

**EZRA J. DONER**  
ATTORNEY-AT-LAW  
119 Fifth Avenue, 3<sup>rd</sup> Floor  
New York, NY 10003

Direct Tel: (212)258-2424  
Mobile: (917) 209-3700  
E-Mail: edoner@donerlaw.com  
www.donerlaw.com

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## **Client Alert: *Bones* Complaints: Did Fox Properly Account for Hulu monies?**

By Ezra Doner\*

**Twentieth Century Fox produces the hit TV series *Bones* for its broadcast network and also makes the series available on Hulu of which it is a one-third owner.**

**Did Fox properly report and share monies it received from its license of *Bones* to Hulu? Two complaints recently filed by revenue participants claim it did not.<sup>1</sup>**

### The Big Picture

As new media technologies and services continue to develop, revenue participants want the opportunity to shape corresponding licensing practices. This is especially true when a distributor, such as Fox, licenses to a new media company, such as Hulu, which Fox co-owns. These new *Bones* cases raise issues I previously explored in posts about *The Walking Dead* and Harlequin Books.

### *Bones*, the Series

*Bones*, a one-hour crime procedural, debuted on the Fox broadcast network in September 2005 and is now in its 11<sup>th</sup> season, making it Fox's longest running one-hour drama ever. As of the date of this writing, a remarkable 220 episodes have aired.

The TV series is based on the "Temperance Brennan" book franchise by Kathy Reichs, a forensic anthropologist. The stars of the series are Emily Deschanel as Brennan and David Boreanaz as Agent Booth. Barry Josephson, an originator of the series, has been an executive producer since inception.

### The Plaintiffs

Reichs, Deschanel and Boreanaz are plaintiffs in one of the recent complaints, and Josephson is the plaintiff in the other. Per the complaints, the plaintiffs' profits participations are: Reichs, 5%; Deschanel and Boreanaz, 3% each; and Josephson, a "significant" but unspecified percentage. While the two lawsuits are separate, there's a fair amount of overlap, and I'll discuss the allegations in them together, without specifying in which complaint specific allegations appear.

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<sup>1</sup>The cases are *Temperance Brennan et al v. Twenty-First Century Fox et al*, No. BC602548 (Super. Ct. Cal.) and *Wark Ent. v. Twentieth Century Fox Film Corp. et al*, No. BC602287 (Super. Ct. Cal).

### Overall Series Performance

The plaintiffs claim that Fox Television has taken in over \$1.1 *billion* in revenues on the series, from domestic broadcast licenses, syndication revenues, subscription video on demand (SVOD) services such as Netflix, and networks and platforms abroad; and that Fox's owned and operated stations and networks which have exhibited the series have received "hundreds of millions of additional dollars" in ad revenues. Yet according to the complaints, despite this level of success, Fox is reporting the show to be deeply in the red, with deficits that are increasing over time. Specifically, the plaintiffs allege that the first *Bones* profits statements, issued during season 3, show Fox in an overall loss position of roughly \$70 million; the next statements put the Fox loss at over \$80 million; and more recent statements put the Fox loss at either approaching, or exceeding, \$100 million, depending on the plaintiff.

### Much to Fight Over

With this much in receipts but a growing loss, there can be a lot to fight over. The plaintiffs allege a multitude of wrongs, ranging from simple breach of contract to strong arm tactics and even fraud, involving tens of millions of dollars or more. But in this brief post, I focus solely on claims relating to Hulu, the streaming service which is one-third owned by Fox and which, at least for purposes of Fox programming, may function as a Fox affiliate.

### Hulu and the Hulu Claims, in General

Hulu offers viewers three tiers of service: a free, ad-supported service, and two tiers of subscription services, one with limited and the other with no commercials. In contrast to cable channels, Hulu is delivered via the internet.

The nub of these plaintiffs' Hulu claims is that because Hulu is an affiliate, Fox's license agreements with Hulu must be on terms comparable to those on which Hulu enters into agreements with unrelated third parties. But, the plaintiffs claim, the Hulu licenses for *Bones* do not reflect such an arm's length standard.

### Challenges to Hulu Arrangements

The plaintiffs specifically claim that Fox licensed *Bones* to Hulu at "below market rates" under agreements that "differ markedly" from Hulu's agreements with third parties, and that Fox has not fully reported Hulu's payments to them, and in some cases has not passed through Hulu payments at all. By way of example, the plaintiffs allege that while many program suppliers insist on cash guarantees in their Hulu licenses, Fox licensed *Bones* to Hulu for a "speculative" percentage of Hulu's ad sales and monthly subscriber fees. This claimed arrangement presumably flows from Fox's shareholder status, as it would be unusual for an unaffiliated series licensor to share in subscriber and ad revenue.

### Stacking of Episodes

As a second example of wrongdoing, the plaintiffs claim that Fox improperly "stacks" current season episodes on Hulu. "Stacking" is a strategy of making available all or many episodes of a

series at the same time across multiple platforms, such as broadcast, broadcaster websites, cable on demand services, paid subscription services and (as in this case) the free Hulu service. The problem for participants in plaintiffs' shoes is that Fox apparently does not report revenues from Hulu for current season episodes and Netflix pays lower license fees – perhaps as much as 30% lower – for current season episodes which have been “stacked”. See Wall Street Journal article at <http://www.wsj.com/articles/streaming-era-sets-off-battle-over-tv-rights-1448793184>.

The *Bones* plaintiffs imply that Fox placed current season episodes on Hulu, at the expense of potential fees from Netflix, because of Fox's self-interest.

#### Out-Of-Date Agreements?

Of course, whether Fox properly licensed to Hulu and accounted to the plaintiffs depends, first and foremost, on the governing agreements. But it may be that the plaintiffs' agreements with Fox, which date from 2004, 2005 or 2006, don't adequately take into account digital technologies and services, as these agreements pre-date not only Hulu but commercial streaming and SVOD services generally.

#### Next Steps

Assuming the *Bones* lawsuits proceed, the plaintiffs in these cases will likely try to discover and establish market rate fees which Hulu pays under agreements with unaffiliated licensors for comparable programs. And they may also try to establish the full economic value to Fox of its Hulu arrangements, which may well be higher than actual market rate licenses. If the *Bones* profit participants succeed in latching on to a share of subscription and ad monies, this would be big win for them.

#### Other Claims, Other Lawsuits

Even if the plaintiffs don't win on the Hulu issues, they still have many other claims to pursue against Fox. And if the plaintiffs succeed in capturing a share of subscription and ad monies, it may have consequences for Fox on other shows and other deals. Because of that potential risk to Fox, in this case, for these plaintiffs, their Hulu claims are especially powerful.

#### Disclaimer

Since this dispute is only at the complaint stage, there haven't yet been judicial findings or rulings. This Alert is based solely on the claims of one side.