcoin Inc. v. Launch Labs*, 18-CV-972 (S.D. Calif. 2018).

Plaintiff Founder Starcoin had approached Launch Labs after the latter debuted the virtual game *CryptoKitties* featuring celebrity likenesses, but in May 2018 sued Launch Labs for trade secret misappropriation under the federal Defend Trade Secrets Act, 18 U.S.C. §1836. The complaint alleged Founder Starcoin gave the defendant "valuable, confidential, trade secret information … concerning licensing digital collectibles based on athletes, entertainers and celebrities that [Launch Labs] did not have, and was not then developing."

Launch Labs promoted its game as "the world's first officially licensed sports crypotcollectible." However, District Judge Janis L. Sammartino observed: "Plaintiff's purported trade secret lacks sufficient particularity that might allow Defendant to ascertain the boundaries of the trade secret."

Judge Sammartino added: "Marrying the concept of celebrity licensing with blockchain technology appears, on its face, to be unremarkable, obvious, and general knowledge. Nearly every industry attempts to gain celebrity endorsements for products. While the Court does not discount that there could be a trade secret embedded in this general idea, the Court finds that Plaintiff has not carried its burden to explain how its trade secret is unique to the blockchain industry.

NO ACTUAL MALICE TO SUPPORT DEFAMATION CLAIM OVER COMPOSITE CHARACTER IN FILM

The U.S. District Court for the Eastern District of New York granted summary judgment for production and distribution defendants in a public-figure libel suit brought over the movie *The Wolf of Wall Street*. *Greene v. Paramount Pictures Corp.*, 14-CV-1044 (E.D.N.Y. 2018).

The 2013 film release, starring Leonard DiCaprio and directed by Martin Scorsese, was based on a memoir by the co-founder of the discredited securities firm Stratton Oakmont. Plaintiff Andrew Greene, a key character in the book, alleged he was defamed in the movie by being "Nicky Koskoff," who the defendants argue was instead was a composite character of several Stratton Oakmont employees.

Eschewing "automatic actual malice" in an "of and concerning" defamation dispute, District Judge Joanna Seybert concluded: "Defendants did not act with knowledge or reckless disregard for whether Koskoff was 'of and concerning' Plaintiff, and thus, that they did not act with actual malice." According to the district judge, this included because the movie's closing-credits disclaimer stated that "certain characters, characterizations, incidents, locations and dialogue were fictionalized or invented for purposes of dramatization" and "the undisputed facts that the Koskoff Character is a composite of three people and has a different name, nickname, employment history, personal history, and criminal history than Plaintiff."

FIDUCIARY BREACH CLAIM CAN REMAIN IN LAWSUIT AGAINST AMC NETWORKS OVER *FEAR OF WALKING DEAD* TV SERIES

The U.S. District Court for the Northern District of California found a claim for breach of fiduciary duty can continue against AMC in a lawsuit that also alleges the *Fear the Walking Dead* TV show infringes on the copyright of comic book creator Melvin Smith. *Smith v. AMC Networks Inc.*, 18-CV-03803 (N.D.Calif. 2019).

Smith claims the zombie-themed TV series on AMC Networks infringed on the copyright for his comic book *Dead Ahead*, about "zombies on the high seas." Smith's agent David Alpert had become co-executive producer of the TV series. First, allowing Smith's copyright infringement claim to move forward, District Judge Lucy H. Koh noted: "Given that Defendants' motions [to dismiss] are 12(b)(6) motions, there is no full record to review or any expert testimony upon which the Court may rely."

District Judge Koh then denied AMC's request for her to take judicial notice of "generic elements of action-adventure, thriller, and horror films and television series, including those involving invasions or outbreaks of some sort and those that take place at sea." The district judge stated: "AMC Defendants reference more than a dozen books, films, Wikipedia articles, and websites, none of which are mentioned in [Smith's complaint]." She added: "In essence, what AMC Defendants ask is that the Court take judicial notice of the aforementioned concepts based purely on AMC Defendants' representation that the underlying works, of which the Court is not asked to take judicial notice, show that the above concepts are generic. … [T]he Court finds that whether the above concepts are generic is subject to reasonable dispute …"

Finally, Smith also alleged Alpert "violated and continues to violate his fiduciary duty [as Smith's agent] by engaging in a pattern and practice of self-dealing." In permitting this fiduciary breach claim to also proceed against the AMC defendants, Judge Kohl explained: "Plaintiff also alleges that AMC Defendants employee Dave Erickson 'worked closely and in concert with David Alpert and [series co-executive producer] Robert Kirkman in the developing, scripting, casting and production of FEAR THE WALKING DEAD …" Moreover, 'as showrunner and a credited co-creator, Dave Erickson served as the primary creative contributor acting on behalf of the AMC Entities, in their collaboration in and funding of the development, scripting, casting, and production of FEAR THE WALKING DEAD.'"

As a result, the district court concluded: "AMC Defendants' argument that there are no allegations that AMC defendants provided 'substantial assistance or encouragement' to Alpert is unavailing."

NO JOINT COPYRIGHT CREATED FROM DAMON DASH'S FILM CO-DIRECTING STINT

The U.S. District Court for the Southern District of New York issued a preliminary injunction preventing actor/music producer Damon Dash from promoting the film *Dear Frank*, which Dash claimed he co-directed for a time under a verbal agreement and thus became co-author of the movie copyright. *Webber v. Dash*, 19 Civ. 610 (S.D.N.Y. 2019).

Director Josh Webber and producer Muddy Water Pictures filed a complaint that included for a declaration that Muddy Waters solely owns the film copyright. Chief District Judge Colleen McMahon observed: "[O]n this record, Muddy's contributions to the Film far outweighed Dash's. Muddy financed the Film in its entirety, entered into work-for-hire agreements with all cast and crew (including the Film's screenwriter), and entered into all other third-party contracts that were necessary to the Film's creation."

Chief Judge McMahon added: "Muddy — having released Dash as a director of the Film over 'creative differences' — clearly exercised final decision-making authority and creative control over the Film."

But there was more from the court: "Most compelling on the issue of mutual intent [to be co-authors], however, is Dash's text message exchange with Webber, in which he concedes that he is holding up distribution of the Film because he now realizes its potential value." The chief judge warned Dash: "The Court cannot and will not transform that bargaining chip into a copyright interest."

COPYRIGHT INFRINGEMENT SUIT OVER JUSTIN TIMBERLAKE SONG IS FOUND TIMELY

The rights holder in the 1969 song "A New Day Is Here At Last" by the late Perry Kibble filed a copyright infringement suit in the U.S. District Court for the Southern District of New York over a sample in the 2006 release "Damn Girl" by Justin Timberlake that featured lawsuit co-defendant will i. am. *PK Music Performance Inc. v. Timberlake*, 16-CV-1215 (S.D.N.Y. 2018). The defendants filed a motion to dismiss, arguing the case wasn't timely filed.

Denying the motion, District Judge Vernon S. Broderick noted in part as to the accrual of the plaintiff's claim: "Defendants' argument that the popularity and success of [Timberlake's *Futuresex/Lovesounds*] Album, DVD, Tour, and HBO Special gave rise to constructive or inquiry notice of Plaintiff's claims is unpersuasive. Nothing in the record before me suggests that [the single] *Damn Girl* was ever played on the radio, and even if it was, that Plaintiff had the opportunity to hear it. The only way Plaintiff would have heard *Damn Girl* would have been by buying the Album or DVD (or obtaining/hearing the song in some other way), owning an HBO subscription (or watching HBO or the performance of the song on HBO in some other way), or attending a concert on the Tour. Defendants have supplied no case law that suggests that a diligent plaintiff is one who obtains all popular or successful albums or concert DVDs at any given time and scours each song and the liner notes to discover potential infringements."

THREE-YEAR STATUTE OF LIMITATIONS ARGUMENT DOESN'T BAR CLAIMS TO COPYRIGHT RENEWAL TERMS

The U.S. Court of Appeals for the Second Circuit ruled that plaintiffs weren't time-barred from claiming copyright renewal terms in a song and sound recording for which the defendants had claimed copyright ownership in the 1970s. *Wilson v. Dynatone Publishing Co.*, 892 F.3d 112 (2d Cir. 2018).

Former members of the music group Sly, Slick & Wicked alleged they owned the renewal-term copyrights, under 17 U.S.C. §304(a), in the early 1970s song and sound recording "Sho' Nuff" for which the defendants issued sampling licenses for 2013 recordings by music artists Justin Timberlake and J. Cole. The U.S. District Court for the Southern District of New York found the plaintiffs' 2016 lawsuit was barred by the three-year statute of limitations of §507(b) of the Copyright Act.

But the Second Circuit explained: "Here, the copyright notice on the 1973 record label and Defendants' 1974 copyright registration [of the song] occurred during the original term. … [T]hose acts, while they may have repudiated Plaintiffs' claim to the initial terms, did not repudiate Plaintiffs' ownership of the [automatically vesting] renewal terms."

The appeals court went on to note: "Defendants rely on Defendant UMG [Recordings] 2001 registration of a renewal term copyright *in the sound recording*, and the sampling of the Sho' Nuff recording without paying royalties, which began on or about January 15, 2013. Neither fact supports a finding that this action is time-barred. At least in these circumstances, UMG's registration of the renewal term with the Copyright Office did not amount to a repudiation of the Plaintiffs' claim triggering their obligation to bring suit. If mere registration of a copyright without more sufficed to trigger the accrual of an ownership claim, then rightful owners would be forced to maintain constant vigil over new registrations. Such a requirement would be vastly more burdensome than the obligations that 'a reasonably diligent plaintiff' would undertake."

The Second Circuit did acknowledge, however, that UMG might win "based on the proposition that UMG's predecessor, by listing itself as copyright owner on the record label, put 'a reasonably diligent plaintiff' on notice to check the Copyright Office registration, … which would have revealed that UMG's predecessor had listed itself as 'Employer for Hire.'"

EVERLY BROTHERS FAMILY FEUD OVER OWNERSHIP OF "CATHY'S CLOWN" SONG COPYRIGHT

The U.S. District Court for the Middle District of Tennessee, Nashville Division, decided that the family of the late Phil Everly was time-barred by the three-year statute of limitations of §507(b) of the Copyright Act from claiming a copyright co-ownership interest in the Everly Brothers' 1960 hit song "Cathy's Clown." *Everly v. Everly*, 352 F.Supp.3d 834 (M.D.Tenn. 2018).

Acuff-Rose, the Everlys' music publisher, registered the song copyright in the Copyright Office in 1960 with Phil and Don as co-authors. In 1980, following what a friend of Phil's described as a "very violent verbally" phone conversation between the brothers, Phil signed a "Release and Assignment" that Don claimed gave Don sole authorship of "Cathy's Clown." Acuff-Rose's 1988 registration of the copyright renewal term cites Don as sole author. In 2011, Don sent a copyright termination notice to recapture the song copyright from Acuff-Rose. Phil died in 2014. In 2016, Phil's family sent a termination notice to Don, who sued for a declaratory ruling that he is sole author of "Cathy's Clown."

District Judge Aleta A. Trauger observed: "This case is in an unusual procedural posture, and neither party has pointed to any precedent that is directly on point." District Judge Trauger found: "[B]ased on the totality of the evidence … Don Everly plainly and expressly repudiated Phil Everly's claim to joint authorship of the Subject Composition[] no later than 2011, when Don filed his Notice of Termination." The court added: "The 2011 Don Everly Notice of Termination filed in the Copyright Office was a public record."

TV HOST'S COURSE OF CONDUCT
DURING HIS LIFE BARS ESTATE
FROM GETTING IP AND PUBLICITY RIGHTS

The U.S. District Court for the Eastern District of Virginia decided that neither the trust nor the estate of Bob Ross, who hosted the PBS TV series *The Joy of Painting*, owns rights to "Bob Ross" intellectual property and right of publicity, based in part on Ross's course of conduct during his life. *RSR Art LLC v. Bob Ross Inc. (BRI)*, 1:17-cv-1077.

Ross, who lived in Florida, formed BRI with his wife and two friends. Prior to his death in 1995, BRI registered several "Bob Ross" trademarks. Also during his lifetime, BRI entered into licensing agreements for Ross products. In 1994, a BRI agreement was drafted to provide the company had the "sole and exclusive" rights to Ross's intellectual property and right of publicity, though he never signed the document. Around the same time, Ross created the Bob Ross Trust and in writing assigned these rights to himself. In 1997, the trust, Ross's estate and BRI entered into a written settlement agreement confirming BRI owned Ross trademarks and art works.

But RSR Art, whose founders include Ross's son Robert Stephen Ross, later filed suit challenging BRI's rights. Granting summary judgment for BRI, however, District Judge Liam O'Grady noted: "The record demonstrates that Bob Ross gave BRI the right to his intellectual property and right of publicity during his lifetime. While there is no formal written agreement assigning those rights to BRI, there is ample evidence in the record supporting that the unsigned written agreement would have merely formalized Bob Ross's oral grant of the exclusive rights to his intellectual property and right of publicity to BRI." District Judge Grady explained that Ross had "acted as though and consented to documents stating that BRI held exclusive rights to his name, image and likeness." (Florida's right-of-publicity statute recognizes verbal transfers of the right of publicity by a living individual. *See* Fla. Stat. §540.08(1).)

The district judge thus decided that Ross didn't have the rights to transfer via his trust or following his death. In any case, the court ruled, the 1997 settlement agreement ended any claim to the IP and publicity rights by any party other than BRI.

OUT-OF-STATE LAW FIRM
LET OUT OF PRINCE RECORDINGS
MINNESOTA LITIGATION

The U.S. District Court for the District of Minnesota decided it lacked personal jurisdiction over an out-of-state law firm named as a defendant in a lawsuit by Prince's estate over alleged unauthorized distribution of some of the late artist's previously unreleased recordings. *Paisley Park Enterprises Inc. v. Boxill*, 17-cv-1212 (D.Minn. 2019).

Co-defendant George Ian Boxill, a recording engineer who worked with Prince, allegedly signed a confidentiality agreement that stated the Prince recordings Boxill worked on "shall remain Paisley's sole and exclusive property, shall not be used by [Boxill] in any way whatsoever, and shall be returned to Paisley immediately upon request."

After Prince died in 2016, the Boston-based law firm Brown & Rosen (B & R), also named as a defendant in the litigation, provided an opinion letter to other defendants stating that the Prince recordings were Prince-Boxill joint works. Paisley Park claimed that, despite its confidentiality agreement with Boxill, the music release defendants used the opinion letter to obtain sales opportunities from third parties.

Granting B&R's motion to be dismissed from the case, District Judge Wilhelmina M. Wright noted: "Plaintiffs allege that (1) with knowledge that the nationwide distribution would include sales to Minnesota, B&R advised Boxill and [co-defendant Rogue Music Alliance] to distribute the Prince Recordings; (2) B&R engaged in license negotiations and discussed Boxill's authorship status with the Prince Estate on multiple occasions; and (3) B&R authored an opinion letter regarding a contract involving a Minnesota entity." However, District Judge Wright also noted: "Although Plaintiffs allege that B&R encouraged Defendants to distribute the Prince Recordings, Plaintiffs concede that B&R did not directly sell the music. Merely encouraging another party to place an item in the stream of commerce does not establish personal jurisdiction over B&R."

The district judge concluded: "An out-of-state law firm provided advice to out-of-state [defense] clients. The advice happened to concern a Minnesota entity and several sales happened to be to Minnesota residents. But to subject B&R to this Court's personal jurisdiction under these circumstances would discourage the dissemination of legal advice and expand the reach of personal jurisdiction well beyond its current limits."

LAWYERING ETHICS RULE IN PLAY IN LAWSUIT BY BUSINESS MANAGER AGAINST RAP ARIST

The U.S. District Court for the Western District of North Carolina dismissed a conversion counterclaim by rapper Chingy against his former business manager Leslie King, a lawyer, on the ground the artist hadn't established that a royalty purchase agreement he signed with the lawyer was void for allegedly violating the state's attorney ethics rule. *Viper Publishing Inc. v. Bailey*, 3:17-CV-00314 (W.D.N.C. 2018). However, the district court allowed the artist to pursue the ethics rule as an affirmative defense in the underlying lawsuit the attorney's music company has filed against Chingy.

King's Viper Publishing sued Chingy for allegedly breaching a contract under which Viper claims it obtained the right to Chingy's digital performance royalties from his sound recordings. Chingy argued he thought the purchase agreement included only one of his tracks.

Under the conflict-of-interest provision of Rule 1.8 of the North Carolina's Rules of Professional Conduct, when an attorney acquires "an ownership, possessory, security, or other pecuniary interest directly adverse to a client," the lawyer must in writing make full disclosure to the client and advise the client to seek independent counsel for the transaction, as well as obtain informed written consent from the client.

But District Judge Graham C. Mullen found: "The only allegation describing any type of *current* relationship between [Howard] Bailey [*i.e.*, Chingy] and King consists of the statement that King provided 'advice' and 'assistance' from 'time to time' to Bailey. Bailey does not describe the type of advice or assistance provided by King, nor does he even allege that the advice and assistance was legal in nature. … At the time the [music royalty] Purchase Agreement was negotiated and signed, Bailey alleges only that he asked King to help him secure financing [to record a single track], and that when those efforts were unsuccessful, King offered to finance the project. Neither of these actions would lead a person in Bailey's position to reasonably believe that he and King shared an attorney-client relationship."

On the other hand, District Judge Mullen noted, "Bailey does not need to plead an affirmative defense with the same level of specificity. Rather, in light of the allegations contained in the Complaint, it is clear that such a[n ethics] violation, if proven, would qualify as a valid defense to Viper's breach of contract claims."

The district court subsequently denied Viper/King's motion a preliminary injunction to order Chingy to deposit the royalties in dispute with the court clerk or into an escrow account. District Judge Mullen noted: "The Court acknowledges that the Purchase Agreement purports to convey 'any and all worldwide digital performance rights to any sound recording created by' Chingy along with the right to license and grant reproduction rights to [his] recordings. However, the Purchase Agreement also contains a liquidated damages clause that, should Viper prevail on all of his claims, would provide a basis for providing compensation that the parties previously agreed was a reasonable estimate of the cost of the alleged breach." The judge added: "Even if the liquidated damages provision is found to be unenforceable but Viper otherwise prevails, Viper's injury could easily be remedied by an accurate accounting of the money value of the royalties lost during the course of litigation."

Tax Panel

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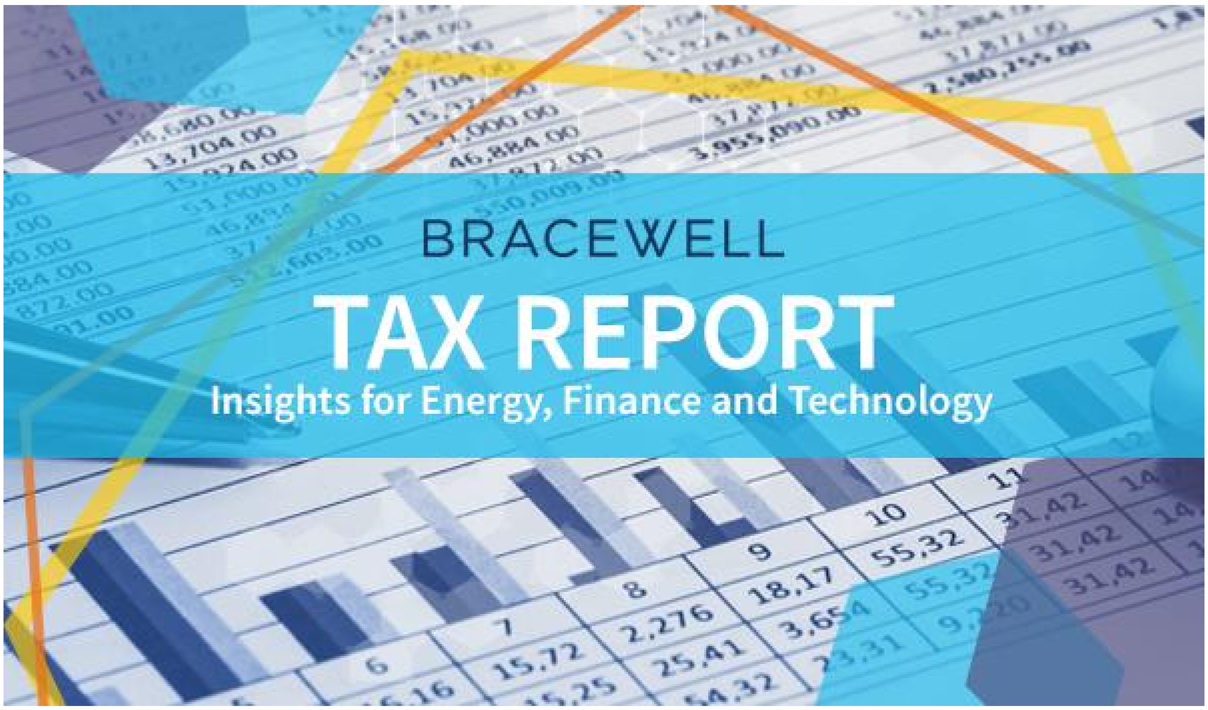
From Hollywood to the Gray Lady: The Impact of Tax Reform on Film, Television and Print Media

March 29, 2018 | **Blog Posts** [/insight-type/blog-posts] | By: **Michele J. Alexander** and **Ryan Davis**



While the media has been reporting on recent tax reform since before the first draft of the bill was introduced, tax reform also will impact the media industry itself, in ways both expected and unexpected. As we will explore here and in future installments, the industry may be impacted in many ways, from a reduction in tax rates and new deductions, to the loss of important deductions and new international regimes that have kept tax experts waiting in anticipation of further guidance.

Considered some of the biggest winners as a result of the reduced corporate tax rate, media companies stand to reap billions from the 40% decrease (from 35% to 21%) provided for in the Tax Cuts and Jobs Act (TCJA). Most of the largest companies in this space operate as corporations (such as Disney, Comcast, and 21st Century Fox) and, as a result, the industry paid one of the highest effective tax rates of any sector.[1] [#1] Moreover, media companies operating in corporate form will be able to take advantage of the new 100% dividends received deduction (DRD) for distributions from a foreign subsidiary to its 10% U.S. shareholders. This deduction applies only to the foreign-source portion of dividends received from a foreign corporation by its U.S. corporate shareholders and is therefore not available to companies which operate as partnerships (or other entities treated as pass throughs, such as LLCs), resulting in an advantage for media companies over their competitors operating in these non-corporate forms. As a result of these factors, the media and entertainment industry is expected to see one of the largest windfalls as a result of the TCJA's passage. This newfound surplus comes at a particularly precarious time for these media companies, as cord-cutting, competition from internet-based streaming and other services and the multiplication of alternative news sources have cut into the revenues of film, television and print media.[2] [#1] Consequently, these companies may use this income to reinvest in capital and labor, as many claim was evidenced by the widely publicized bonuses both Disney and Comcast paid to employees in the immediate aftermath of the TCJA's passage.[3] [#1] However, some argue that companies will not use the windfall for compensation but rather for stock buybacks and other actions to benefit stockholders.[4] [#1] These additional funds also may lead to an increase in M&A activity, as companies attempt to use the extra cash to fund both mergers and acquisitions in order to better secure their place in an increasingly difficult market.

Owners of smaller media companies that operate as partnerships also may benefit from the new qualified business income (QBI) deduction (click **here** **[https://www.bracewell.com/blog/impact-individuals-operating-business-directly-or-indirectly-through-pass-through-entity]** for more). New Code Section 199A generally permits a 20% deduction against taxable income for QBI, which, broadly-speaking, is taxable income earned through partnerships from certain U.S. trades or businesses. Under prior law, an individual taxpayer's QBI would have been subject to the ordinary federal income tax rates applicable to individuals, with a maximum rate of 39.6%. Under the TCJA, unless limitations apply, the QBI deduction could reduce the maximum effective rate imposed on an individual's share of a partnership's QBI to 29.6% (or 80% of the new maximum ordinary rate of 37%). However, new Code Section 199A seems to come at the cost of former Code Section 199, which provided a deduction for domestic production activities (the Domestic Production Activities Deduction or DPAD) and was relied upon heavily in the media and entertainment industry, most notably for film and TV production. This incentive brought film and TV production back from Canada and other jurisdictions that had initially lured companies abroad with low cost and tax incentives. U.S. states, such as Georgia, New York and North Carolina, and U.S. cities, such as New York City, followed suit by implementing incentives of their own. With the repeal of the DPAD, it remains to be seen if state and local incentives will be sufficient, along with lower tax rates and a new expense deduction (discussed below), to keep media production on shore or whether they will have to add new incentives and/or augment existing ones.

As noted, the loss of the DPAD may be partially counteracted by new production incentives for domestic film, television and live theater. The immediate expensing provision contained in Code Section 168(k) allows businesses to immediately deduct the full cost of new and used property placed into service between September 27, 2017 and (generally) January 1, 2023, at which point the percentage that may be expensed begins to be phased down through January 1, 2027. Code Section 168(k) specifically permits film and theater production companies to take advantage of this new immediate expensing with respect to their capital investment in projects where 75% of the compensation for services occurs in the United States, with the intention of increasing the number of projects undertaken domestically. The extent to which this new deduction mitigates the effect of the DPAD's repeal thus depends in part on how capital intensive a company's production activities may be.

Media companies debating the pros and cons of keeping production activities in the United States certainly will have to consider the implications of the TCJA's international tax reform provisions. In addition to the decreased corporate rate, the second primary aim of corporate tax reform was bringing the U.S. federal tax system more in line with the territorial model. These provisions seek to accomplish this by both encouraging the repatriation of income held abroad and punishing companies that refuse to do so. In order to encourage the return of this capital to the United States, the TCJA provides for a low one-time repatriation tax on income previously kept offshore (15.5% on foreign cash and other liquid assets and 8% on all residual assets, in each case, to the extent of earnings and profits). This will provide domestic media companies with much-desired access to money that has been kept offshore due to the high cost of repatriation before the passage of the TCJA.

Taxpayers operating in this sector will be further encouraged to take advantage of this one-time repatriation opportunity as a result of certain punitive measures found within the TCJA's international provisions. The new Base Erosion Anti-Abuse Tax (BEAT) generally operates to limit deductibility of payments to affiliates of U.S. taxpayers that are in low- or no-tax jurisdictions (click **here** **[https://www.bracewell.com/blog/provisions-affecting-renewable-energy-and-power-industry]** for more). The BEAT generally requires corporations with average annual gross receipts of $500 million to pay a tax on deductible payments made to foreign affiliates equal to 10% for years before 2025, with a phase in at 5% for 2018. Worldwide media companies might find themselves unexpectedly hit by BEAT, depending on the residency of their affiliates (i.e., in low-tax jurisdictions) as BEAT does not require an intent to evade tax.

Another new international provision in the TCJA, the global intangible low-taxed income (GILTI) tax, is designed to impose a tax on companies that hold valuable intangible assets offshore, a particularly important provision for a global industry reliant on licenses, copyrights and royalties. This requires U.S. shareholders holding at least a 10% share of a controlled foreign corporation to include in gross income for the tax year such corporation's income from intangible assets held abroad that would not otherwise be taxable in the United States (click **here** **[https://www.bracewell.com/blog/focus-finance-impact-tax-reform]** for more). Although there are deductions available that will allow corporations to be taxed on intangibles at an effective rate of 10.5% through 2025 and at 13.125% beginning in 2026, this still presents a liability that may push media companies to repatriate offshore assets. As we have noted in previous installments, these rules are under intense scrutiny for certain potential unintended consequences, so future guidance and regulations that could impact how this provision is interpreted and/or enacted may be forthcoming.

In addition to the benefits of reform described above, media companies—particularly television and print media which depend heavily on advertising dollars—dodged a bullet when Congress decided not to use the TCJA to remove certain advertising deductions.[5] [#1] [#1] Aside from its effect on the largest media corporations, the removal of these deductions would have had a particularly negative impact on local television and print media, which rely heavily on small business advertising. The possibility of removing this deduction in order to pay for other tax decreases in the bill was openly discussed throughout the drafting process, with many proponents of local media outlets claiming that its removal would prove to be a death knell for these already struggling enterprises.[6] [#1] To the relief of these advocates, the deduction's removal did not find its way into the bill's final form.

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[] [1] See **here** **[http://deadline.com/2017/12/tax-overhaul-hollywood-windfall-1202230059/]**

[2] See **here** **[https://www.pwc.com/us/outlook]** and **here** **[http://www.pewresearch.org/fact-tank/2017/06/01/circulation-and-revenue-fall-for-newspaper-industry/]**

[3] See **here** **[http://variety.com/2018/tv/news/media-firms-tax-reform-1202695792/]**

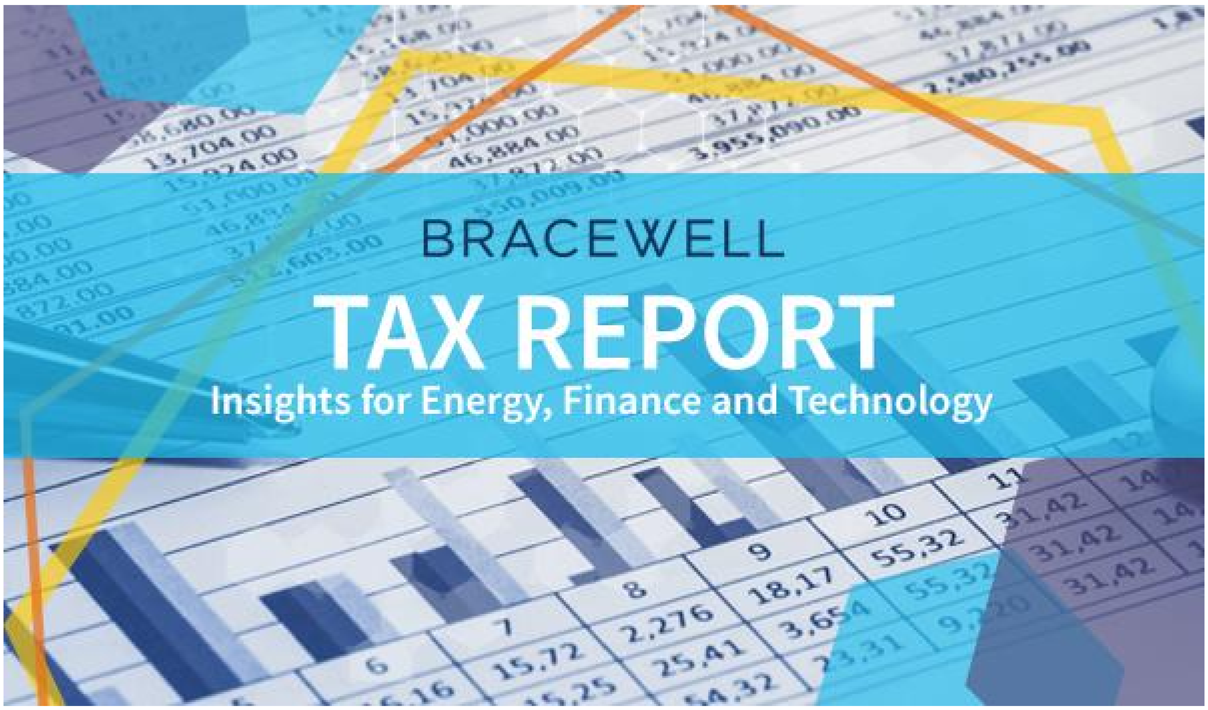
[4] See **here** **[http://www.syracuse.com/opinion/index.ssf/2018/03/gop_tax_law_will_devastate_new_yorkers_commentary.html]**

[5] See **here** **[https://www.bloomberg.com/news/articles/2017-10-31/big-media-makes-late-push-to-kill-advertising-levy-in-tax-bill]**

[6] See **here** **[http://thehill.com/policy/finance/333743-lawmakers-leave-advertising-tax-break-alone]**

From Hollywood to the Gray Lady: The Impact of Tax Reform on Film, Television and Print Media - Part 2

April 12, 2018 | **Blog Posts** [/insight-type/blog-posts] | By: **Michele J. Alexander** and **Ryan Davis**



As noted in our last report, tax reform will impact the media industry in many ways, including those in the industry responsible for reporting on the widespread effects of these sweeping changes to existing tax law. In this installment, we will explore new limitations which will specifically impact media companies' restructuring, acquisition and disposition strategies.

The Tax Cuts and Jobs Act (TCJA) contains new limits on a corporation's ability to take advantage of its net operating losses (NOLs), which may harm traditional media companies disproportionately operating as corporations (click **here** [https://bracewell.com/blog/focus-finance-debt-restructuring-under-tax-cuts-and-jobs-act] for more). As a result of the TCJA, corporations generally will be able to utilize NOL carryovers against only 80% of their taxable income in future years, and carrybacks are eliminated. Notably, this change affects losses arising in 2018, so NOL carryforwards from 2017 and earlier are not subject to the 80% limit (or carryback repeal) – which may accelerate business transactions that originally were contemplated to occur further down the road for media companies than 2018. While we already expect to see more M&A activity in this sector due to the 40% decrease in the corporate tax rate, target media companies with large NOLs otherwise may be considered less attractive due to the limited opportunity to use prior losses in future years. Of course, taxpayers already had been subject to limits in their ability to "traffic" in losses by purchasing such "loss companies" – namely, Code

Section 382 limits the ability of a corporation, following an "ownership change" (a defined term, but one that includes most M&A activity) to use "pre-change" losses against "post-change" income. Because the limitation is the value of the corporation at the time of the change multiplied by a prescribed rate, there may be circumstances where it is not a material impediment (i.e., where the value of the enterprise is high). However, even there, and certainly where the Code Section 382 limitation already is severe, this new NOL limit further devalues the tax benefit. As a result, 2018 may be a banner year for media acquisitions, as companies try to close transactions ahead of this change.

The new NOL limitation also may have a large impact on strategic decisions media companies must make on whether to restructure their debt. Generally, when debt is forgiven or reduced, borrowers are taxed on the amount of debt from which they are, or are deemed to be, relieved (cancellation of indebtedness, or COD, income). As noted **here** [https://bracewell.com/blog/focus-finance-debt-restructuring-under-tax-cuts-and-jobs-act] , a company looking to restructure its debt and facing the possibility of COD income could rely on: (1) large NOL carryovers to shield taxable COD income and (2) an exclusion of COD income from taxable income for a debtor who is in a bankruptcy case or insolvent (but, in the latter case, only to the extent the debtor's liabilities exceed its assets). Where the COD income is excluded, such exclusion is at the cost of reducing certain attributes of the debtor, notably NOLs and depreciable tax basis. As we have explored previously, but revisit here in the context of media restructurings, the new NOL limitation is a new headache for a taxpayer that cannot exclude COD income (in whole or in part). If the taxpayer has (noncash) taxable income from cancellation of debt and insufficient current year losses to shield such income, it could have tax for the year of the restructuring as a result of no longer having a full NOL carryover – and no related cash with which to pay it.

Again, given that the 80% limitation (and carryback repeal) applies to losses arising in taxable years beginning in 2018, more restructurings in 2018 may be expected. Of course, many restructurings will continue to result in excluded COD income. Though not specifically addressed in the new law, we would expect the entire NOL (i.e., not limited to 80% of current taxable income) to be available for reduction against such excluded COD income. Considering that insolvent media companies not in bankruptcy only can exclude COD income (and reduce its tax assets) to the extent of insolvency, following 2018 we may see more media workouts in bankruptcy (possibly prepackaged) to avoid the direct impact of the 80% limitation.

The new interest deduction limits also could be an issue for media companies. Under the TCJA, interest on indebtedness generally may be deducted only up to an amount equal to the sum of business interest income and 30 percent of adjusted gross income (the Interest Deduction Limit) (click **here** [https://bracewell.com/blog/focus-finance-impact-tax-reform] for more). The disallowed interest may be carried forward indefinitely to succeeding taxable years and also may impact media companies' restructuring decisions. As media companies do not typically function as lenders or invest in debt, the new limit effectively is 30 percent of adjusted gross income (and, beginning in 2021, without deduction for depreciation, amortization or depletion). Thus, the new provisions may act as a 30% taxable income limit (with no interest income buffer). However, media companies incur debt and, whereas the new NOL limitations may impact future restructurings, the Interest Deduction Limit may alter the manner in which media companies borrow and restructure existing debt. Generally, there is no COD income recognized to the extent the payment of a liability would have given rise to a deduction. Under prior law, this meant that interest generally was not included as COD income if it was deductible. As we discuss **here** [https://bracewell.com/blog/focus-finance-debt-restructuring-under-tax-cuts-and-jobs-act] , it may be this exception could be read to apply only to the extent that the interest is deductible in the year after the Interest Deduction Limitation is applied. On the other hand, the indefinite carryover could be interpreted to mean that the interest will be deductible at some point (assuming no other limits apply), thus any unpaid interest should continue to be excluded from COD income. To the extent this issue remains unclear, it could impact the ability of media companies to restructure.

As we discussed in our first Bracewell Tax Report (click **here** **[https://bracewell.com/blog/focus-finance-impact-tax-reform]**), we may see more companies looking to preferred equity investment (rather than debt) as a result of the Interest Deduction Limitation (and the NOL limits, to the extent otherwise deductible interest creates or increases NOLs that now may be viewed as less valuable). Going forward, we may see both debt for preferred equity exchanges as well as new placements of preferred equity. Given to whom this type of investment typically is attractive, the media industry may be well-positioned to be an exciting new area for private equity investment.

Finally, the repeal of like-kind exchange treatment other than for real estate also stands to disproportionately affect media transactions. Prior to the TCJA, Code Section 1031 allowed for tax-free treatment where property held for use in a trade or business or for investment was exchanged for like-kind property (also held for use in a trade or business or for investment). Television and radio station owners historically switched stations amongst themselves in order to better take advantage of broadcast areas which provided them with more conducive audiences, often in multi-party transactions. This became especially attractive after 2000 once the IRS began ruling (albeit privately) that FCC licenses – even television and radio licenses – were like kind, a point that had been greatly debated due to the differing range, geography and demographics each station could provide.[1] [#1] However, new Code Section 1031(a)(1) limits like-kind exchanges to real property, leaving owners of personal property, such as FCC licenses, out in the cold. Moreover, as FCC licenses are not tangible personal property, they will not be eligible for the new immediate expensing provisions of Code Section 168(k) (click **here** [https://bracewell.com/blog/focus-finance-debt-restructuring-under-tax-cuts-and-jobs-act] for more) which would have offset the loss of like-kind exchange treatment. This repeal will likely have a chilling effect on such transactions, generally seen as beneficial and promoting efficiency the industry.

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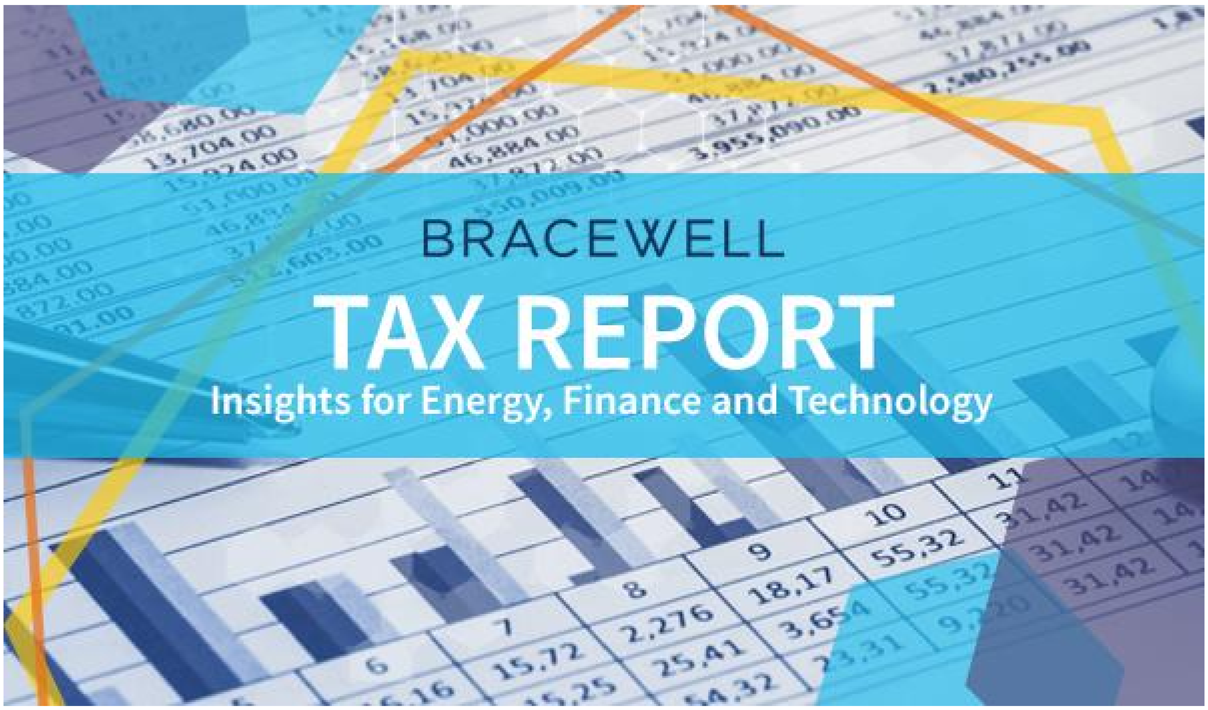
[1] See TAM 200035005.

From Hollywood to the Gray Lady: The Impact of Tax Reform on Film, Television and Print Media - Part 3

April 26, 2018 | **Blog Posts** [/insight-type/blog-posts] | By: **Michele J. Alexander** and **Ryan Davis**



As we have noted in past reports, tax reform is impacting the media industry in a number of important ways (click **here** [https://bracewell.com/blog/hollywood-gray-lady-impact-tax-reform-film-television-and-print-media] and **here** **[https://bracewell.com/blog/hollywood-gray-lady-impact-tax-reform-film-television-and-print-media-part-2]** for more). In this installment, we further explore new international and domestic provisions that will impact media companies' decisions regarding foreign versus domestic production.

Unlike many of the country's largest technology companies, media and entertainment companies generally did not benefit from inversions and other pre-tax reform practices that reduced their overall U.S. tax bill. However, they still find themselves casualties of the Tax Cuts and Jobs Act (TCJA) efforts to curb the parking of valuable assets, and payment of significant cash amounts, offshore. In order to encourage the return of valuable assets and capital to the United States, the TCJA provides for a low one-time repatriation tax on income previously kept offshore (15.5% on foreign cash and other liquid assets and 8% on all residual assets, in each case, to the extent of earnings and profits). Although the tax is intended as short-term encouragement for the return of capital to the United States (as it is imposed whether or not cash actually is repatriated), this also could act as a longer-term incentive for keeping domestic media production onshore. This longer-term domestic benefit is reinforced by other new provisions found in the TCJA. The new Base Erosion Anti-Abuse Tax (BEAT) complements the repatriation tax by providing an incentive for American companies to hold assets onshore by doing away with the primary benefit they derived from not doing so – specifically, the avoidance of U.S. federal taxation. The new provision accomplishes this by limiting the deductibility of payments to foreign affiliates in lower-tax jurisdictions by U.S. taxpayers (click **here** **[https://bracewell.com/blog/hollywood-gray-lady-impact-tax-reform-film-television-and-print-media]** for more). The BEAT generally requires corporations with average annual gross receipts of $500 million to pay a tax on deductible payments made to foreign affiliates equal to 10% for years before 2025, with a phase in at 5% for 2018. While worldwide media companies do not appear to be the intended target, larger media enterprises may find themselves within the ambit of BEAT and thereby motivated to bring certain activities onshore. Of course, there are significant, often competing non-tax considerations for media/entertainment and film production companies, as location may very well impact production and finished product.

Similarly, the global intangible low-taxed income (or GILTI) tax targets American companies that continue to hold intangible assets offshore while maintaining the majority of their operations domestically. This could have a particularly important impact on U.S. media companies, which want to reap the benefits of being located in certain U.S. markets with notable advantages (such as New York or Los Angeles) while still being able to mitigate their tax burden by holding valuable copyrights or licenses abroad. However, just as in the case of BEAT, many international media and entertainment companies have legitimate non-tax reasons for holding these intangibles abroad, particularly in jurisdictions where filming and production actually take place. The new tax undermines this tax maneuver – but also disadvantages this latter category – by requiring U.S. shareholders holding at least a 10% share of a controlled foreign corporation to include in gross income for the tax year such corporation's income from intangible assets held abroad that otherwise would not be taxable in the United States (click **here** [https://bracewell.com/blog/hollywood-gray-lady-impact-tax-reform-film-television-and-print-media] for more). Although the FDII deduction (discussed below) may allow corporations to reduce their tax burden with respect to intangibles, this likely will lead U.S.-based media companies to reevaluate whether it remains profitable to keep these intangible assets abroad – but also to consider bringing activities onshore where the new status quo subjects even "innocent" media companies to the tax.

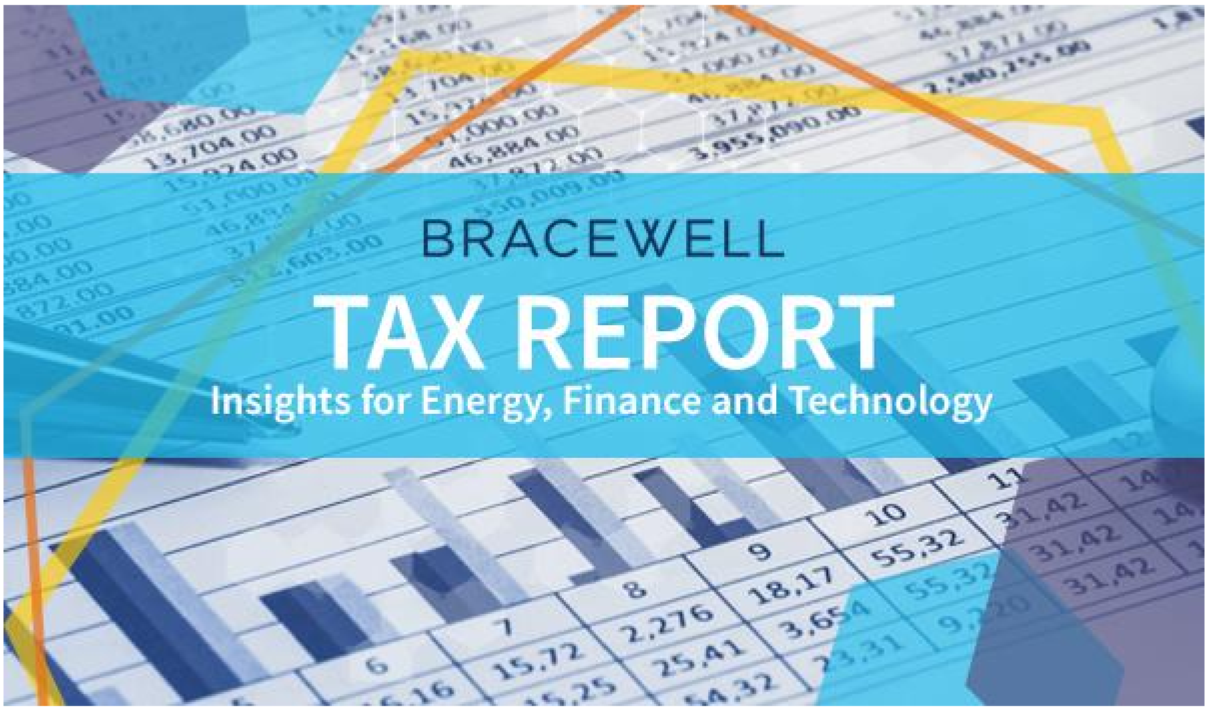
As a practical offset to the GILTI tax, the TCJA provides a new incentive for U.S. companies to provide goods and services to foreign markets by allowing domestic corporations to take deductions on their so-called foreign-derived intangible income (FDII). This deduction only is available to U.S. entities classified as corporations for tax purposes (including domestic corporate subsidiaries of foreign companies) – which provides a disproportionate boon to the media industry – and is determined using a complex calculation (which we will discuss more in-depth in later installments). A domestic corporation's FDII is 37.5% deductible (to the extent it has taxable income), which yields a 13.125% effective tax rate (the new 21% corporate rate multiplied by 37.5%) and may be further reduced with foreign tax credits where applicable. It should be noted, however, that for tax years beginning after December 31, 2025, the effective tax rate on FDII increases to 16.406%. As noted above, the FDII provision also reduces the tax rate on GILTI by 50% to an effective rate of 10.5% (increasing to 13.135% in 2026). One consequence of this provision is that it provides a tax incentive to earn income from the sale of property and services to persons outside the United States, even though media companies otherwise may have these streams without regard to tax. As a result, a number of countries have threatened to challenge the legality this provision at the World Trade Organization under the theory that it provides an export subsidy to domestic corporations. At the same time, media and technology companies are undertaking detailed review of their tax projections taking into account GILTI and FDII – as we will explore in greater detail in future installments, it seems like a "mixed bag" within the industry as to how much the GILTI will sting, and how much the FDII will mitigate.

In addition to encouraging (or coercing) domestic media companies to return capital and investment to the United States, the TCJA also may spur new investment from non-U.S. investors. Specifically, the significantly lower corporate rate could encourage investment from foreign companies (and other types of foreign investors) that had previously refrained from doing so due to the relatively high U.S. corporate tax rate. It is possible that prior to the law's passage, potential television and film investors outside of the United States were hesitant to invest in productions without the presence of corporate blockers. However, blockers were viewed as unattractive options due both to the entity-level rate of taxation and the former so-called earnings stripping rules, which limited interest deductions for related party debt (click **here** **[https://bracewell.com/blog/finance-funds-%E2%80%93-how-tax-reform-may-impact-borrowing-and-investing-private-equity]** for more). Now the TCJA has repealed the earnings stripping rules and, at the same time, one of the largest drawback to using blockers – the entity level tax to which they are subject – now is mitigated by the aforementioned decrease in the corporate tax rate (from 35% to 21%). Particularly where the investment strategy does not rely on dividend payments, blockers actually may be a more attractive option following tax reform. In particular, private equity funds with a media focus may consider more U.S. investment, particularly since traditional fund investment does not contemplate dividend payments.

The alleviation of these concerns with corporate blockers also may encourage potential foreign investors in media to use them, or switch to them from an investment in media partnerships or joint ventures structured as partnerships for tax purposes. This is specifically due to the way in which the TCJA codified a controversial IRS ruling and subjected non-U.S. persons selling partnership interests to tax and withholding on so-called "effectively connected income" (ECI) to the extent that the gain from such disposition is attributable to ECI-producing assets (click **here** [https://bracewell.com/blog/tax-reform-and-foreign-partner] for more). While there has been some preliminary guidance issued on the withholding obligation, in general it may cause practical concerns, as foreign partners attempting to invest domestically may be forced to file federal income tax returns in order to obtain a refund of amounts withheld in excess of their actual tax liability. This may drive foreign investors to invest in media partnerships that plan to utilize blocker corporations in order to protect the foreign investors from both the taint of ECI and any personal reporting requirements to the IRS.

From Hollywood to the Gray Lady: The Impact of Tax Reform on Film, Television and Print Media - Part 4

May 14, 2018 | **Blog Posts** [/insight-type/blog-posts] | By: **Michele J. Alexander** and **Ryan Davis**



As we have noted in past reports, tax reform is impacting the media industry in a number of important ways. In this installment of our focus on tax reform and the media, we will further explore the Foreign-Derived Intangible Income (FDII) Deduction and its role in international tax reform.

As discussed briefly in our prior installment, the Tax Cuts and Jobs Act (TCJA) contains a new provision which provides an incentive for US companies to provide goods and services to customers abroad. This new provision allows a deduction for the taxpayer's so-called foreign-derived intangible income (FDII), which is only available to entities classified as corporations for U.S. federal tax purposes and reduces a corporation's effective rate to 13.125% with respect to such income (rather than the new 21% rate). As we have previously discussed, the largest actors in the media industry operate in corporate form, making the FDII deduction and its incentive for international commercial activity a particularly salient feature of reform for this sector.

The deduction is determined using a complex calculation. First, the domestic corporation must determine its "deduction eligible income" by determining its gross income and then reducing it by certain income items and deductions. Next, the taxpayer must determine the portion of this income which is from the sale of either property or services provided to a foreign person or for foreign use. Finally, the taxpayer must calculate its deemed intangible income, which is its deduction eligible income minus its deemed tangible income return, or 10% of its qualified business asset investment, which is, in turn, defined as the quarterly average of its adjusted bases in certain depreciable tangible property used in the corporation's trade or business. Once these component parts are calculated, the FDII can be determined by multiplying the deemed intangible income by the percentage of the deduction eligible income that is foreign-derived. This FDII is then 37.5% deductible, which, when multiplied by the new 21% rate, yields a 13.125% effective tax rate. This may then be further reduced with foreign tax credits to the extent applicable. However, after December 31, 2025 the effective tax rate on FDII increases to 16.406% (again, based on the current 21 percent US corporate income tax rate).

The critical fact for the purpose of this provision is that the income in question is earned from foreign markets. In general, property must be sold or leased to a foreign person for use outside the United States, and services must be provided to persons, or performed with respect to property, located outside the United States. Consequently, the FDII deduction incentivizes domestic corporations to increase the percentage of their income they earn from foreign customers.

However, as the "simplified" description of the FDII above illustrates, the calculations are difficult, fact specific and pending further guidance, confusing. Time will tell how corporations are meant to, for example, allocate activity that takes place both within and outside the United States. Also, the FDII is a carrot in international tax reform, though it does not on its own encourage companies to bring production onshore, which seems inconsistent with the new international provisions otherwise. As we have discussed at length (**here** **[https://protect-us.mimecast.com/s/yjykC1wYEKfEV16Lc6YL3P]** and **here** **[https://protect-us.mimecast.com/s/NqFyC2kg2LTEMvV0cYLguB]**), the TCJA added a new tax (GILTI) on intangible assets held abroad. For some corporations, the FDII may serve only to mitigate the cost of that new tax. Further, media companies' production often is inflexible as it is driven by the location of news reporting, from live coverage to in-depth documentaries. These companies may find themselves with little room to minimize GILTI and/or maximize the FDII. On the other hand, large movie studios and networks may have sufficient planning opportunities to leverage the new system – moving intangibles onshore to avoid or lower GILTI while otherwise revamping their international planning to take advantage of FDII. It remains to be seen whether Treasury will view this as a favored effect of the new laws or see creative tax planning around these new provisions as abusive. Even absent abuse, media and entertainment companies are dedicating vast resources simply to figure out their GILTI tax exposure and potential FDII – and to know whether planning will be effective, they need to know their starting point.

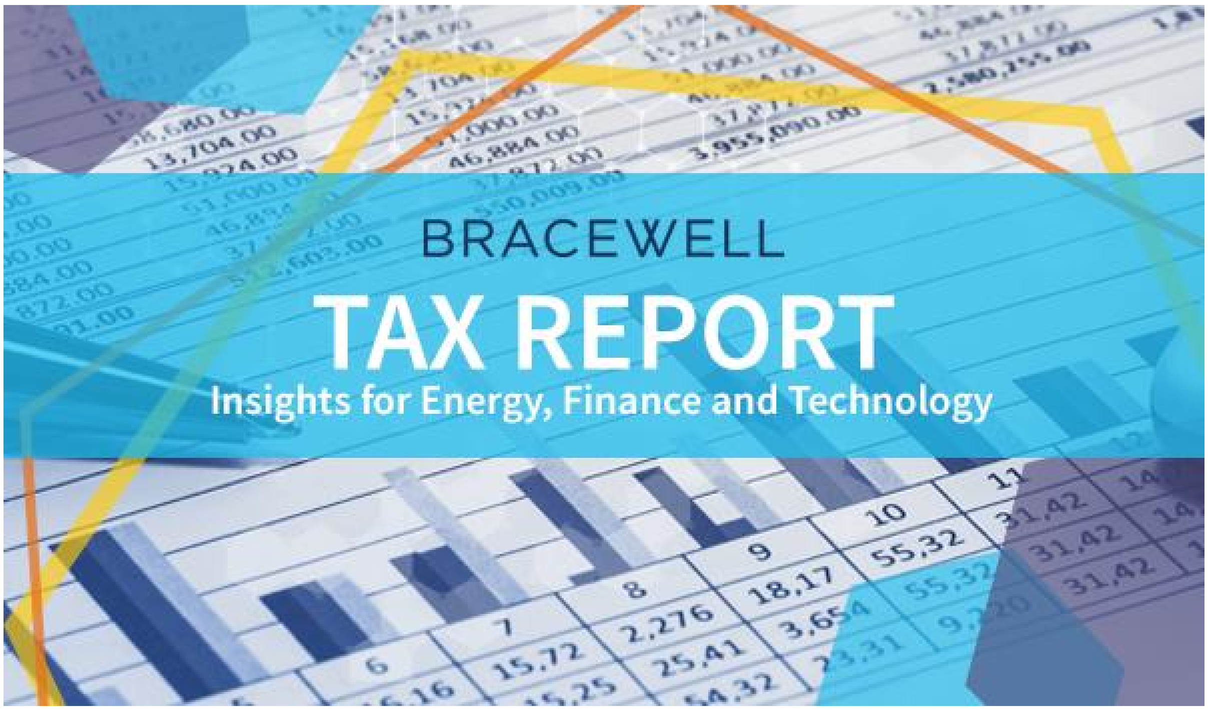
Even given the complexity of the FDII, and that it may be disingenuous to view it in isolation, it may be recognized as an attempt by Congress to allow truly international media and technology companies to compete on the global playing field, particularly where these companies have substantial non-tax reasons to hold intangibles and engage in production abroad. Of course, even in light of possible pre-TCJA tax abuse, the new taxes otherwise could have contained an exception for those companies with a non-tax business purpose for the location of these assets and activities.

Of course, the FDII is another way that Congress is favoring corporate form (in this case, given the assets at issue, in particular for media and tech). The FDII dovetails nicely with the new territorial corporate tax system with a lower tax rate. In an industry that already seems to favor corporate form, media stands to gain tremendously from tax reform – to the extent its actors have the flexibility for efficient tax planning. First, of course, they need to compute their new benefits.

BRACEWELL

From Hollywood to the Gray Lady: The Impact of Tax Reform on Film, Television and Print Media - Part 5

May 31, 2018 | **Blog Posts** [/insight-type/blog-posts] | By: **Michele J. Alexander** and **Ryan Davis**



As we have noted in past reports, tax reform is impacting the media industry in a number of important ways. When making investment decisions, potential investors will look to the overall health of the industry. The entertainment and media sector is unique in its outsized dependence on the creative talent of those who work in the field, as employees or otherwise. Accordingly, this fifth installment discussing tax reform and the media will focus on ways in which tax reform may help or hurt these individuals and, as a consequence, the industry at large.

The change for individual taxpayers resulting from tax reform that has garnered the largest amount of attention in the entertainment and media industry is the elimination (currently, through 2025) of the deduction for itemized expenses above 2% of adjusted gross income (the so-called 2% floor). This had been the means for employees to deduct business related expenses and was particularly important to individuals in the creative professions who are employees for tax purposes. This provision could have applied to the most famous of performers (such as those under contract with a show or network, or a concert promoter, in the case of musicians) who spent a disproportionate amount of their income on items that would qualify for this deduction. These expenses included such industry-specific necessities as acting and other training classes, travel costs for auditions and interviews, head shots and agent and manager fees. It is estimated that, whereas an individual taxpayer taking this deduction only needed to spend approximately 2% of his or her income on the items that qualify under this provision, those in the creative professions spend between 20% and 35%.[1] [#1] This high percentage of income so spent, coupled with the modest salary earned by many individuals working in the entertainment industry, could result in fewer people from lower and middle-income backgrounds – who may have greater talent but lack the financial safety net (or luck) of their wealthier peers – from pursuing a career in the industry. Moreover, those who work "day jobs" in other fields otherwise may be unable to deduct expenses relating to an acting or creative career to the extent they cannot show a history of profit.[2] [#1] Indeed, this is possibly another illustration of how tax reform either has benefitted or spared high wage earners while harming the working class – the media and entertainment industry appears not to have escaped this wide spread effect, and criticism, of the new tax laws.

There are two options available to a taxpayer that wants to continue to deduct these expenses. First, an individual performing services in the entertainment industry instead could perform those services as an independent contractor. However, this would come at the price of certain employee benefits of particular importance to certain people in the entertainment industry, including the right to unionize. The other alternative is for the individual taxpayer to "incorporate" themselves and become a pass through entity, such as an LLC or an "S Corporation," that generally is not itself subject to corporate level tax. Similarly, the individual could form a C corporation and take advantage of lower corporate rates; the effective federal tax rate for an individual shareholder on corporate earnings (now taxed at the new 21% corporate tax rate) and dividends (if any, taxed at 20%) is 36.8%; as we have noted [here], this rivals the new rates on pass through income. In each case, the taxpayer could then "loan out" their services to the media or production company and still take advantage of the deduction. However, these entities may prove unpractical, as incorporation comes with steep attorney fees, both for the high upfront costs for legal filings required for incorporation as well as continued reporting and tax compliance (which can be surprisingly complex, particularly in the case of an S corporation). Consequently, this solution may prove most practical for only the highest earners who ironically otherwise might be least likely to feel the deduction's loss (though high earners operating as employees would not be indifferent, as their costs could have exceeded the 2% floor, even at high levels of compensation). The LLC could be an attractive, less expensive option (which we explore a bit more below), but may require a second member if the intent is to avoid a single member LLC, which generally is ignored for federal income tax purposes. Otherwise, if an actor forms a disregarded entity to perform services, it is no different than the actor herself being an independent contractor or, in certain circumstances, an employee (which is what this intended to avoid).

In addition to the realized concerns about losing the employee business deduction, there also had been concern that the trade and business expense deduction for performing artists would be revoked as a revenue raiser for the new legislation. Fortunately, this deduction was preserved, though the impact may be minimal after all. Code Section 62(a)(2)(B) allows a trade or business expense deduction for expenses of a qualified performing artist incurred in connection with his or her performances. The term "qualified performing artist" means (i) one which performed as an employee for two different employers during the taxable year, (ii) the amount of income eligible for deduction exceeds ten percent of the taxpayer's income, or (iii) the taxpayer made less than $16,000 for the year. As a result of this provision not being repealed, performing artists may continue to take advantage of this valuable deduction while they chase the rise to fame – or settle comfortably in supporting or other roles that are more available. However, this deduction requires the individual to be an employee, which ought to prevent the individual from otherwise deducting job-related expenses (following the repeal of the deduction described above).

However, the new and much publicized strict limitations on deductions for state and local taxes also will negatively impact individuals in the entertainment and media industry, as it is overwhelmingly located in California and the greater New York area (comprised of New York, Connecticut and New Jersey). These jurisdictions all have some of the highest state taxes in the country, with New York City also leveling relatively high local taxes. Of particular concern is the non-deductibility of property taxes, which are particularly high in these states due to both the tax rates themselves and the high value of real property. The inability to deduct this hefty tax burden from their income may lead many in the entertainment and media industry to relocate. This potential dispersal of talent could lead to companies having difficulty filling positions and individuals finding it costly to attend auditions and interviews in other states. On the other hand, opportunities may abound for states and offshore locations that previously had trouble attracting talent away from NYC and LA. However, this is another reason that those not at the highest levels of the industry may be forced away from these epicenters, especially if the industry acclimates to the new higher costs and does not abandon historic locales for filming and production.

New Code Section 199A may be helpful for independent acts that consider themselves too small to warrant incorporation (or otherwise want to avoid corporations) and instead opt for passthrough status. These stand to benefit from the new so-called "qualified business income" (QBI) deduction (click here for more). New Code Section 199A generally permits a 20% deduction against taxable income for QBI, which, broadly-speaking, is taxable income earned from certain U.S. trades or businesses. Under prior law, an individual taxpayer's QBI would have been subject to the ordinary federal income tax rates applicable to individuals, with a maximum rate of 39.6%. Under the TCJA, unless limitations apply, the QBI deduction could reduce the maximum effective rate imposed on an individual's share of an entity's QBI to 29.6% (or 80% of the new maximum ordinary rate of 37%). This will help offset the advantage that larger entertainment and media corporations received over these smaller acts as a result of the forty percent decrease in the federal corporate tax rate. Note that new Section 199A also applies to income earned directly, but the use of a passthrough entity such as an LLC may help a group of performers – such as a band, or a group of actors in a performance – share income, as well as invest income and provide for governance and decision-making powers as desired. Typically, these entities also provide liability protection, which is a prime non-tax consideration – this includes single member LLCs, which provide the benefit of the new 199A deduction, add little to no tax complexity (as they are disregarded for federal and most state income tax purposes), and provides a legal form of doing business separate from the individual.

Although the creation of new Code Section 199A may help individuals in the industry, the repeal of old Code Section 199, which provided a deduction for domestic production activities (the Domestic Production Activities Deduction or DPAD) and was relied upon heavily in the media and entertainment industry, most notably for film and TV production, may negatively impact opportunities for actors, producers and directors as well as other performers in the United States. This incentive brought film and TV production (and with it, jobs in this sector) back from Canada and other jurisdictions that initially had lured companies abroad with low cost and tax incentives. Futhermore, Code Section 181, which allowed the cost of qualified film, television or live theater productions (defined as those projects where 75% of the compensation for services occurs in the United States) to be treated as a deductible expense, does not apply to productions commencing after December 31, 2017.

However, taxpayers wondering what to do about later projects should be pleased to see that going forward, these qualified projects also are eligible for the so-called "immediate expensing" provision contained in Code Section 168(k) (click here for more). This provision allows businesses to immediately deduct the full cost of new and used property placed into service between September 27, 2017 and (generally) January 1, 2023, at which point the percentage that may be expensed begins to be phased down through January 1, 2027. Although there is hope that the new deductionwill result in an increase in the number of projects undertaken (and thus the number of jobs located) domestically, it has yet to be seen the extent to which it will counteract the DAPD's repeal, particularly since it is not yet clear how it will operate in place of the old Section 181 deduction for qualified productions. Combined with the loss of most deductibility for federal tax purposes for state and local taxes, historically favored locations such as NYC and LA also must be considering state and local incentives to keep movie, TV and music production from relocating. If nothing else, the reactions of state and local governments may impact planning for those in media and entertainment on the talent side as much as investors and those on the business side of the industry. Of course, the talent's reaction and tax planning can influence the industry as much as the industry can affect its actors (pun intended).

[] [1] https://www.hollywoodreporter.com/news/study-new-tax-bill-shafts-working-entertainers-but-stars-are-untouched-1067571

[2] See Section 183(d) (presumes that an activity is for profit if profitable for three years in a five year period).

Trust and Estates Panel

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Entertainment Arts & Sport Law section (EASL)

of the New York State Bar Association (NYSBA)

ANNUAL SPRING MEETING

Wednesday, May 15, 2019

2:00 - 5:00 p.m. (CLE Program): **Trusts and Estates Panel**

I. OVERVIEW

Estate Planning Basics for everyone:

- Living Will and Health Care Proxy
- Durable power of attorney for personal business affairs
- Last Will and Testament and/or Revocable Trust
- Beneficiary Designations:
  - Life insurance
  - Retirement assets
- Joint bank or stock accounts
- "Pay of Death" Accounts

Federal Estate and Gift Tax at 40% for amounts over exemption amount

State Estate Tax, depending on domicile

II. **WHAT CAN GO WRONG** (with celebrity examples)?

- Allowing state law to determine who gets property
  - Nonmarital children?
  - Estranged blood relatives?
  - The State of New York?

- Unintended beneficiaries resulting from outright gifts

    - Strangers?
    - Commercial creditors?
    - Eventual ex-spouses of family members?
    - Disliked children of a surviving spouse's previous marriage?
    - Con Artists?
    - "Friends" of the beneficiary with "needs"?

- Inappropriate will and trust provisions

    - Mandatory income or age payouts to children (facilitating waste or damaging behavior)
    - Failure to adequately update documents for subsequent children
    - Failure to anticipate conflicting interests of chosen executors/trustees
    - Failure to utilize provisions that could give beneficiaries significant control without sacrificing creditor protections
    - Bad tax allocation clauses that accelerate the payment of tax
    - Failure to provide flexibility through disclaimer provisions
    - Failure to provide flexibility through decanting provisions
    - Failure to name an appropriate artistic/literary executor to manage body of work
    - Structuring to require otherwise unnecessary court involvement

- Excess taxes payable due to failure to take advantage of available exemptions

    - Inadequate Marital deduction planning
    - Inadequate Generation-Skipping Tax planning
    - Inadequate income tax planning (multiple jurisdictions claiming right to tax)
    - New York versus CA?
    - Don't ignore state estate tax differences to save income taxes

- Litigation resulting from any of the above

III. SPECIAL ISSUES FOR CREATORS OF COPYRIGHTED WORKS AND CELEBRITIES

The Right of Publicity

Rights of Heirs to terminate Copyright

Anonymity and Asset protection

Establishing a clear domicile ("tax home")

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Marc Jacobson

Statutory recapture of rights under U.S. Copyright Law

U.S. entertainment lawyer Marc Jacobson outlines how to recapture rights under copyright.

The grand scheme regarding the term of copyright protection in the U.S., for the first time in 20 years, is in full bloom in the U.S. On January 1, 2019, works first published in or before 1923 fell into the public domain – making them free to copy on their own, or to use to create derivative works based on those public domain works. At the same time, rights in the United States to certain works created in the early 1960's and early 1980's can now be recaptured by the authors, if those authors are still alive, or if deceased, by their statutory heirs. Upon recapture, those authors or their heirs can make a new agreement with the same or a new party, on hopefully better terms. This overall plan granting creators the ability own rights for a limited period of time, as mandated by the US Constitution, as well as Congress' intent to give creators a second bite at the revenue apple, is now in full operation, after years of legislative tinkering. Recapturing of rights in the United States, regardless of where the work is created - US law does not apply in foreign countries (more on that later) - offers creators and their families a new opportunity to make more money from these works.

Copyright is territorial

Copyright law is territorial in nature. As such, the laws of the USA do not apply in Canada or France, for example, nor do the laws of Germany or Australia apply in the US. Each country establishes its own laws, rights and obligations. While these laws, rights and obligations are often consistent in many respects around the world, there are important differences from country to country. For example, there was no copyright law in Cambodia when one of our clients made a movie there using local musical works, which allowed him to use the works around the world without a fee.

Certainly, there is an effort to ensure that certain rights exist under all copyright laws, such as the owner of the copyright owning the exclusive right to copy, perform or display certain works. There is also an effort to harmonize the term of copyright protection among the countries of the world.

Background on the term of US Copyright Law

The 1909 US Copyright Act provided that works registered for copyright which were not works for hire, would have an original term of 28 years, and, if a renewal application was timely and properly filed, a renewal term of 28 years. In the 1976 Act, which became effective on January 1, 1978, Congress extended the term for another 19 years, for a total of 75 years. Then, under the 1998 Sonny Bono Copyright Term Extension Act ("Sony Bono Act"), works received another 20 years, for a total of 95 years from their publication dates. In addition, the Sonny Bono Act effectively protected works which were created in 1923 or after and not yet in the public domain until January

Resumé

Marc Jacobson

Marc Jacobson is a copyright and entertainment attorney practicing in New York City. A recognized authority in the field of copyright law, he is frequently invited to speak to both professional and lay audiences about copyright and entertainment-related topics, including the recapture process. He is the Founding Chairman of the NYS Bar Association Section on Entertainment Arts & Sports Law and is listed in "Best Lawyers" in the United States for 2019. He is one of only a handful of lawyers recognized since 2005 in Chambers USA as a leading entertainment lawyer in NYC for Music and Film. Marc has been selected as a "SuperLawyer" every year since 2008 and has taught entertainment law at two prestigious New York law schools.

1, 2019 or later. If an author did not live to the commencement of the renewal term, any grant of that term failed upon the vesting of the renewal term. The ability to reclaim rights, then is not new in US copyright law.

Current term of copyright

Now, under the 1976 US Copyright Act, as in most of the world, works created after January 1, 1978 - other than works made for hire – are protected in the US for the life of the author, plus 70 years, or if it is a joint work prepared by two or more authors, then it is 70 years after the death of the last surviving author. But if the author created a work and granted rights "in perpetuity" or similar language, the author (or if the author has passed away, certain specified heirs have) has the right to recapture the US rights to those works. This is true regardless of where the work was created geographically. In general, works created after January 1, 1978 the rights to which were granted to another party are subject to recapture 35 years after the grant, or, if the grant includes a right of publication, then it is measured from the earlier of (a) 35 years from the date of publication or (b) 40 years from the date of the grant. A work published in 1979 was susceptible of recapture in 2014. Works published in 1984 are eligible for recapture in 2019, 35 years after publication. Next year, in 2020, works published in 1985 will be eligible for recapture, and so on. Generally speaking, for pre-1978 works, those works created in 1963, may also be recaptured in 2019, 56 years after creation, under certain conditions.

> *"The law says that to recapture the rights, at least two and no more than ten year's notice must be given (called the "window"), and papers must be filed in the Copyright Office."*

How to recapture US rights

The steps to be followed to recapture US rights are detailed and tricky. The recapture is not automatic. One misstep and the recapture will not be effective.

The law says that to recapture the rights, at least two and no more than ten year's notice must be given (called the "window"), and papers must be filed in the Copyright Office. The successful recapture requires having the proper contracts, the author's signature, or the signature of a majority in interest of certain of the author's heirs who are specified in the statute. Also, if more than one author signed the original grant, then to be effective, a majority of the authors must join in serving notice of termination.

A major challenge in exercising recapture rights is properly calculating the dates on which notice must be sent, and the effective dates of such notice of termination. Notice must be provided not to the original grantee, but to the current owner of the rights, who is sometimes difficult to find, especially since catalogs of copyrights are frequently bought and sold. Notice must be properly served, and copies of the notice and a special form must be filed in the Copyright Office. As mentioned above, works created before January 1, 1978 are eligible for recapture 56 years after registration or publication. Works created on or after January 1, 1978 are eligible for recapture 35 years from the date of publication, or 40 years from the date of the grant depending on the grant.

After notice, but before vesting

During the period between (a) the service of proper notice along with filing a recordation in the copyright office, and (b) the effective date of recapture, only the existing right holder may negotiate and reach an agreement with the author or the author's heirs regarding these terminated rights. Once the author or the author's heirs recapture those rights, the exclusivity period ends, and the author or the author's heirs are free to make a new deal with anyone – or just keep the rights themselves.

Congress recognized that the first deal an author or creator makes is made with very unequal bargaining power. Even though that first contract may grant rights for what appears to be forever, the law allows the grantor to secure another bite at the apple.

Relevant, recent litigation

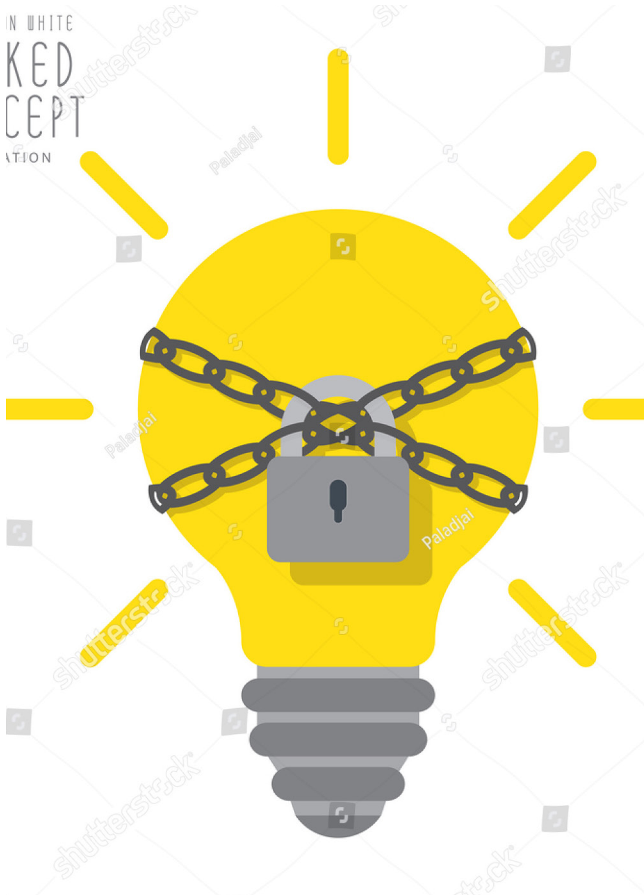
There is a decision in the UK which holds that the UK authors were not eligible to terminate their US rights. After the authors filed an appeal, the case was settled. Most copyright lawyers with whom I have spoken feel that decision was decided incorrectly based on a failure of proof, and the courts failure to consider the applicability of the Berne Convention.

Shortly after that decision, Sir Paul McCartney, one of the principal songwriters of The Beatles, then filed suit against EMI, seeking to make certain that his notice of recapture would be effective. That case was settled before EMI filed an answer.

Finally, two class action cases are pending which assert that recordings created as a work for hire under the 1978 act are in fact not works for hire, and that the parties to the recording agreement are entitled to terminate the grant of right. A recording is not one of the nine works eligible to be a work made for hire under section 101 of the Copyright Act, so the record companies' assertion that each recording is a work for hire may be subject to a successful challenge. But then there is the issue of who is the author of the work, and who is eligible to terminate the grant. Specifically, are the engineers, producers, mixers, masterers, musicians and others included as an author of the work? If so, certifying the plaintiff class may ultimately prove impossible.

Conclusion

If you or your family had a family member who was a songwriter or even a recording artist (in some cases), or a photographer, illustrator, writer of books or magazine articles, you may have rights that could be worth significant money to you. Further, exercising these recapture rights may be investment into the legacy of your loved ones. Exercising these recapture rights can be complicated and tricky but ignoring them is simply a mistake.



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By **Marc Jacobson**

Recapturing Copyrights

Help your clients make money from their works

This is a big year for copyright in the United States. For the first time in 20 years, on Jan. 1, 2019, works first published in the United States in the early 20th century fell into the public domain—making them free to copy or use to create derivative works based on those public domain works.[1] At the same time, rights in the United States to certain works created in the early 1960s and early 1980s can now be recaptured by the authors, if those authors are still alive, or if deceased, by their heirs.[2] On recapture, those authors or their heirs can make a new agreement with the same or a new party on potentially better terms. The grand scheme about owning rights for a limited period of time so that works will eventually pass into the public domain, as well as Congress' intent to give creators a second bite at the revenue apple, is now in full operation, after years of legislative tinkering. Recapturing of rights in the United States—U.S. law doesn't apply in foreign countries (more on that later)—offers creators and their families a new opportunity to make more money from these works.

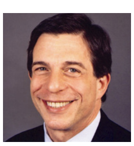
Copyright is Territorial

Copyright law is territorial in nature. As such, the U.S. laws don't apply in Canada or France, for example, nor do the laws of Germany or Australia apply in the United States. Each country can establish its own laws, rights and obligations. While these laws, rights and obligations are often similar and consistent in many respects around the world, there are important differences from country to country. For example, there was no copyright law in Cambodia when one of our clients made a movie there using local works, so works created there could be used by the rest of the world at no cost.[3] Conversely, many European countries created the "making available" right so that in the music area, for example, merely offering the ability to listen to a song on a website, even if the song is never played or downloaded, makes the website owner obligated to pay the copyright holder. On the other hand, in the United States, no such right exists so that only the actual copying or performance of a song generates revenue for the copyright owners.[4]

Certainly, there's an effort to ensure that certain rights exist under all copyright laws, such as the owner of the copyright owning the exclusive right to copy, perform or display certain works. There's also an effort to harmonize the term of copyright protection among the countries of the world. Further, for a country to become a member of the leading international treaty, the Berne Convention, there must be no formalities required to secure copyright protection. Under U.S. law, for example, copyright subsists from the moment of creation when the work is fixed in a tangible medium of expression, but registration is only required to enforce in court any rights granted to the owner under the statute.[5]

British Reversionary Rights

Under the U.K. Copyright Law, rights granted by authors in copyrighted works created between 1911 and 1957 are automatically vested in the author's heirs 25 years after the author's death. This concept also applied across the British Commonwealth. Over time, however, each of the Commonwealth territories elected to rescind those rights, so their importance in copyright law is diminishing each year. However, there are some important countries where this concept may still apply. These include the United Kingdom, Ireland, Canada,



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Australia and New Zealand, Israel, South Africa, Jamaica and other Caribbean countries. So, the concept of copyright recapture isn't unique to the United States.[6]

U.S. Copyright Law Background

The 1909 U.S. Copyright Act provided that works registered for copyright would have an original term of 28 years, and, if a renewal application was timely and properly filed, a renewal term of 28 additional years. In the 1976 U.S. Copyright Act (the 1976 Act), which became effective on Jan. 1, 1978, as the rest of the world was providing for copyright of much longer duration, Congress extended the term for another 19 years, for a total of 75 years. Then, under the 1998 Sonny Bono Copyright Term Extension Act (Sonny Bono Act), works that weren't works for hire received another 20 years, for a total of 95 years from their publication dates. In the interim, Congress eliminated the need to file renewal applications, so the term of copyright protection wasn't dependent on filing properly completed and timely renewal applications. In addition, the Sonny Bono Act effectively protected works that were created in 1923 or after and not yet in the public domain until Jan. 1, 2019 or later.[7]

Current Term of Copyright

Now, like most of the rest of the world, under the 1976 Act, generally speaking, works created after Jan. 1, 1978 —other than works made for hire—are protected in the United States for the life of the author, plus 70 years, or if it's a joint work prepared by two or more authors, then it's 70 years after the death of the last surviving author.[8] But, if the author, or his now-deceased family member, created a work and granted rights "in perpetuity" or similar language, the author or, if the author has passed away, certain specified heirs, has the right to recapture the U.S. rights to those works. This is true regardless of where the work was created geographically. In general, works created after Jan. 1, 1978 and licensed or assigned to another person or company are subject to recapture 35 years after the grant, or, if the grant has a right of publication, then it's measured from the earlier of: (1) 35 years from the date of publication, or (2) 40 years from the date of the grant.[9] A work published in 1979 was susceptible to recapture in 2014. Works published in 1984 are eligible for recapture in 2019,[10] 35 years after publication. Next year, in 2020, works published in 1985 will be eligible for recapture, and so on. Generally, for pre-1978 works, those works created in 1963 may also be recaptured in 2019, 56 years after creation, under certain conditions.[11]

The steps to be followed to recapture U.S. rights are detailed and tricky.

It's important to note that unlike the British Reversionary Rights, which provide that rights revert to the author's heirs 25 years after death, U.S. rights aren't recaptured unless notice of termination is timely served and properly filed.

How to Recapture U.S. Rights

The steps to be followed to recapture U.S. rights are detailed and tricky. The recapture doesn't happen automatically. One misstep and the recapture won't be effective. The law says that to recapture the rights, notice must be given within a proper time frame (called the "window"), papers must be filed in the Copyright Office and a specified amount of time must lapse. The successful recapture of these rights requires substantial advance planning. It requires having the proper contracts, the author's signature or the signature of a majority in interest of certain of the author's heirs who are specified in the statute. Also, if more than one author signed the original grant, then to terminate such grant, a majority of the authors must join in serving notice of termination. The recapturing process is best accomplished with assistance from an experienced copyright lawyer to help navigate the complexities and nuances involved.

Planning in advance of a recapture is essential to its success. The hardest part is calculating the dates on which notice must be sent and the effective dates of such notice of termination. The author or his specified heirs must give notice no earlier than 10 years and no later than two years before the rights would vest. Notice must be provided not to the original grantee, but to the current owner of the rights, who's sometimes difficult to find, especially because catalogs of copyrights are frequently bought and sold. Notice must be properly served, and copies of the notice and a special form must be filed in the Copyright Office. As mentioned above, works created before Jan. 1, 1978 are eligible for recapture 56 years after registration or publication. Works created on or after Jan. 1, 1978 are eligible for recapture 35 years from the date of publication or 40 years from the date of the grant depending on the grant.[12]

> This right of recapture may be the antithesis of the public domain.

After Notice, but Before Vesting

During the period between: (1) the service of proper notice along with filing a recordation in the copyright office, and (2) the effective date of recapture, only the existing right holder may negotiate and reach an agreement with the author or the author's heirs regarding these terminated rights. That gives the existing owner a leg up to keep the rights. Once the author or the author's heirs recapture those rights, the exclusivity period ends, and the author or the author's heirs are free to make a new deal with anyone—or just keep the rights themselves.[13]

Estate Planning

Estate-planning professionals should consider how, when and with whom termination rights will vest and make sure the proper parties are well versed in how to exercise these rights. The Copyright Act doesn't prohibit the children of an author from agreeing among themselves how to handle these rights, prior to the author's demise. Further, while an author's will can't dictate what happens to these rights, because the statutory scheme may not be altered, the author's will can indicate how the deceased wants his works handled, who'll administer them for all the children and similar related issues. The will can't, however, mandate, for example, that only two of five children can exercise the recapture rights for all the children, because that clearly violates the statutory scheme.

Recapture isn't Public Domain

This right of recapture may be the antithesis of the public domain. Because the U.S. Constitution says that copyright should be secured to authors for a "limited time," it's appropriate that works fall eventually into the public domain. Before 1998, works did fall into the public domain every year. Under the 1976 Act, nothing went into the public domain for the last 20 years. Now, pre-1924 works, like Kahlil Gibran's *The Prophet* and Robert Frost's "Stopping by Woods on a Snowy Evening" and songs like "Who's Sorry Now" by Kalmar, Ruby and Snyder (which is the song that, after a 1985 U.S. Supreme Court Case, helped set the stage about how the recapture actually works) are now in the public domain.[14] These works may now be published by others with no royalty due to the authors, and movies, plays and other works may be created based on those public domain works without paying for the underlying rights.

But, while the other works fall into the public domain, the legislative construct to give authors and their heirs another chance to make a deal also is developing full steam ahead. Congress recognized that an author or creator has less bargaining power when making his first deal. Even though that first contract may grant rights for what appears to be forever, the law says that "if, and only if, you follow these procedures, you get to make a new deal for your U.S. rights."

Relevant, Recent Litigation

After serving its notice of termination, the U.K. band Duran Duran was met with litigation from EMI Music Publishing (EMI), which asserted that the contract by which EMI secured its rights was governed by U.K. law. EMI also argued that under that contract, therefore, there was no basis for the band to terminate rights in the United States. Due to some procedural issues, and in my view, a failure of proof, EMI was able to defeat the band's ability to terminate rights. Many copyright lawyers feel

the decision is wrong and that it may even violate the Berne Convention. Failing to bring this violation to the court's attention, as well as the lack of expert testimony about how U.S. law works, resulted in a decision in the publisher's favor.[15] Shortly after that decision, Sir Paul McCartney, one of the principal songwriters of The Beatles, then filed suit against EMI, seeking to make certain that his recapture of rights would be effective. Not surprisingly, that lawsuit was settled, and EMI didn't even file an answer. While the terms of the settlement are confidential, I believe that the recapture notices were effective, and Sir Paul was able to achieve better financial terms for his songs as each song was recaptured. This, in fact, is the very essence of the statutory scheme, allowing the creator another bite at the revenue apple.[16]

Finally, while many cases filed and decisions rendered address the recapture process and right, the gist of which I've incorporated into the article, a new case, *John Waite, Joe Ely et al. v. UMG Recordings Inc. et al.*, was filed that touches on the complicated issue of whether a recording is a work made for hire. As mentioned above, if a work is made for hire, it's owned by the company engaging the author, from the moment of creation, and as such, there's no grant of rights that may be terminated. Under the definition of "work for hire," a work specially ordered or commissioned may be treated as a work made for hire if an agreement is signed in advance of the creation of the work. Another condition, however, is that the type of work created is listed as one of the nine categories of works eligible to be a work for hire. A recording isn't one of the nine categories, although a compilation is one. Most recent recording agreements provide that the recordings delivered to the record company are to be treated as works for hire, but if such treatment is found ineffective, such rights are deemed assigned to the record company. U.S. rights to a work transferred by assignment may be recaptured, but U.S. rights to a work for hire may not be. The recent litigation posits, in a class action suit, on behalf of all artists who sought to recapture their rights from the labels, that the works created weren't for hire, and therefore the recordings are eligible for recapture.[17] My view is that it will be very difficult to certify that as a plaintiff class because of the challenges in determining who the authors of the work are—do the authors include, for example, engineers, mixers, side men and backup singers? If so, to what extent do they, and what percentage of them, need to execute a notice of termination to effectively recapture these rights? I think this case will die on a motion to dismiss. But, there will always be a new way to challenge the status quo, and efforts to expand these rights by authors and their heirs will be met with equal opposition from those who seek to retain them and limit these rights.

Investment in Legacy

If your client or his family member was a songwriter or even a recording artist (in some cases), a photographer, illustrator or writer of books or magazine articles, he may have rights that could be worth significant money to him and his family. Further, exercising these recapture rights may be investment in the legacy of his loved ones. Exercising these recapture rights can be complicated and tricky, but ignoring them is simply a mistake.

Endnotes

1. *https://law.duke.edu/cspd/publicdomainday/2019/.*
2. *www.copyright.gov/recordation/termination.html.*
3. *www.wipo.int/edocs/lexdocs/laws/en/kh/kh003en.pdf.*
4. *www.copyright.gov/docs/making_available/making-available-right.pdf.*
5. *www.copyright.gov/circs/circ01.pdf.*
6. *See, e.g., Chappell & Co. Ltd v Redwood Music Ltd.*, [1981] RPC 337(HL).
7. *www.copyright.gov/circs/circ15a.pdf.*
8. *www.copyright.gov/title17/92chap3.html.*
9. *www.copyright.gov/title17/92chap3.html.*
10. *www.copyright.gov/title17/92chap2.html.*
11. *www.copyright.gov/title17/92chap3.html#304.*
12. *www.copyright.gov/title37/201/37cfr201-10.html; www.copyright.gov/docs/203.html.*
13. *www.copyright.gov/title17/92chap3.html; www.copyright.gov/title17/92chap2.html.*
14. *https://law.duke.edu/cspd/publicdomainday/2019/.*
15. *www.bailii.org/ew/cases/EWHC/Ch/2016/3091.html.*
16. *www.scribd.com/document/336935184/Mccartney-termination#fullscreen&from_embed.*
17. *www.documentcloud.org/documents/5726454-Waite-Termination.html.*

Speaker Biographies

MICHELE ALEXANDER, ESQ.

Biography

Michele is a tax lawyer who employs her training and knowledge to help clients make the best business decisions and navigate many types of complex tax issues. During her years of practice, Michele has provided counsel in a wide range of transactions, from mergers and acquisitions, capital markets and securities offerings, to financing, joint ventures, and restructurings. In recent years, Michele’s practice has evolved to include a strong focus on private equity and hedge funds and similar investment vehicles. She also has experience in, and has written extensively about, real estate investment trusts, and has advised many international clients on inbound U.S. real estate investments.

MARC JACOBSON, ESQ.

Biography

Selected by Chambers USA every year since 2005 and by Super Lawyers since 2008 as one of the top Entertainment Lawyers in NYC, Jacobson built his unique practice by focusing on his two passions: music and film.

In the music area, he represented the estates of George & Ira Gershwin, Elvis Presley and Duke Ellington and important songwriters such as Jimmy Webb, Shakira, James Brown and Holland- Dozier-Holland. He represented the digital jukebox industry in its negotiations for performing rights, as well as the Cheer and Spirit industry regarding its use of music. He handles sophisticated music publishing and recording transactions, as well as negotiations to license the use of music by non-traditional music users.

Jacobson also handles all legal aspects of filmed entertainment for a variety of films. He worked on "Conviction" with Hilary Swank and Sam Rockwell, "Texasville," with Jeff Bridges and Cybil Shepard and "All's Fair" with George Segal and Sally Kellerman, "Back in The Day," with Alec Baldwin and Anabella Sciorria," Born to Lead: The Sal Aneuse Story," "Inversion," and others. He is or has served as Executive Producer for "Nitrous!," "Leaves of the Tree" and "Hostage." He is the Founding Chairman of the NYS Bar Association Section on Entertainment Arts & Sports Law, testified before Congress and WIPO regarding the US Digital Millennium Copyright Act, and was Adjunct Professor of Entertainment Law at Fordham University Law School, CUNY Law School and The New School. He speaks regularly at bar association and other events about issues related to his practice. He has received many awards relating to his abilities as an attorney. He is licensed to practice law in New York, California, and Florida.

TRACY GREEN LANDAUER, ESQ.

Biography

Tracy Green Landauer is a partner in the firm's New York office where she focuses her practice on Tax and Trusts & Estates counsel. She provides personal estate planning, charitable gift planning and closely-held business succession planning to a broad range of domestic and international individuals and families. Ms. Landauer also provides ongoing and special issue representation to both new and established private foundations (individual and corporate) and public charities including arts, health, educational, community, literary, research and trade organizations.

She values the long-standing relationships she has with many of her clients. Whether working with individuals in planning their estates or with the officers and directors of the non-profits she represents, she listens closely to help her clients prioritize their needs and goals in order to help them implement the best plan for their circumstances. Estate planning clients gain an understanding of the options open to them and work with Ms. Landauer to determine which steps to take first for the greatest peace of mind. Her start-up tax-exempt clients work with her to make tailored, strategic choices on issues of formation, exemption, board governance and policies, and organizational structures.

Both new and established non-profits work with Ms. Landauer to successfully navigate IRS and state reporting requirements and audits; U.S. tax compliance issues in domestic and international grant-making; unrelated business income, prohibited transactions and operational issues; and compliance with state fundraising/solicitation requirements for print and electronic media.

Ms. Landauer has authored several publications in the trusts and estates area. Thomson Reuters has included her on its annual "Super Lawyers" list in Estate & Probate Law since 2012.

JEREMY SHEFF, ESQ.
Biography

Professor of LawDirector, Intellectual Property Law Center, School of Law
B.A., Columbia University (summa cum laude), 1999J.D., Harvard Law School (cum laude), 2002

Jeremy Sheff joined the faculty of St. John's University School of Law in the fall of 2008. He teaches Property, Introduction to Intellectual Property, Patent Law, Trademark Law, International Intellectual Property, and First Amendment Law. He was appointed Founding Director of the Intellectual Property Law Center in 2014.

Professor Sheff's research interests span Intellectual Property law, First Amendment law, and Internet and Cyberlaw. In particular, his research focuses on how law mediates the creation, dissemination, and use of information in social, cultural, and economic exchange. He approaches these issues from an interdisciplinary perspective, drawing on research in psychology, philosophy, economics, marketing, and political science.

Professor Sheff received his B.A., summa cum laude, from Columbia University in 1999, and his J.D., cum laude, from Harvard Law School in 2002. While at Harvard he was an editor and symposium chair of the Harvard Law Review. After graduation, he clerked for Hon. C. P. Sifton of the U.S. District Court for the Eastern District of New York.

Prior to his arrival at St. John's, Professor Sheff worked as a litigator for five years at Cravath, Swaine & Moore LLP, where his practice covered a broad variety of commercial disputes, including intellectual property litigation, antitrust litigation, contract disputes, and commercial tort claims.

FRED SIEGEL, ESQ.

Biography

Fred Siegel is the founder of Fred Siegel, CPA (est. 1997), a boutique consulting/public accounting firm specializing in key tax and business issues for independent film producers and dealing with the business of film. Primary practice areas are Consulting, Financing, Film Tax Credits, Deal Structures, Taxation. The firm is one of sixteen CPA firms qualified by the NYS Dept. of Economic Development to perform "audit" type services on NYS film tax credit applications for film production companies applying for NYS film tax credits. Working

almost entirely with independent filmmakers and their development and production companies, film financing companies, film funds, and creative professionals, the firm offers a range of "niche" services in areas such as structuring deals and cash flows; film production tax credits and financing; tax consequences of film financing; film taxation and accounting; and performing due diligence and providing reports for film financiers and production companies in connection with "film tax credit" loans. A former jazz musician and entrepreneur, Fred is a graduate of Columbia University, (B.A. Economics, Phi Beta Kappa, Magna Cum Laude), attended New York University's Stern Graduate School of Business (accounting; taxation), and began his professional career in public accounting at Coopers & Lybrand, prior to its merger with PriceWaterhouse. Fred has worked with a large range of both established and emerging independent filmmakers for over twenty-five years, including such well-known filmmakers as Christine Vachon and Killer Films ("Still Alice;" "Far From Heaven;" "Boys Don't Cry"); Debra Granik ("Winters Bone"); Paul Mezey ("Beach Rats;' "Beasts of the Southern Wild"; "Maria Full of Grace"); Chris Smith ("Fyre"; "The Yes Men"; "American Movie"); and Good Machine ("Happiness" - Todd Solondz, and "Safe" - Todd Haynes).

BARRY SKIDELSKY, ESQ.

Biography

Barry Skidelsky is the current Chair of the Entertainment, Arts and Sports Law Section (EASL) of the New York State Bar Association (NYSBA), having previously served as chair of EASL's Television and Radio committee. He is also a member of NYSBA's House of Delegates, the association's governing body.

A Berklee trained jazz musician and former radio broadcasting executive, Barry is a NYC based attorney with strong business acumen providing legal representation, counsel, co-counsel, consulting, arbitration, mediation, and related services nationwide. He also practices before the Federal Communications Commission in Washington DC, and is former chair of the NY Chapter of the Federal Communications Bar Association (FCBA).

Having substantial experience across diverse corporate, transactional, litigation/ADR and regulatory matters, Barry has particular expertise and interests in working with other lawyers, lenders, investors, owners, operators and creators involved with entertainment, digital media, telecommunications and technology.

Barry's core legal competencies involve M&A, general corporate, commercial, finance, intellectual property, real property, employment, regulatory compliance and governance issues; and, he has a strong understanding of finance, communications and computer technologies.

His background includes successes as in-house General Counsel, corporate Secretary, and board of directors member, for several venture capital and private equity backed companies, including a competitive local exchange carrier (CLEC) and an internet service provider (ISP), and he served as General Counsel for a publicly traded digital media company. He was also a broadcast station broker, FCC ownership divestiture trustee, and bankruptcy trustee.

A graduate of both the University of Vermont and Vermont Law School, Barry is also a frequent author and speaker for both legal and business audiences, has a good sense of humor, and is fluent in Spanish.

Contact Barry at 212-832-4800 or bskidelsky@mindspring.com.

STAN SOOCHER, ESQ.

Biography

Stan Soocher is the long-time Editor-in-Chief of *Entertainment Law & Finance*, and an award-winning entertainment attorney and entertainment law journalist. He is also Professor of Music & Entertainment Industry Studies at the University of Colorado's Denver Campus. Stan is author of the books *Baby You're a Rich Man: Suing the Beatles for Fun & Profit* and *They Fought the Law: Rock Music Goes to Court*, the latter which is available in an updated, expanded edition in Amazon's Kindle Store. He has spoken to the New York State Bar Association EASL Section on a number of well-received occasions.