Los Angeles lawyer Bill Colitre traces the emergence of digital technology in the music industry and discusses its impact on revenue and the framework of legal rights.

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CELEBRITY INFLUENCE ON BRANDS

Streaming Revenue

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IMMIGRATION POLICY AND ENTERTAINMENT

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This year’s entertainment law issue continues our recent trend of addressing cutting-edge—and thorny—legal issues that litigators and transactional lawyers face in today’s environment. Practitioners are confronting these issues because so much is changing in the regulatory environment and the means by which content is produced, marketed, and distributed.

Our treatment of the dynamic shifts in the entertainment industry starts on a high note in our cover story on music rights in the digital age. The record business has emerged from its dark days and, as Bill Colitre heralds in his article, the music business is in its healthiest state since 1995. Colitre explains that the business cycle for the music segment of entertainment has evolved into a fairly stable set of business models and legal frameworks and details how those models and frameworks function. Gone (or going) is the unit-sales business model in favor of a range of services founded on streaming in its various forms and configurations.

Alan Friel, Andy Marcus, and Stephanie Lucas examine the regulatory framework governing advertising in the age of social media and the interplay among brands, social influencers—people who have large social media followings—and the Federal Trade Commission’s efforts to eliminate deceptive advertising. The authors address in particular the concept of native advertising, the risks it presents, and offer best practices to avoid or minimize the likelihood of noncompliance by the influencer and the brand.

Immigration attorney Chad Blocker examines the visa categories most frequently used by the entertainment industry and how they may change under the Trump administration. Blocker also looks at other impacts—both real and possible—resulting from an administration that in many ways views immigration with wariness and even suspicion.

Across the Atlantic, Tim Johnson identifies a host of issues the entertainment and media industry and its lawyers will face post-Brexit, including whether the European Union’s state-aid rules will continue to restrict subsidies for film production and whether films and television programs made in the United Kingdom will continue to be European Works post-Brexit.

Only in the entertainment law issue will you find a lively discussion of the tax implications for the “ruthless overseer of the Death Star’s construction” of Star Wars fame—or at least the implications for the estate of Peter Cushing who portrayed him. Bradford S. Cohen and Scott J. Loresch focus on estate and tax planning for rights of publicity and outline current issues that govern the tax treatment of a decedent’s right of publicity.

Finally, Jordan Arnold focuses on cutting-edge technologies that can deter litigation involving authenticity and provenance of investment-grade artworks. Like advertising, the art world is feeling the influence of social media. Instagram, for example, has become a powerful art market. The article identifies four potentially game-changing advanced authentication tools and techniques.

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Creating an Effective Relationship with In-House Counsel

As companies across the country build and improve their internal legal departments, outside lawyers find themselves competing for an ever smaller number of corporate matters. In this environment, even top legal knowledge and experience may not be enough to woo potential clients. Developing a relationship with in-house counsel—who is often responsible for retaining outside lawyers and managing their work—can therefore be critically important. A successful relationship with in-house counsel requires that outside lawyers demonstrate not only legal knowledge and expertise but also the “three Cs”: 1) commitment, 2) communication, and 3) courtesy.

First, outside lawyers must commit to providing practical advice for the company. While this sounds simple, it requires taking the time to learn about the company’s business structure, operations, and goals, as well as the macro- and micro-trends affecting the company’s industry. To start, outside lawyers should review public materials on the company, including press releases, regulatory filings, and analyst reports. These materials, particularly statements by the company’s management, can provide a wealth of information regarding the company’s business needs that may ultimately shape the outside lawyer’s advice.

Outside lawyers also need to know the company’s business structure and in-house counsel’s relevant chain of command. Most in-house counsel—even those who hold executive positions—report to others within the company. These higher-ups, together with any other stakeholders, will need to sign off on a recommended course of action before it can be implemented.

For this reason, it is not enough to simply pass along a few case citations and a general description of what the law says; outside lawyers need to provide straightforward advice that in-house counsel can share directly with others they deem appropriate. Moreover, outside lawyers need to keep the company’s practical realities in mind when giving legal advice. Most companies will be limited in what they can reasonably accomplish by cost and resource constraints. Outside counsel needs to understand these constraints and provide recommendations that take such constraints into account.

Second, outside lawyers should communicate regularly with in-house counsel and appropriate stakeholders.1 In particular, outside lawyers must keep in-house counsel up to date on developments in the specific legal matter at hand and update in-house counsel about any developments in the relevant law generally.

Additionally, outside lawyers should keep a running list of action items that can be circulated to in-house counsel. These items should be updated as the matter progresses to ensure that the legal team and other relevant persons are completing assigned tasks. This system can help reduce some of the in-house counsel’s administrative workload so that he or she can focus on the legal tasks at issue.

Outside lawyers should also be prepared to give in-house counsel bad news as soon as it is received. Because thorough analyses take time to put together, it may not be possible to provide a written legal opinion immediately. However, outside lawyers should not be afraid to make a phone call apprising in-house counsel about the development and any risks or consequences that are immediately apparent.

Third, be courteous. Today’s in-house counsel have a number of responsibilities and often spend much of the day responding to urgent matters within the company. They report to a number of key personnel within the company and may have to obtain buy-in from all of them before approving any legal strategy. In sum, in-house counsel are busy. Outside lawyers need to keep that in mind and aim to provide services on the client’s schedule rather than becoming frustrated with in-house counsel’s schedule or demands. Outside lawyers should be responsive—even after hours—and provide in-house counsel with drafts of documents well before deadline to ensure that in-house counsel has sufficient time to obtain internal approvals.

Outside lawyers should seek to become a business partner with the company and, specifically, in-house counsel. Successful outside lawyers understand their clients’ business needs and are able to focus their legal advice to those business needs in a meaningful way.

1 The outside lawyer should ask in-house counsel for instructions on communicating with stakeholders. In-house counsel may prefer the outside lawyer to communicate directly with all stakeholders through a group e-mail or other means; alternatively, in-house counsel may prefer to receive and relay all information to the stakeholders.

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I just had to form a new corporation, and it’s just so damn perfect!

John McIlwwee, Entertainment Business Manager
Shepherd McIlwwee Tinglof
What Brexit Will Mean for the U.K. Film and TV Industries

SINCE THE RESULT OF THE REFERENDUM in the United Kingdom in June of 2016, there has been a great deal of speculation as to what repercussions will result from the U.K. decision to leave the European Union, known in shorthand as Brexit. For months, Prime Minister Theresa May has said that “Brexit means Brexit,” but offered little clarification. Critics might take the view that, in translation, this is equivalent to saying “a word which has no meaning” means “a word which has no meaning.” However, in January of 2017, the prime minister outlined her specific goals for the Brexit negotiations with the European Union. Regaining control of trade, lawmaking, and immigration were the highlights of her remarks. Two months later, on March 29, 2017, driven by what the prime minister referred to as the U.K. tradition of “looking beyond Europe to the wider world,” the United Kingdom invoked Article 50 of the Lisbon Treaty, triggering a two-year negotiation period with the European Union leading up to a formal exit. Of the U.K.’s decision to leave the E.U. single market (no longer guaranteeing the free movement of goods, capital, services, and people), May stated, “[T]he government will seek a bold and ambitious trade agreement with the E.U. to avoid contributing huge sums to the E.U. budget.” However, she also said she remained open to the possibility that “there may be some European programs in which [the United Kingdom] may want to participate.” In addition, her plan is that the United Kingdom will depart from the European Customs Union (the bloc of E.U. countries that negotiates as a single entity in international trade deals) to pursue its own trade deals and craft a customs agreement within the United Kingdom. Other goals include taking back control of laws by ending the European Court of Justice’s jurisdiction and providing more protection for workers’ rights by building on E.U. labor laws. Migration was also mentioned but no details were shared beyond “gaining control of the number of people coming to Britain from the E.U.” and “protecting the integrity of the U.K.’s immigration system.” Finally, the prime minister promised that the final negotiated Brexit deal between the United Kingdom and the European Union will be put to a vote in both houses of Parliament before it is presented to the European Parliament.

Production Subsidies

While the United Kingdom remains a member of the European Union, it is bound by E.U. state aid rules. Broadly speaking, these rules prevent member states of the European Union from introducing measures to subsidize local activity at the expense of activity in other parts of the European Union. The basis for these rules is that a single market means that businesses across the European Union should have the same opportunities in every country of the European Union, regardless of origin. The European Commission describes state aid as an advantage in any form whatsoever conferred on a selective basis to undertakings by national public authorities. Therefore, subsidies granted to individuals or general measures open to all enterprises are not covered by this prohibition and do not constitute state aid (examples include general taxation measures or employment legislation).

To be considered state aid, a measure needs to have these features: 1) intervention by the state or through state resources that can take a variety of forms (including grants, interest and tax reliefs, guarantees, government holdings of all or part of a company, or providing goods and services on preferential terms), 2) intervention that gives the recipient an advantage on a selective basis, for example to specific companies or industry sectors, or to companies located in specific regions, 3) competition that has been or may be distorted, and 4) the intervention is likely to affect trade between member states.

Nevertheless, there is an exception to the state aid rules for cultural purposes subject to a notification and clearance procedure. The U.K. film and television tax credits have obtained clearance that they do not breach the state aid rules on the basis of this cultural exception. The terms of the cultural tests that apply to qualification for the tax credits, together with the level of that tax credit, have been approved by the European Union.

On a positive note, leaving the single market could mean that the United Kingdom is no longer bound to a trading agreement with the European Union and would be free to adopt more beneficial rules. This would require the United Kingdom to allocate additional resources to fund the credits.

On a less positive note, the cultural tests for tax credit purposes allow the hiring of personnel from across the European Union. Thus, personnel from any member state of the European Union and the European Economic Area are treated as British for the purposes of the cultural tests. One of the reasons is that the European Union requires free movement of people within the European Union, and although the cultural exception allows productions made in the United Kingdom to be subsidized, it does not allow discrimination against E.U. personnel from outside the United Kingdom.

Once the United Kingdom leaves the European Union, this requirement may no longer apply and the cultural tests could be restricted.

The degree of flexibility that film and television producers will have in the future to hire non-U.K. personnel is far from clear.

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of the European Convention on Transfrontier Television, which is an international convention entered into under the auspices of the Council of Europe.¹³ States that have signed up to the convention include, for example, Turkey and Ukraine. In order to qualify, paragraph 3 of the AVMS Directive mandates that the film or television program still would need to be made by one or more producers established in a member state of the European Union or such a European third state.

The works referred to in points (n)(i) and (ii) of paragraph 1 are works mainly made with authors and workers residing in one or more of the states referred to in those provisions as long as that they comply with one of the following conditions: 1) they are made by one or more producers established in one or more of those states, 2) the production of the works is supervised and actually controlled by one or more producers established in one or more of those states, 3) the contribution of coproducers of those states to the total coproduction costs is preponderant and the coproduction is not controlled by one or more producers established outside those states, 4) the production of the works need to be supervised and actually controlled by one or more producers established in one or more of those states, and 5) in the case of coproductions, the contribution of coproducers from those states to the total production costs has to be preponderant and the coproduction must not be controlled by one or more producers outside those states.

It is possible for the United Kingdom to leave the European Union but remain a member of the Council of Europe and therefore a European third state party to the European Convention of Transfrontier Television.¹⁶ Accordingly, there is a scenario (depending upon the U.K. approach to Brexit and whether it means leaving other pan-European organizations as well as the European Union), in which British film and television programming could continue to qualify as European Works even if the United Kingdom leaves the European Union without any relevant replacement trading arrangement.

**Media Service Providers**

If the United Kingdom leaves the European Union and decides not to be bound by applicable E.U. rules by, for example, remaining a member of the European Free Trade Area, it remains an open question as to how media service providers operating from the United Kingdom will be treated. The terms of the AVMS Directive broadly provide that each member state must impose minimum requirements (e.g., regarding European Works) on media service providers under their jurisdiction.

Article 2 of the AVMS Directive requires that each member state ensure all audiovisual media services transmitted under the member state’s jurisdiction comply with the rules applicable to media services intended for the public. Member states have jurisdiction over media service providers established in the relevant member state, but if a service is not established in a member state, they also have jurisdiction over a service if they use a satellite up-link situated in that member state and, although they do not use a satellite up-link situated in that member state, they use satellite capacity appertaining to the member state.

The quid pro quo is that a service operating from one member state should be freely available in all member states of the United Kingdom: “Member States shall ensure freedom of reception and shall not restrict retransmissions on their territory of audiovisual media services from other Member States for reasons which fall within the fields coordinated by this Directive.”¹⁷

If, post-Brexit, the AVMS Directive no longer applies, services under the jurisdiction of the United Kingdom would no longer be afforded the protection of freedom of reception in other U.K. member states under Article 3 of the AVMS Directive. Media service providers could then find the United Kingdom a less attractive jurisdiction for their operations. If the United Kingdom is not a member state of the European Union, it is also possible that a member state could have jurisdiction over the media service provider in question under Article 2 if the service uses a satellite uplink situated in another member state or if it uses satellite capacity pertaining to another member state (which may result in the service being subject to more than one licensing regime). Accordingly, once more detail is available as to the arrangements proposed for Brexit, media service providers will need to give consideration to the effects that any Brexit arrangements will have on their need for licensing in the United Kingdom and any other E.U. member state.

**Portability of Services**

At the end of 2015, the European Commission promulgated a regulation of the European Parliament and Council aimed at ensuring cross-border portability of online content services.¹⁸ Article 3 of this regulation provides that a subscriber to an online service in one E.U. member state who is temporarily resident in another E.U. member state should continue to have access to that service, and the service provider must enable this. In order to address potential copyright licensing consequences, the regulation provides that, for copyright purposes, the subscriber is deemed to have access to the service in the E.U. member state of residence, rather than the member state in which the subscriber is temporarily present.
Article 4 deals with this in the following terms:
“The provision of an online content service to, as well as the access to and the use of this service by, a subscriber, in accordance with Article 3(1), shall be deemed to occur solely in the Member State of residence.”

Article 5 addresses contractual provisions in the following terms: “Any contractual provisions including those between holders of copyright and related rights, those holding any other rights relevant for the use of content in online content services and service providers, as well as between service providers and subscribers which are contrary to Articles 3(1) and 4 shall be unenforceable.”

The draft regulation was approved by the legal affairs committee of the European Parliament on November 28, 2016. It is likely to come into force in 2017. The likely scenario is that the portability regulation will come into force pre-Brexit: affecting access by British subscribers to British services in other E.U. member states and also access by subscribers from other E.U. member states to services from those states in Britain, with online service providers (including broadcasters providing online services, such as the British Broadcasting Corporation) needing to set up arrangements to enable this. However, if this arrangement were to cease to apply when the United Kingdom leaves the European Union, unless alternative arrangements are made, strictly speaking, the protection afforded by the regulation for reception of British services in E.U. member states and reception of U.K. member states services in Britain no longer apply, including the legal fiction that addresses the enforceability of contracts and copyright infringement issues.

A great deal turns on which E.U. programs and other pan-European organizations the United Kingdom will seek to participate in after Brexit and it may be some time before producers, distributors, broadcasters, and practitioners get any degree of clarity. In the past 40 years of E.U. membership, a huge portion of U.K. legislation has been implemented pursuant to, or by, E.U. measures; therefore, it is intended that there will be a “great repeal” act of Parliament. The idea behind this is that (unless specifically amended or repealed), on Brexit, the existing legislation that derives from E.U. membership will be entrenched for the future. So, for example, in the United Kingdom the AVMS Directive provisions and the portability regulation may continue in force. But U.K. legislation cannot amend legislation in other E.U. member states. Thus, for the reciprocal benefits and protections that these measures provide in other E.U. member states, the question is whether and how they will be preserved. How will the United Kingdom be treated as a member state for the purposes of the AVMS Directive or the portability regulation as those measures apply in the continuing member states once the United Kingdom ceases to be an E.U. member state? For the time being, this question has no answer.

2 Article 30 of the Lisbon Treaty allows a member nation to withdraw from the European Union. The Lisbon Treaty forms the constitutional basis of the European Union. It amended two treaties: the 1993 Maastricht Treaty (now called the Treaty on European Union) and the 1957 Treaty of Rome (now called the Treaty on the Functioning of the European Union).
3 May, supra note 1.
4 Id.
5 Id.
6 Id.
9 Id.
11 The cultural test for film examines factors such as content, contribution, practitioners, and hubs to determine whether a film meets the cultural exception for film tax relief. An applicant is able to acquire up to eight points for “cultural practitioners” if various members of the team are citizens or residents of the United Kingdom or European Economic Area. See The cultural test for film: British certification and tax relief, British Film Institute, available at http://www.bfi.org.uk/supporting.uk-film/british-certification-tax-relief/cultural-test-film (last viewed Mar. 29, 2017).
12 May supra note 1.
15 The Council of Europe is the continent’s leading human rights organization. It includes 47 member states, 28 of which are members of the European Union. See Who we are, Council of Europe, http://www.coe.int/en/web/about-us/who-we-are (last viewed Mar. 29, 2017).
17 Directive 2010/13/EU, supra note 13, Art. 3.
Tax and Estate Planning for Postmortem Celebrity

MOVIEGOERS WHO SAT DOWN TO WATCH the latest Star Wars film, Rogue One: A Star Wars Story, may have been surprised to see a middle-aged Peter Cushing reprising the role of Grand Moff Tarkin, the ruthless overseer of the Death Star’s construction. Since Cushing passed away in 1994 at the age of 81, the posthumous performance could only be that of an impersonator or the work of a cutting-edge special effects studio. To those in the movie industry, the performance represents a notable achievement in special effects.1 To trusts and estates practitioners, the posthumous performance raises a number of other questions: Does a studio have the right to use a celebrity’s image after his or her death? If so, is there any way to plan ahead to avoid the misappropriation of a celebrity client’s likeness after death? If a posthumous performance can generate income for the performer’s estate or its beneficiaries, what are the income and estate tax implications? How can the income and estate tax impact be minimized? These questions all touch on the treatment of the right of publicity after a celebrity’s death.

There is no single, clear definition of the right of publicity, but it may be defined generally as the right to use an individual’s name, image, likeness, or persona. The right of publicity can be distinguished from copyright in that copyright law protects the owner of a work, whereas the right of publicity protects the person depicted in that work. For example, a photographer may hold a copyright to a given photograph and may bring an action under federal copyright law for a third party’s unauthorized use of the photograph. In contrast, the subject of the photograph would not have a claim under copyright law for the unauthorized use since he or she does not own a direct interest in the photograph. Instead, the subject’s claim must be that the unauthorized use of the photograph violates a more personal right by, for example, suggesting a personal endorsement or involvement, creating unwanted associations with the subject’s likeness, or profiting from a persona that the subject, at least intuitively, feels should belong only to him or her.

Publicity rights are more analogous to federal trademark rights, which prevent one person from commercial use of words, terms, names, or symbols that are likely to mislead or deceive consumers regarding association with another person or mislead consumers regarding the quality or origin of a product or service.2 Right of publicity and trademark may overlap, for example, when there is false endorsement, unauthorized commercial use of a celebrity’s likeness, falsely suggested endorsement, or the likelihood of consumer confusion.3 However, federal trademark law is concerned more with misrepresentation regarding the commercial source of a product—whether an individual, a corporation, or otherwise—whereas the right of publicity is concerned with unauthorized commercial use of an individual’s name, likeness, or other distinguishing characteristics.4

In contrast to other intellectual property rights, such as copyrights, trademarks, and patents, federal law does not currently provide direct protection for an individual’s right of publicity.5 Instead, the right of publicity developed under state common law as an outgrowth of the common law right to privacy.6 Currently, 38 states provide a right of publicity under statute, common law, or both.7 While each of these states protects at least the individual’s name and likeness, protection provided by states varies widely in scope, with some states explicitly extending protection to an individual’s photograph, voice, signature, and appearance—even gestures and mannerisms.

After death, state laws diverge further in protection of publicity rights. A majority of states do not extend rights of publicity after death. Of the states that do provide a right of publicity after death, 15 states—including California—currently provide statutory protection8 and six states currently provide protection under common law.9 California’s right of publicity statute was originally enacted in 1971.10 Under the statute in its original form, rights of publicity did not extend beyond a celebrity’s death. In 1979, in a case brought by the heirs of Bela Lugosi against Universal Pictures, the California Supreme Court reversed a trial court ruling that had held that Lugosi’s heirs were entitled to recover the profits made by the defendant for use of Lugosi’s likeness, directing the trial court to enter a judgment in favor of Universal Pictures.11 In 1984, in part in response to Lugosi v. Universal Pictures, the California legislature enacted what is now Civil Code Section 3344.1, extending the right of publicity beyond death and making the right inheritable by a celebrity’s heirs and assignable to a celebrity’s beneficiaries.12 In 1999, the California legislature further expanded the postmortem right of publicity by extending the length of the right from 50 to 70 years after the celebrity’s death.13 In 2007, in response to litigation around the estate of Marilyn Monroe, California enacted a further amendment to Section 3344.1, which explicitly extends the postmortem right of publicity to celebrities who died before January 1, 1985, and which explicitly allows for transfer of the postmortem right of publicity in contracts, trusts, or other tes-

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tamentary instruments executed before Jan-
uary 1, 1985.14

Perhaps unsurprisingly, California is among
the states that provide the strongest protections
for publicity rights after death.15 In contrast,
New York does not currently provide post-
mortem protection for an individual’s right
of publicity. Given the disparity among state
protections after death, the state in which a
celebrity was domiciled at the time of his or
her death can be the determining factor in
whether the celebrity’s right of publicity con-
tinues to have lasting value to beneficiaries,
as the successors to Marilyn Monroe’s estate
discovered. Despite the fact that Monroe’s
estate was probated in New York after her
dead in 1962, a successor to Monroe’s estate
attempted to enforce Monroe’s posthumous
right of publicity in California, based on
Monroe’s ties to California at the time of her
death, against a company that was selling
unauthorized merchandise bearing Monroe’s
likeness and photographs. In response to the
Monroe litigation, the California legislature
passed a law clarifying that even the rights of
publicity of decedents who died before the
January 1, 1985, effective date of California’s
posthumous right of publicity statute, were
protected under the statute.16 However, a fed-
eral district court, affirmed by the Ninth
Circuit, held that Monroe’s estate was estop-
ped from claiming California domicile, since
Monroe’s executor repeatedly took the position
that she was domiciled in New York in probate
and other proceedings.17

In light of the wide range of states’ ap-
proaches, lack of uniformity, and increasingly
national and even global scope of the use of
publicity rights, some commentators have
called for a federal statute addressing right
of publicity.18

Given the expanding scope of publicity
rights after death, a celebrity’s estate planning
advisors should plan ahead for the postmortem
management of these rights. Just as an indi-
vidual’s estate planning documents may name
an investment advisor to assist in management
of the estate’s investments or a business man-
ager to assist in oversight of a business held
by the estate, a celebrity’s living trust (or the
irrevocable trust to which the celebrity’s pub-
licity rights are transferred) should name an
individual or team responsible for management
of the client’s publicity rights after death. This
person or team should include an experienced
entertainment lawyer and business manager,
not necessarily the client’s executor, trustee,
agent, or family. Not only can such an appoint-
ment help to maximize the value of the
celebrity’s publicity rights, but it also may
avoid conflict among the celebrity’s benefi-
ciaries and avoid saddling an executor or

trustee with the responsibility of navigating
business negotiations after the celebrity’s death.
If the celebrity has specific wishes regarding
how his or her publicity rights should or should
not be used after death, estate planning doc-
ments should provide direction to the public-
licity rights manager. For example, Robin
Williams’s living trust reportedly provided
that his right of publicity should not be
exploited during the 25-year period following
his death.19 It is not yet clear, however, the
extent to which such limitations on exploitation
of a celebrity’s publicity rights may be con-
sidered when valuing a celebrity’s posthumous
publicity rights for estate tax purposes.

As advances in technology expand the
ways in which celebrities’ likenesses are util-
ized after death, the tax implications of pub-
licity rights after death will also become
increasingly important. In considering a given
right held by a decedent’s estate, a threshold
question for the estate tax practitioner is
whether the right represents an asset or an
income stream for tax purposes. If the right
is an asset, it may be subject to estate tax20
and receive a “step up” in its tax basis equal
to the right’s fair market value.21 If the right
is instead an income stream derived from the
personal efforts of the decedent during his
or her lifetime (or “income in respect of the
decedent”), it would not receive this tax basis

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adjustment (or step-up), but would still be subject to estate tax.22

Among the first cases to address directly whether a decedent’s right of publicity was an asset to be included in a decedent’s gross estate for federal estate tax purposes was Estate of Andrews v. United States.23 V.C. Andrews was an author of young adult paperback novels in the 1970s and 1980s. When she died in 1986, Andrews’s publisher sought to capitalize on the record demand for her novels by continuing to release books under her name. With the agreement of the executor of Andrews’s estate and her surviving family, a ghost writer was hired to write first one and then several additional novels, which were released under Andrews’s name and went on to commercial success. Andrews’s estate tax return did not include the right to use Andrews’s name as an asset, and on audit of the estate tax return, the IRS determined that Andrews’s name was an asset with a fair market value of over $1 million, based on the anticipated revenue stream from the posthumous publication of ghostwritten novels. The U.S. District Court for the Eastern District of Virginia held that Andrews’s name was an asset of the estate and had a value of $703,500 on her date of death.

More recently, the valuation of a celebrity’s right of publicity arose in the estate of Michael Jackson. In reporting the value of Jackson’s right of publicity on his estate tax return, the executor of Jackson’s estate initially claimed the right of publicity to be worth just $2,105 at the time of his death in 2009,24 based on an analysis of the modest earnings generated by Jackson’s publicity rights in the years leading up to his death.25 In an audit of Jackson’s estate, the IRS initially claimed that Jackson’s publicity rights were worth more than $400 million at the time of his death;26 however, prior to trial, the IRS revised this valuation downward, to $161 million.27 Hearings before the Tax Court regarding this issue took place in February 2017.28

If the decedent’s right of publicity is an asset of his or her estate, rather than income in respect of the decedent, estate planning practitioners must also consider whether the right of publicity constitutes a capital asset for income tax purposes in the hands of the estate and its beneficiaries. If the right of publicity is a capital asset, and the celebrity’s estate later sells the right of publicity to a third party, any gain recognized by the estate on the sale would be taxed at capital gains rates rather than ordinary income rates.

The Internal Revenue Code defines “capital asset” negatively: if an asset is not in one of an enumerated list of excluded categories of assets, it is a capital asset. Among the types of assets excluded from the definition of capital asset are certain self-created intangibles
and certain inventory and other property used in the taxpayer’s trade or business.29

Self-created copyrights, musical and literary works, and “similar property”30 produced by a taxpayer’s personal efforts are excluded from the definition of “capital asset.”31 Accordingly, if the creator of such assets sells them during his or her lifetime, the gain will be subject to tax at ordinary income tax rates (currently less favorable than capital gains rates for individual taxpayers). Upon the death of the author, these self-created works become capital assets in the hands of the estate (since the efforts of the estate and its beneficiaries did not produce the assets). The right of publicity is distinct from rights under copyright law and generally bears more resemblance to trademark rights. Accordingly, while the value of publicity rights is undoubtedly generated by the personal efforts of the celebrity, the right of publicity probably is not excluded from the definition of capital asset under the exclusion for self-created copyrights and similar works. Further, if the right of publicity is excluded under this provision during the celebrity’s lifetime, the right of publicity would become a capital asset upon the celebrity’s death.

Inventory and depreciable property used in a taxpayer’s trade or business are generally also excluded from the definition of capital asset.32 This raises the question of whether a celebrity’s right of publicity is: 1) depreciable property in the hands of the estate or 2) used by the estate in a trade or business (rather than, for example, held for investment). The answers to these questions likely depend upon the facts and circumstances of a given case. If the estate establishes a company that licenses the celebrity’s name to third parties, the right of publicity probably would constitute depreciable property used in the taxpayer’s trade or business; therefore, the right of publicity would not be a capital asset. If the estate instead merely holds the right of publicity for future sale, the right of publicity probably would be a capital asset.

Regardless of whether the right of publicity is a capital asset in the hands of a celebrity’s estate, it appears that, at least for decedents domiciled in states extending post-mortem rights of publicity, the IRS views the right of publicity as an asset of the celebrity’s estate, subject to estate tax. It remains an open question what position the IRS might take for celebrity decedents who are domiciled in states that do not extend posthumous rights of publicity.

An obvious next question for the estate tax practitioner is whether there is anything that a celebrity can do during his or her lifetime to remove these publicity rights from the celebrity’s taxable estate or to reduce the value of the publicity rights included in the estate. With traditional assets, this might be accomplished by, for example, gifting or selling the assets to an irrevocable grantor trust established during the grantor’s lifetime for the benefit of his or her children or other beneficiaries. For estate and gift tax purposes, the transfer to the irrevocable grantor trust is a completed sale or gift of the beneficial ownership of the transferred asset, which means that the asset is removed from the grantor’s estate for estate tax purposes. However, for income tax purposes, a grantor trust is disregarded during the life of the grantor,33 meaning that the grantor would continue to be taxed on the income generated by the transferred assets. This presents an additional benefit to the grantor, since the grantor’s payment of income tax: 1) is not treated as a taxable gift to the beneficiaries of the trust34 and 2) further reduces the grantor’s taxable estate.

In the estate of a popular celebrity, such a transfer of publicity rights during life might save the estate from paying hundreds of millions of dollars in estate tax on an asset that may not be easily liquidated.35 However, rights of publicity may not be so simple to remove from a celebrity’s estate for a number of reasons. First, given the personal nature of the right of publicity, there is a threshold question as to whether the right of publicity may be transferred during the celebrity’s lifetime.36 At least in California, the answer...
appears to be yes. In *Timed Out, LLC v. Youabian, Inc.*, a California Court of Appeal reversed a trial court decision holding that two models could not assign rights in their likenesses. In reaching its conclusion that the models' publicity rights were assignable during their lifetimes, the court of appeals noted that Civil Code section 3344.1(b) explicitly contemplates such a transfer:

Nothing in this section shall be construed to render invalid or unenforceable any contract entered into by a deceased personality during his or her lifetime by which the deceased personality assigned the rights, in whole or in part, to use his or her name, voice, signature, photograph, or likeness.38

There is also precedent for celebrities’ selling outright interests in their rights of publicity during life. For example, in April 2016, Muhammed Ali reportedly sold an 80 percent interest in his name and likeness to a New York-based company for $50 million.39

A second issue raised by an inter-vivos transfer of a celebrity’s rights of publicity is whether the celebrity’s continued control over those rights following the transfer might result in the rights being included in his or her taxable estate. Notwithstanding the transfer, Section 2036(a)(2) of the Internal Revenue Code requires that, when a decedent retained the right during his or her lifetime to determine the persons who may possess or enjoy the income from property, the decedent must include that property in his or her taxable estate upon death, notwithstanding the fact that beneficial ownership may have been formally transferred during the decedent’s lifetime.

While the application of Section 2036 and related provisions of the Internal Revenue Code to rights of publicity transferred during a celebrity’s lifetime remains untested, celebrities may reduce the risk of such rights being brought back into their taxable estates. First, the celebrity should not be the trustee of the irrevocable trust to which he or she transfers the publicity rights, and if the celebrity retains the right to replace the trustee, the terms of the trust should require that an independent trustee (rather than a related or subordinate trustee) must be chosen as the replacement. Second, the celebrity should consider selling, rather than gifting, the publicity rights to the irrevocable trust since transfers resulting from a sale “for adequate and full consideration” are outside the scope of Section 2036.40 A third issue, if the celebrity’s career is ongoing, concerns the need to continue to make use of his or her persona and likeness without, for example, first seeking the approval of the trustee of a trust. This issue may create an opportunity, however, since the celebrity may enter into a contract with the irrevocable trust pursuant to which the celebrity is allowed to
continue to use his or her name, likeness, or other publicity rights in exchange for a series of royalty payments. Since the irrevocable grantor trust is disregarded for income tax purposes, these payments will not result in taxable income to the celebrity or the celebrity’s beneficiaries. Also, since the payments will represent an arm’s-length fair value price for the celebrity’s use of his or her name or likeness, the payments should not be treated as gifts to the beneficiaries of the irrevocable trust. Accordingly, the celebrity may achieve a further reduction to his or her taxable estate.

Celebrities domiciled in California may be able to avoid some of these tax risks because the California Civil Code creates distinct lifetime (Section 3344) and posthumous (Section 3344.1) rights of publicity. A celebrity domiciled in California could transfer only the posthumous right of publicity to an irrevocable grantor trust during his or her lifetime, retaining the lifetime right of publicity. Section 3344.1 specifically allows the transfer of posthumous rights alone. By retaining a lifetime right of publicity, the celebrity could avoid risks related to retention of control and determining an arm’s-length royalty rate for the lifetime use of the publicity rights. Further, since the retained lifetime right of publicity would terminate at the time of the celebrity’s death pursuant to Section 3344, the celebrity should not be required to include the retained lifetime right of publicity in his or her estate.

As technology advances and posthumous performances become more and more prevalent, postmortem publicity rights are likely to continue to expand in scope. This will present new challenges to executors and beneficiaries, but it will also present new opportunities and responsibilities for celebrities and their advisors to plan ahead to minimize taxation, provide for their beneficiaries, and manage a lasting legacy. Moreover, as technology advances to allow digital recreation of celebrities’ likenesses, studios may, in an effort to reduce the cost of hiring talent, create digital amalgamations of various body parts and gestures of beloved celebrities. Such a digital Frankenstein’s monster might subliminally spark feelings of recognition and goodwill in audiences without obviously infringing on any one celebrity’s rights. O brave new world, that has such actors in’t!


20 I.R.C. §2031(a).
21 I.R.C. §1014(a).
22 I.R.C. §§61(a)(14), 1014(c); see also O’Daniel’s Estate v. Comm’r, 173 F. 2d 966 (2d Cir. 1949).
26 Gottlieb, supra note 24.
28 Estate of Jackson v. Comm’r, Tax Court Docket No. 017152-13. As of the date of writing, the Tax Court has not reached a conclusion on this issue.
29 I.R.C. §1221(a)(1)-(3).
30 Treasury Regulations interpreting the definition of “capital asset” clarify that the phrase “similar property” is intended to include other property eligible for copyright protection. Treas. Reg. §1.1221-1(c)(1).
31 I.R.C. §1221(a)(3). However, under I.R.C. §1221(b)(3), authors of musical works may elect to treat the works as capital assets.
32 I.R.C. §1221(a)(1)-(2). A number of interconnected provisions of the Internal Revenue Code may alter the character of gain recognized on the sale of property used in a trade or business. See, e.g., I.R.C. §§1231, 1245. A complete discussion of these provisions is beyond the scope of this article.
33 I.R.C. §§671-79; see also Rev. Rul. 85-13, 1985-1 C.B. 184 (holding that a sale between a grantor and an irrevocable grantor trust established by the grantor is disregarded for federal income tax purposes).
35 For example, if the IRS’s original assertion as to the value of Michael Jackson’s publicity rights were sustained, the estate could owe in excess of $160 million in additional estate taxes (40 percent of $400 million).
36 Compare, for example, rights of privacy, which are fundamentally attached to the individual and cannot be transferred or assigned in a traditional sense.
38 Id. at 1008, quoting CIV. CODE §3344.1.
40 I.R.C. §2036(a). The performer would need to hire an appraiser to perform an independent appraisal.
41 Compare a grantor’s payment of rent to an irrevocable trust in exchange for continued use of a personal residence that the grantor transferred to the irrevocable trust.
42 In determining the amount of these arm’s-length royalty payments, the celebrity should err on the side of overpaying the irrevocable trust, since any excess above fair value would be treated as a taxable gift. If instead the IRS determined that the celebrity was underpaying for the use of these rights, the IRS may argue that he or she retained an interest in the rights and that they should be brought back into the celebrity’s estate for estate tax purposes.
STREAMING REVENUE

Music rights owners and agents experience unprecedented speed, transparency, and efficiency with digital services

AFTER 15 YEARS of decline, the business of recorded music is arguably in its healthiest state since 1995. (See “Recorded Music Developments 1995 - Present” on page 23). The Recording Industry Association of America recently reported that overall revenues grew a robust 11.4 percent in 2016—a welcome return to significant growth for the industry. The primary business model of recorded music is now one of access to licensed services based on sponsor or subscription revenue rather than one of physical goods sold by units. As this new positive economic cycle for recorded music begins, it is worth surveying the legal structures that frame the primary revenue sources involved.

Currently, rights owners and their agents are experiencing unprecedented speed, transparency, and efficiency in accounting and revenue recognition. As examples, digital service providers (DSPs) like Pandora and Spotify make geographic music consumption statistics available to artists on their platforms daily, record companies receive reports of consumption from their on-demand streaming partners weekly, and publishers receive reporting on the interactive streaming of their compositions monthly, within 20 days after the close of the month. These reports are based on extremely granular per-listen data (as opposed to “per spin,” as is traditional for broadcast radio). Because the Internet is based on one-to-one connectivity, it is now possible to know very quickly not only that an album has sold or that the promoted single from the album has been broadcast but also that the third track on the album has unexpected heat and should be considered for secondary promotion. For music publishers, mechanical rights payments typically are now received 45 days after the close of the applicable quarter, whereas in the days of physical distribution, these royalties were received several quarters in arrears, after complex and obscure reserves calculations had been made to accommodate retailers’ right to return physical goods held on consignment. Perhaps most importantly, each “listen” on a streaming service is individually logged under the eyes of third-party auditors, creating a certified, high-resolution data set documenting music listening behavior and narrowing to a historical low the number of opportunities for nefarious accounting practices. Independent organizations like BuzzAngle and Nielsen

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are now able to report with extreme granularity many hundreds of billions of streams by type (audio, video, on-demand, noninterac-
tive, ad-supported, subscription) in nearly real time. 

There are numerous fronts along which the business and law of the recorded music industry are still rapidly evolving. Two audio streaming segments are of particular interest, as they are now the largest parts of the

At this stage of the business cycle a set of relatively stable business models and new legal frameworks have emerged, edging out the traditional physical records business. While the business is certainly no less complex than it has ever been, this new paradigm has come with enormous benefits for consumers in terms of access, as well as for rights owners in terms of direct, rapid, and transparent accounting.

recorded music business: on-demand stream-
ing and noninteractive webcasting.

One cautionary note on downloading: sales from the downloading of singles and albums remain significant—together still comprising $2.3 billion in 2015—even as they are now declining faster than CD sales (per-
haps because the “possession” of a down-
loaded file does not serve the same desire for artifacts that CDs do). The decline in these significant segments will create a stiff head-
wind against revenue growth until their cycles have fully tapered off, so the streaming seg-
ments of the business will have to demonstrate a great deal of growth in order to maintain the pace of total industry growth set in 2016. Prevailing predictions still expect relatively flat revenue growth for recorded music through 2020.

On-Demand Audio Streaming

Between its launch in October of 2008 and June of 2016, 100 million people worldwide had come to know on-demand streaming through the Spotify service based in Stock-
holm, Sweden. Approximately 50 million of these users are paying subscribers, while the rest receive the service with advertising inserted throughout the experience. Spotify’s nearest competitor, Apple Music, launched June 30, 2015, and has already exceeded 20 million paying subscribers; Apple Music does not have an advertising supported tier. At $10 per month per subscriber, these two services alone represent well in excess of $500 million a month in gross subscription revenue globally. It is difficult to find clear comparative statistics, but various indicators suggest that ad-supported on-demand stream-

ings produces significantly less revenue, though the ad-supported segment still con-
tributes a material incremental amount on top of subscription revenue.

The rights underpinning this business are primarily the rights to use the sound record-
ings (which the services obtain from recording distributors) and the musical compositions embodied in those sound recordings (which they obtain from music publishing adminis-

Musi
cal Compositions

With respect to the musical compositions used in these streaming services, the identical consumer activity (on-demand streaming) implicates a remarkably different legal frame-
work. Again, the primary activity involved is the transmission of an audio file from a server to a listener, suggesting the right of public performance (which, in the case of musical compositions, is not restricted to digital audio transmission). While the public performance right is common to interactive and noninteractive services, more emphasis in connection with on-demand streaming is arguably placed on the rights of reproduction and distribution. During the 2000s, a debate emerged as to whether the rights of repro-
duction and distribution are implicated at all by the mere transmission of an on-demand stream through a service not designed to retain a copy of the song at the receiving end. Numerous structural features of the music business as it evolved over the twentieth century helped shape that debate, including the fact that early in the century music publishers in the United States had evolved sepa-
rate collective management organizations

share this revenue with artists. However, fol-
loowing the leak of the agreement between Sony and Spotify, all three of the major labels felt compelled to release public statements describing their policies on this topic. It has been observed, in particular by artists’ managers, that labels also sometimes secure equity stakes in their digital music service licensees, leading to the more complex ques-
tion of how profits from such stakes might also be shared with artists.

Musical Compositions

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rate collective management organizations

At this stage of the business cycle a set of relatively stable business models and new legal frameworks have emerged, edging out the traditional physical records business. While the business is certainly no less complex than it has ever been, this new paradigm has come with enormous benefits for consumers in terms of access, as well as for rights owners in terms of direct, rapid, and transparent accounting.
around the public performance right and the so-called “mechanical” right, each of which has differing flows of revenue as between music publishers and songwriters. It was apparent early on that a business built on access would inevitably erode a business built on unit sales, which would consequently shift the relative economics of the performance societies vis-à-vis mechanical rights administrators. Moreover, the mechanical right in the United States is the subject of a statutory license, the fees for which are set by Copyright Royalty Board (CRB) arbitration proceedings every five years. The debate was settled in the context of the proceeding known as “Phonorecords I,” during which the parties—including the labels, publishers, and digital music services—agreed that the mechanical right would apply, agreed that it would be licensable pursuant to the Section 115 compulsory mechanical license, and established a royalty rate formula for this use that persists to the present time. As of this writing, the successor to that proceeding, Phonorecords III, is before the CRB, its trial phase having just been completed, and a final determination expected by December 2017. This proceeding will set rates and terms for the period 2018 through 2022.

In the traditional physical record business, mechanical license royalties flow to publishers from record retailers through the record labels. For example, a label may obtain a mechanical license for a song from a music publisher and have one of its contracted artists interpret that song into a recording, which would then be sold wholesale to retailers. The statutory royalty rate operates effectively as a ceiling, because if the publisher does not agree to terms, the label can avail itself of the Section 115 license for making and distributing phonorecords. These royalties then flow back to publishers through the same chain, via the labels. This arrangement is fraught with data and accounting challenges that have led to historical underpayment problems, culminating most recently in a $264 million late fee settlement in 2009 referred to as the “Memorandum of Understanding” between the labels and publishers. As the on-demand streaming services emerged in the early 2000s, however, this structure shifted. Because the services are actually producing and distributing copies of compositions in this new “access” business, it falls to them to obtain the required mechanical licenses. Therefore, the labels must obtain mechanical licenses to make and sell any physical or downloaded copies of the recordings, and the DSPs must obtain separate mechanical licenses to operate their on-demand streaming businesses. Consequently, the publishers are now in direct privity of license with the parties exploiting their songs at the retail level for the first time in the history of the recorded music business.

The services have a range of options in obtaining these licenses. They can contract directly with publishing administrators, collectively license via, for example, the Harry Fox Agency, which represents a group of affiliated publishing administrators, or avail themselves of the statutory license by sending each publishing administrator a Notice of Intention to Obtain a Compulsory License. In practice, most DSPs license their services using some combination of these approaches. The primary challenge, however, is that sound recordings are largely controlled by a relatively manageable group of distributors and each tends to be owned by at least 57,000 publishing administrators who tend to own compositions in fractional shares. This creates an enormous transactional challenge in terms of licensing, license administration, and royalty accounting. This challenge, and the consequences of imperfection in meeting it, were laid bare in late 2015 and early 2016 when two class action lawsuits were filed against Spotify, and a separate $30 million settlement was announced with the National Music Publishers Association. The issues raised in these disputes bear a striking resemblance to those raised in the labels’ late fee settlement.

The royalty rates currently applicable to on-demand streaming services vary according to the type of offering a service provides. The rate that generally applies is roughly 10.5 percent of defined service revenue after application of several greater-of and lesser-of comparatives involving, among other things, a penny-rate per subscriber and a metric designed to maintain a rate that is roughly 21 percent of what the service pays to the labels for the corresponding sound recording rights. From this amount, moneys paid by the applicable licensee for public performance rights are deducted, because they also flow back to publishers and songwriters. Each month, licensees are required to perform this calculation to arrive at a total royalty pool, which is then divided by the number of plays on the service to arrive at a per-play rate. The per-play rate is then applied to each

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**Recorded Music Business Developments 1995 - Present**

<table>
<thead>
<tr>
<th>Year</th>
<th>Event</th>
</tr>
</thead>
<tbody>
<tr>
<td>1995</td>
<td>CD ROM drives become standard on computers, and Columbia House adds CD ROMS to marketing program.¹</td>
</tr>
<tr>
<td>1999</td>
<td>Napster triggers flood of peer-to-peer sharing of audio files.³</td>
</tr>
<tr>
<td>2000-2010</td>
<td>After initial unprecedented windfall rise generated by CD sales, music industry revenues fall.⁴</td>
</tr>
<tr>
<td>2005-2015</td>
<td>“Downloading” era (nearly synonymous with Apple’s iTunes Store) begins mainstream shift from physical goods to electronic distribution business.⁵</td>
</tr>
<tr>
<td>2010-2015</td>
<td>Revenues barely tread water as mix of revenue sources shifts with expanding revenue from digital formats, offsetting continuing decline of CD revenue.⁶</td>
</tr>
<tr>
<td>2015</td>
<td>Streaming revenue emerges as the largest segment of recorded music revenue (34.3 percent).⁷</td>
</tr>
<tr>
<td>2016</td>
<td>Recorded music revenues finally return to growth with strong double-digit showing (11.4 percent).⁸</td>
</tr>
</tbody>
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⁶ Id.

⁷ Id.

play of a song on the licensee’s service, with adjustments for songs greater than five minutes in duration.31 According to the moving papers of the parties available at press time, a primary debate in the current Phonorecordings III proceeding is whether this formula should continue, perhaps with adjustments, or be replaced by a simpler penny-rate per play or a pool based on a penny-rate per subscriber.42

Noninteractive Audio Streaming

More people are likely familiar with noninteractive, advertising-supported webcasting services—for example, Pandora43 and iHeart Radio44—which collectively have hundreds of million users in the United States alone. Pandora is the clear category leader in this segment: across all music streaming services, it held 25 percent of time spent listening, edged out only by YouTube.45 Some of these services are simply simulcasts or near simulcasts of traditional over-the-air broadcast radio stations,46 while others are programmed by computer algorithms designed to conform to individual listeners’ tastes and afford a limited number of “skips” forward.47

As with on-demand streaming, the primary right type implicated by these services is the public performance of sound recordings via digital audio transmission. However, when these transmissions are not interactive, they are eligible for a compulsory license to publicly perform sound recordings by means of digital audio transmission,48 as well as a corresponding right of ephemeral reproduction, which addresses the server copies from which such streams emanate and any incidental reproductions made during the course of the transmission across the Internet.49 As with the Section 115 statutory mechanical license, these two statutory licenses are the subject of Copyright Royalty Board proceedings every five years.50 The most recent proceeding, governing rates and terms for the period 2016-2020, was styled “Web IV” and concluded in December 2015.51

The Web IV proceeding considered a wide range of issues in determining the rates and terms for the applicable period. Among them was whether the penny-rate per-performance royalty structure that has prevailed since the first proceeding to determine such rates and terms should continue or be replaced with a greater-of-formulation taking into consideration a percentage of the licensees’ revenues. In the end, the per-performance model was retained, at a rate of $.0017 per stream in 2016, indexed to inflation for the years 2017-20.52

If less than two-tenths of a penny sounds small, all those streams add up. All royalties generated by the Sections 112 and 114 statutory licenses are collected and dispersed by SoundExchange, an agency deemed the sole “Collective” by the judges of the Copyright Royalty Board in the context of the second proceeding to set rates and terms for webcasters.53 SoundExchange distributed a record $883.9 million in royalties in 2016,54 although it is not clear exactly how much of that sum was attributable to advertising-supported webcasting because the figure includes other business models eligible for the Sections 112 and 114 licenses that are not broken out (such as Sirius XM satellite radio and residential digital music services like Music Choice). It has been speculated that the majority of that figure is from webcasting and that more than half was paid in by Pandora alone.55 Whether Pandora’s payments to SoundExchange will remain as high is uncertain, given reports that Pandora has shifted its licensing strategy in connection with its move into subscription interactive streaming, which would require at least some licensing direct from the labels, and not pursuant to the statutory licenses.56

Licensing Compositions

Virtually all of those streaming sound recordings (excepting, for example, comedy sketches) embody musical compositions that also must be licensed. Whereas on-demand streaming by industry-wide agreement implicates the mechanical right, the noninteractive streaming market is entirely focused on the public performance right.

Musical composition public performance rights licensing is traditionally managed in the United States by performing rights organizations (PROs). Although most territories have only one such organization, the United States traditionally has three: the American Society of Composers, Authors and Publishers (ASCAP), Broadcast Music, Inc. (BMI), and the smaller Society of European Stage Authors and Composers (SESAC).57 Recently, however, the notable artist manager Irving Azoff founded a new PRO called Global Music Rights (GMR),58 and there are signs that other entities are planning to offer carve-out rights and obscuring selling them exclusively in the blanket license format, discouraging direct licensing by refusing to offer carve-out rights and obscuring the works in its repertoire.61 The case subsequently settled, and SESAC agreed to become subject to a binding arbitration regime with the RMLC, roughly echoing the rate-setting procedure set forth in the consent decrees for ASCAP and BMI.62

DOJ Review

In 2014, ASCAP and BMI requested that the DOJ review the consent decrees, hoping to have them limited or eliminated.63 During the process, however, it emerged that the PROs had differing views from the DOJ on how the PROs’ blanket licenses operate with respect to compositions fractionally owned by multiple parties in which one or more of those parties are affiliated with different PROs.64 Thus, rather than substantially reducing or eliminating the decrees, the DOJ interpreted the existing consent decree as prohibiting ASCAP and BMI from issuing licenses solely to their controlled share of a work. They effectively interpreted all existing ASCAP or BMI grants of license as extending to the whole of the work, regardless of the PRO’s controlled share. In reaction, BMI filed suit with the U.S. District Court of the Southern District of New York on the “fractional licensing” issue, and the court ruled in favor of BMI.65 The DOJ then appealed that ruling to the Second Circuit, where it currently resides.66 ASCAP, meanwhile, has elected to take a legislative approach to the matter.67

Against this background, a licensee must seek licenses from each of ASCAP, BMI, SESAC, and GMR, each of which controls separate repertoire. The rates and terms of such licenses with ASCAP and BMI are well

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Working together for a more just LA
known, as they have typically been set through the public process dictated by the consent decrees. The most recent precedent for noninteractive audio streaming was effectively 1.85 percent of revenue for ASCAP and 2.5 percent for BMI.\footnote{Cary Sherman, 2016: A Year of Progress for Music, \texttt{medium.com} (Mar. 30, 2017), available at http://medium.com/RIAA-2016-a-year-of-progress-for-music-4c967f7022635.} Not subject to consent decrees, SESAC and GMR are free to negotiate their rates through private free-market negotiations; therefore, comparative figures are not readily available.

Thus, at this stage of the business cycle, a set of relatively stable business models and new legal frameworks have emerged, edging out the traditional physical records business. This evolution has replaced a “unit sales” business model with a range of services based around access to streaming music, whether on a noninteractive or on-demand basis and whether advertising-supported or subscription-based. While the business is certainly no less complex than it has ever been, this new paradigm has come with enormous benefits for consumers in terms of access, as well as for rights owners in terms of direct, rapid, and transparent accounting. Looking to the future, however, the lack of profitability among the leading streaming music services constitutes a dark cloud over prospects for long-term stability in the business.\footnote{PANDORA AMP, \url{http://amp.pandora.com} (last visited Feb. 21, 2017)} It remains to be seen whether there is sufficient market demand for these emergent models to scale to profitability, or whether further drama lurks in the offing.

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57 See Todd Brabec & Jeff Brabec, PRO Licensing - Multiple Choices, Considerations and Results, AIMP ARTICLES, http://www.aimp.org/aimpArticles/7/PRO_Licensing_Multiple_Choices,_Considerations_and_Results (last visited Mar. 8, 2017);
63 Id. at 3.
64 Id. at 3.
BRANDS are tapping social media celebrities—also known as influencers—to promote their products and services, and influencers can command significant compensation. Brands also use social media and other digital media formats to publish ads that seem native to the format and look more like editorial content than ads. In both cases, consumers can be deceived because the advertising nature of the message may not be apparent, thus the consumer may not be able to judge the objectivity or credibility of the speaker. In this case, the message may be deceptive advertising and actionable under state and federal false advertising and consumer protection laws. The Federal Trade Commission (FTC) has been particularly active in issuing guidance and bringing enforcement actions in these situations. Advertisers, publishers, and influencers, and often entertainment and sports celebrities, need to take care to ensure that their activities are not deceptive. This includes ensuring that the promotional nature of the message, and the connection between the speaker and the brand, is clear to consumers and that the message is otherwise accurate and not deceptive or misleading.

In 2009, the FTC was concerned about the use of celebrities to promote brands in social media, on talk shows, and in other contexts when it was not clear that they were paid spokespersons. It addressed these concerns by updating its Guides Concerning the Use of Endorsements and Testimonials in Advertising (E&T Guides). The E&T Guides, along with additional subsequent guidance and dozens of enforcement actions, provide a helpful roadmap for conducting legally compliant digital media advertising and promotional marketing in social media.

FTC Advertising Law
The E&T Guides address the application of Section 5 of the FTC Act “to the use of endorsements and testimonials in advertising.” In particular, Section 5 states that “unfair or deceptive acts or practices in or affecting commerce are hereby declared unlawful.” Under Section 5, the four core principles for compliance are: 1) advertising must be truthful and not misleading, 2) advertising must substantiate any express or implied claims, 3) advertising cannot be unfair or deceptive, and 4) any disclosures necessary to make an ad accurate must be clear and conspicuous.

The 2009 revised E&T Guides state that advertisers are subject to liability for false or unsubstantiated statements made through endorsements or for failure to disclose a material connection between themselves and endorsers. Although the E&T Guides do not carry the force of law or regulation, they articulate what the FTC believes is required to avoid deception under Section 5. Putting aside outright false or deceptive statements, the three most important factors to consider in evaluating social media promotions and native advertising are: 1) the existence of a material connection between the speaker and a brand, 2) when there is an endorsement or other promotional message, and 3) if there is an effective disclosure of the advertising nature of the message and of the connection between the speaker and the brand.

Based on the 2009 E&T Guides, the best practices for brands to follow for ensuring proper material connection disclosures are to 1) implement social media endorsement guidelines and policies for all internal and third-party marketing and promoting on
behavior of the brand, 2) obligate employees, agencies, influencers, and bloggers to effectively disclose material connections and to be accurate and not deceptive or misleading in either their association to the brand or what they say about it (separate and apart from the business and financial provisions of an engagement contract), 3) monitor the influencers’ conduct in connection with campaigns, 4) enforce proper compliance—if instances of noncompliance occur—by requiring remedial action and taking disciplinary and other corrective action, and 5) set up an incentive for compliance by holding back a material portion of compensation until compliance is confirmed.

**FTC 2013 Dot Com Guide**

In 2013, the FTC released a guide on dot-com disclosures (.Com Guide) to describe the standards for online ads and effective disclosure for these ads. The .Com Guide, the FTC reinforced that online ads must disclose all material information needed to prevent consumers from being explicitly or implicitly deceived and that disclosures must be clear, conspicuous, and proximate to any ad content that requires qualifications or disclosures to prevent deception. The FTC stated, “If a disclosure is necessary to prevent an advertisement from being deceptive [or] unfair...and if it is not possible to make the disclosure clear and conspicuous, then either the claim should be modified or the ad should not be disseminated.” This can be a challenge in social media and other online media in which space is limited. In recent years the FTC has advised what types of short-form disclosures are effective (e.g., #Ad, #[BrandName]Sweepstakes, #Sponsored) and what are not (e.g., #Sp, #Collab, #Sweeps). There may be more organic ways to give an effective disclosure. For instance, when an influencer receives a free product to try, stating, “Brand gave me this product to review, and...” may be effective if that is the extent of the connection. However, if the influencer also receives payment to review and comment on the product, this type of disclosure may be ineffective in communicating the extent of the connection necessary for consumers to judge the speaker’s objectivity. In other words, context is key.

After the 2009 revised E&T Guides, the FTC compiled a list of the most frequently asked questions (FAQs) to provide advertisers clarity in their compliance efforts. These FAQs reiterated the importance of adopting social media policies and recommended a “formal program to remind employees periodically of your policy, especially if the company encourages employees to share their opinions about your products.” These suggested social media policies should include: 1) employee and contractor compliance training and corrective action, 2) an explanation to network members about what they can and cannot say about products (for example, a list of the health claims they are allowed to make), 3) instruction to network members concerning their responsibilities for disclosing corporate connection, 4) periodic searches on what network members are saying, and 5) follow up with respect to questionable practices.

Some of the FAQs involved what constitutes an effective disclosure under traditional and digital media advertising. In answering these questions, the FTC accounted for the 2009 E&T Guides as well as the 2013 .Com Guide. In addressing disclosure requirements for bloggers, the FTC Endorsement Guide FAQ requires disclosure when a significant minority of consumers would not understand the material connection between the blogger and the brand. In addition to discussion of examples of clear and understandable forms of disclosure, the FAQs indicate that even clear disclosures of affiliation on speaker profile pages or site homepages can be deemed ineffective disclosures when they are not sufficiently conspicuous and proximate to each promotional message. Also, an advertiser’s logo or hashtag is insufficient to explain that the speaker likes the brand and is endorsing it. Also, the guidelines suggest that starting the material connection in the description field of the video is insufficient. Disclosures for videos should appear at the beginning of the video while longer videos should have recurring, multiple disclosures to ensure the consumer is aware of the material connection. For live streams, disclosure should occur multiple times and be periodic throughout the stream. However, the FTC has stated continuous disclosure for a live stream would be the best practice. Additionally, the disclosure in the promotional video should be long enough to read, or if spoken, at an understandable cadence. In the context of a YouTube multichannel network, the disclosure on compensated reviews needs to identify the sponsor in a “sponsored by” notice made by the product manufacturer. Based on advertisers’ increasingly using promotional videos for their campaigns, ensuring the video has the appropriate disclosures will be an important facet of planning the campaign and properly educating the consumers.

**Native Advertising**

Native advertising is generally defined as the practice of designing ads that look and feel like the natural editorial content of a website, social media platform, magazine, or video network. Native advertising is also defined as a method in which the advertiser attempts to gain attention by providing content in the context of the user’s experience with native ad formats matching both the form and functions of the user experience in which it is placed. Another definition, which comes from the Interactive Advertising Bureau, defines native advertising as “paid ads that
are so cohesive with the page content, assimilated into the design, and consistent with the platform behavior that the viewer simply feels that they belong.” Regardless of how it is defined, native advertising is an increasingly popular method for integrating paid advertisements into editorial content to engage consumers in information about, related to, or to promote the business that originated or paid for the content. As a demonstration of the power of native advertising, a recent study indicates that about “75 percent of advertisers have gone native and the rest intend to.”

Although many companies have adopted native advertising to successfully promote their own brand, and media companies enjoy the revenue stream created by this new form of advertising, disclosure compliance is required just as with social media influencer campaigns. Notably, the FTC guidelines mandate disclosure in promotional content that appears to be an advertisement in order to avoid deceiving the customer. Nevertheless, native advertising compliance with FTC disclosure can be particularly difficult because “native blurs the line between editorial content and advertising, and, when most effective, engages readers in the same way as the surrounding editorial content for a site.” Therefore, a thorough understanding of the FTC’s guidance on native advertising is the best way for advertisers to ensure compliance.

The FTC “will find a native ad’s format deceptive if it materially misleads consumers about its commercial nature, including through an express or implied misrepresentation that it comes from a party other than the sponsoring advertiser.” When a business uses native advertising, it is responsible for ensuring the native ads are clearly identifiable as advertising before the consumer arrives at the main advertising page. Also, regardless of how many consumers arrive at the advertising content, the native ads must not mislead the consumer about its commercial nature. As a business evaluates whether native ads are recognizable as advertising to consumers, the advertisers should analyze the native ad’s “overall appearance; the similarity of its written, spoken, or visual style or subject matter to nonadvertising content on the publisher site on which it appears; and the degree to which it is distinguishable from other content on the publisher site.” The more similar the native ad appears to the content on the publisher’s site, the more likely disclosure will be required to prevent potential consumer deception.

To make effective disclosures for native ads, the FTC recommends following the .Com Guide. Similar to the other disclosure guidance, the disclosures should be 1) in clear and unambiguous language, 2) as close as possible to the native ads to which they relate, 3) in a font and color that’s easy to read, 4) in a shade that stands out against the background, 5) on the screen long enough to be noticed, read, and understood with respect to video ads, and 6) read—for audio disclosures—in a cadence and vocabulary easy for consumers to follow. Because advertisers have flexibility in identifying native ads as ads with different interfaces and available platforms, effective (i.e., compliant) disclosure can be accomplished creatively. Nevertheless, advertisers should ensure their native ad disclosures follow the FTC’s guidelines concerning proximity and placement, prominence, and clarity of meaning in its native advertising guide and carefully analyze the FTC’s examples of effective and ineffective native ad disclosures.

**Best Practices Case Study**

One of the best ways to demonstrate what an effective system of FTC compliance, monitoring, and enforcement looks like is to view it in practice in a real-world business environment. Social media influencer agencies have popped up over the past two to three years amid the incredible growth of social media advertising dollars pouring into the market. Social media advertising budgets have doubled worldwide over the past two years, going from $16 billion in the United States in 2014 to $32 billion in 2016. Social
media spending in the U.S. alone is expected to reach $17.34 billion in 2019. Today, many brands and studios—and the media agencies they engage to manage their social media advertising budgets—look to these social media influencer agencies to creatively develop content and cast as well as manage and execute social media influencer campaigns. When a social media agency is engaged to execute a social media influencer campaign, it is typical for the agency to be contractually obligated to comply with all applicable federal laws, rules, and regulations. These obligations should specifically call out the FTC E&T Guides in addition to other federal and state advertising laws.

In executing a branded social media campaign, social influencer agencies are tasked with a challenge to ensure all posts published by the influencers in their network are FTC-compliant. One of the most effective ways for the social influencer agency to satisfy its contractual obligations to clients is to educate the social influencers and their representatives about the E&T Guides. Social influencers communicate almost entirely in a visual language in social media. A one- or two-page list of contractual obligations in an influencer’s deal memo for the branded content campaign will likely be read once and not necessarily be understood.

As was learned from the FTC’s closing letter to Machinima, presenting influencers with a branded content campaign deal memo containing a separate section dedicated to FTC endorsement disclosure obligations is the best practice. In 2013, Machinima, Inc., a multichannel network on YouTube, conducted an advertising campaign at the request of Starcom MediaVest Group—an advertising agency representing Microsoft—in which it paid several of its network influencers to produce and upload Xbox One game play videos that were subsequently posted to YouTube to generate interest and sales activity of the newly released Xbox One and associated games. As the FTC letter indicates, the influencers were directed by Machinima to speak favorably about Xbox One and the game titles. Despite the fact that Machinima did not require the influencers to disclose in their videos that they were being compensated to produce and upload the videos, the FTC decided not to take enforcement action against Microsoft or Starcom because the incidents appeared to be isolated since Microsoft already had in place a “robust compliance program,” and both companies had “adopted additional safeguards regarding sponsored endorsements,” acting quickly to have Machinima insert disclosures into the campaign videos once they learned of the breach.

Providing disclosure examples in a visual, imagery-based, detailed description of what a proper endorsement disclosure looks like to followers on each social media platform is the best way to communicate important contractual and legal obligations to influencers who work in an imagery-based publishing and distribution world. If the client’s branded content campaign requires influencers to post on the influencer’s Instagram account, for example, the agency should include images of what a branded social post looks like on Instagram in the E&T Guides obligations section of the influencer deal memo.

Another method for social influencer agencies to ensure that branded content campaigns for their clients are FTC-compliant is to include image-based examples and step-by-step instructions in the influencer deal memo on how to use platform-specific branded content tools. YouTube has recently added a new tool to provide notice to viewers about sponsored content to help influencers achieve compliance with the necessary disclosures about their relationships with advertisers. The new feature adds visible text on a video for the first few seconds watched by a viewer with a label stating “Includes paid promo-
tion.” Similarly, Facebook implemented a branded content tool in the spring of 2016 and requires any post that includes paid content to be published using the tool. The Facebook Branded Content Tool adds hyperlinked text at the top of the post “Brand with Influence.” Clicking on the “Brand” link takes the user to the brand’s official Facebook page.

One of the practical challenges facing influencers, agencies, and brands is establishing a baseline of acceptable and mutually agreed compliant disclosures for each campaign. Many social media influencer campaigns involve negotiating a campaign statement of work among three separate legal departments (the media agency representing the brand, the brand, and the agency). Personal experience has demonstrated that many influencers will not agree to use the standard FTC acceptable #Ad, #sponsored, or #Paid in their paid posts because they view them as “sassy” or “too commercial.”

From a legal compliance and policy point of view, these accepted disclosures are intended to inform followers that the post is commercial or paid. Marketing departments for brands often align with influencers in their desire to make influencer marketing seem organic and not overtly commercial. In many cases, the brand, the media agency, and the influencer agency agree to provide social influencers a choice of mutually agreed disclosures that include standard direct disclosures (#Ad, #Sponsored, or #Paid) and more organic copy in the body of the text of each post, for example “I’m working with Brand…,” “I’ve teamed up with Brand…,” or “I’ve partnered with Brand….” Many influencers and brands prefer the organic nature of these types of disclosures over the more commercial #Ad because it lends more authenticity to the influencer’s messaging as it is presented more in the influencer’s voice. The FTC has not commented specifically on which, if any, of these types of more organic disclosures would be FTC-compliant in disclosing the material connection between the advertiser and the influencer. The options for disclosures should be enumerated specifically in the influencer’s deal memo as well as in the statement of work between the brand and the social media influencer agency.

Social influencer agencies need to ensure that the influencers they engage to execute branded content campaigns in social media do so in compliance not only with E&T Guides but also with social platform terms of service and requirements for usage of their tools. Although the branded-content tools being implemented by social platforms are helpful to influencers in disclosing their relationships with advertisers, it is not clear whether the tools create posts that are compliant with FTC endorsement disclosure requirements or with other applicable laws. Until practitioners know more about how the FTC views the posts published through the social platform branded content tools, the best practice is to include a requirement that the influencer use the tools in accordance with each social platform’s terms of service and the specific text approved in the deal memo for compliant disclosures (e.g., #Ad, #Paid, #Sponsored).

Social influence agencies and businesses executing branded content campaigns in social media using influencers should be concerned with establishing an effective system of compliance, monitoring, and enforcement that focuses on the influencer’s actions. To date, the FTC has not pursued action against influencers merely for failure to comply with the individual disclosure obligations, without further misconduct. However, social media agencies, influencers, and talent managers should be aware that there has been an increase in formal complaints from consumer protection organizations to the FTC regarding flagrant deceptive marketing practices of many high profile influencers in social media. In 2016, there were formal complaints to the FTC from Truth in Advertising and the Center for Digital Democracy.35 Both formal complaints alleged rampant failure of high-profile social influencers and celebrities—e.g., the Kardashians—of publishing paid branded content posts without disclosing the nature of their relationship with the advertisers.36 These consumer protection organizations also point out that the majority of the violations are taking place on platforms like Instagram where the consumers may be more vulnerable because they are often younger—according to Pew Research more than 80 percent of consumers under 30 use Instagram as opposed to 43 percent age 30 and above.37 With the increase in formal complaints to the FTC related to violations from influencers, it is possible that the FTC may begin to investigate and take action against influencers directly.

The FTC has issued guidelines and answered FAQs concerning social media promotions and native advertising; however, concerning some of the best practices a business can follow to ensure FTC compliance, each advertiser and business should adjust its own disclosure and compliance program practices based on particular campaigns. As technology continues to evolve and the FTC promulgates further guidelines and clarifications, heightened vigilance on avoiding deception in advertisements should be the mission of every brand and agency.

1 16 C.F.R. §255.
2 16 C.F.R. §255(a).
4 16 C.F.R. §255(a).
6 Id.
8 Id.
9 Id.
10 Id.
13 Id.
14 Id.
15 Id.
16 Id.
21 Id.
22 Native Advertising, supra note 17.
23 Id.
24 Id.
25 Id.
26 Id.
27 Com Disclosures, supra note 5.
28 Id.
29 Id.
30 Evan LePage, All the Social Media Advertising Stats You Need to Know, Hootsuite (Nov. 29, 2016), available at https://blog.hootsuite.com/social-media-advertising-stats.
32 Id.
33 Id.
34 Id.
36 Weissman letter, supra note 35.
ON JANUARY 20, 2017, when President Donald Trump signed the executive order banning individuals from seven predominantly Muslim countries and all refugees from temporarily entering the United States, the entertainment industry reacted strongly.

Christopher Dodd, the former U.S. senator from Connecticut and current chairman of the Motion Picture Association of America (MPAA), expressed the organization’s concern about the ban’s impact, noting, “[T]he U.S. film and television industry is part of a global enterprise that is enriched by the contributions of talented individuals from around the world.” Dodd added, “Among those potentially affected are members of the creative community who cannot freely express themselves in their home country and come to the United States seeking the opportunity to communicate and enlighten.”

The Screen Actors Guild called the ban “misguided” while the Directors Guild of America stated that “artists—regardless of their national origin, faith, or gender—should be able to come to the United States to showcase their work.” The American Federation of Musicians commented that the ban “violates our country’s founding principles.” Finally, the Entertainment Software Association, comprised of leading video game companies, urged the new administration to “exercise caution with regard to vital immigration and foreign work programs” and stated that “as a leading force in technology and exporter of entertainment, the U.S. video game industry thrives on the contributions of innovators and storytellers from around the world.”

These statements make clear that the U.S. entertainment industry values diversity and considers itself to be a welcoming, open, and inclusive community. While the January 20 travel ban was struck down as unconstitutional by a federal judge, the fact that President Trump took such a dramatic step
only three days after being sworn into office raises an important question: Under an administration that in many ways views immigration with wariness and even suspicion, what do the next four years portend for an industry that relies on the contributions of people from all over the world?

Entertainment-Related Visa Categories

From actors, animators, and cinematographers to musicians and video game developers, the U.S. entertainment industry is comprised of people from all over the world, many of whom are working in the United States under some type of employment visa that potentially can be affected by changes to immigration policy. Entertainment professionals use four main categories of visas: O-1, P, H-1B, and B-1.

The O-1 visa is for individuals of extraordinary ability in their field. Specifically, the O-1A is for individuals who possess extraordinary ability in the arts, sciences, education, business, or athletics. It requires showing that the individual's level of expertise is ordinarily encountered. The O-1B is for individuals with extraordinary ability in their field. Specifically, the O-1B was created specifically for entertainers. In addition, while most visa categories must be sponsored by employers, the O-1 may be sponsored by an employer or an agent. For example, an agent may sponsor a voice actor for an O-1 visa. To qualify, the individual must serve in a position that normally requires a bachelor's degree or its equivalent. A “group” may consist of as few as two people. When adjudicating P-1 petitions, USCIS evaluates the reputation and achievements of the group as a whole and not the achievements of its individual members. Exemplary of who may apply for a P-1 is a musical group coming to the United States for a three-month, multicity tour.

The P-2 visa is for entertainers and artists, both individuals and groups, who are coming to the United States under a reciprocal exchange program between a U.S.-based organization and a similar organization abroad. One of the better-known P-2 programs is overseen by the American Federation of Musicians, which in collaboration with its Canadian counterpart, the Canadian Federation of Musicians, operates a reciprocal visa program.

The P-3 visa is for entertainers and artists coming to the United States temporarily to perform or teach, individually or as part of a group, in a “culturally unique” program. The program may be commercial or non-commercial and requires the beneficiary to develop, interpret, represent, or teach a unique or traditional theatrical, artistic, musical, or cultural performance or presentation. The primary objective of the program must be to increase the understanding or development of the art form. Similar to the O-1, P-3 visa petitions must be accompanied by a written consultation from an appropriate labor organization.

While the Trump administration has not announced specific changes to the O or P visa categories, the possibility of stricter adjudication of these petitions lingers. Stricter adjudication could result in more requests for evidence from government officers, which slows processing times, as well as denials of visa petitions that may have been approved in the past. Adverse adjudications may be appealed, but the process is so lengthy and burdensome that the performance or event may have passed by the time the appeal is granted. While top stars and groups or well-known executives may not be impacted, tougher scrutiny of O and P petitions could impact individuals or groups who have achieved noted success on a more limited basis. From the outset, petitioners should provide substantial documentation of the achievements of the beneficiary or beneficiary.
Foreign Worker Programs,” requires the Department of Labor, the Department of Homeland Security, and the Department of Justice to issue a report “on the actual or potential, direct or indirect injury caused to U.S. workers” by the H-1B program.31 The draft executive order also calls upon the government to consider changes in the H-1B cap allocation process to ensure that only the best and the brightest are chosen.32 While the draft executive order has yet to be signed, it nonetheless reflects some of the Trump administration’s views on the H-1B program and the changes that may be coming.

Another visa used by individuals in the entertainment industry is the B-1 for business visitors. It is intended for short-term visits (typically not more than six months) by a person who intends to conduct business activities in the United States that are incident to the person’s business outside the country. Examples of permissible B-1 activities include attending business meetings or industry conferences or events. While the Visa Waiver Program allows the citizens of 38 “low-risk” countries to travel to visit the United States for up to 90 days without obtaining a visa from a U.S. consulate abroad, citizens of other countries are required to obtain a B-1 visa to visit.33 The B-1 is different from the other three visa categories for several reasons. First, it is for individuals who maintain and retain residence outside of the United States, not those who intend to work temporarily in the United States. Second, individuals apply for the B-1 by appearing at a U.S. consulate abroad rather than first submitting a visa petition to a USCIS office in the United States. At the time of the consular interview, applicants must demonstrate a legitimate reason to travel to America and that they have no intention of abandoning their residence abroad.34

During his presidential campaign, Trump made “extreme vetting” of visa applicants from Middle Eastern countries a central feature of his plan to make America safer.41 The administration has yet to provide details on how visa applicants will be vetted more thoroughly, but in a cable dated March 17, 2017, the U.S. Department of State ordered U.S. consulates around the world to scrutinize all visa applicants more closely.42 Presumably, the focus of this greater scrutiny will be on applicants who may present a security threat to the country, but the cable also directs consular officers to review “non-security-related” ineligibilities.43 Many are concerned about the application delays that may result because of the heightened scrutiny.

In the entertainment industry, prompt visa issuance is often critical because of tight production schedules and other defined and inflexible business timelines. Delayed visa issuance for a critical resource could translate into a postponed production schedule and cost a production company literally hundreds of thousands of dollars.

One noticeable area of impact is more forceful questioning by U.S. immigration officers at airports and other ports of entry.44 Additionally, there are increased anecdotal reports that travelers are being asked to share the contents of cell phones, tablets, and laptops at the time of entry into the country, raising serious privacy and business confidentiality concerns.45 The U.S. Supreme Court has yet to rule on the constitutional limits of an immigration officer’s authority to conduct searches of electronic devices at the port of entry. Until it does, the government will continue to claim that Fourth Amendment protections against unlawful search and seizure do not apply to travelers—U.S. citizens and otherwise—entering the United States.

This means that immigration officers at ports of entry can and will assert the right to search electronic devices at their discretion. For example, if a video game executive returns from a trip abroad and has a laptop containing the alpha version of a video game under production, he or she may be asked to share the contents of the laptop with an immigration officer. The executive would understandably be uneasy about complying with the request, especially if the company has poured millions of dollars into the game’s development. However, even if he or she refuses to consent to the search, the officer could potentially seize the laptop. In the entertainment industry, where intellectual property can be so valuable, this raises serious concerns. Indeed, the executive may be better off simply leaving the laptop at home and using alternative and secure methods of transmitting data online which may create its own set of challenges.

President Trump has called for the hiring of an additional 10,000 agents for Immigration and Customs Enforcement, the agency charged with enforcing immigration laws in the country’s interior.46 This means that worksite enforcement actions likely will become more commonplace. What can employers do to prepare?

Under the Immigration Reform and Control Act of 1986, employers are required to verify that all new hires are authorized to work in the U.S. by completing a Form I-9. Employers must maintain a valid Form I-9 for all active employees hired after November 6, 1986. Companies in the entertainment industry could potentially be the target of enforcement actions and should make sure their I-9 forms are in good order. In 2016, Immigration and Customs Enforcement conducted almost 1,300 audits of company I-9s, assessing more than $17 million in fines.47 With the Trump administration’s focus on enforcement, it is anticipated that I-9 audits will increase substantially in the coming years, possibly exceeding the peak in 2013 when the government brought more than 3,100 enforcement actions against employers.48 In addition, H-1B employers should take the step of confirming they are properly maintaining public access files for all H-1B employees.49 The Department of Labor’s Wage and Hour Division has enforcement authority under the H-1B program and is expected to be more active in the coming years as well.

Suspension of Premium Processing

On March 3, 2017, USCIS made the surprise announcement that it was suspending the premium processing program for all H-1B petitions for up to six months.50 The premium processing program allows employers to pay an additional $1,225 filing fee for the government to process a case within 15 calendar days. While the agency has been tight-lipped on its reasons for the suspension, speculation is that it is the result of resource limitations, compounded by President Trump’s January 23, 2017 hiring freeze on all federal workers.51 To that end, it is believed that USCIS simply does not have enough caseworkers to meet the 15-day processing deadline. While the suspension should not impact the work eligibility of H-1B visa holders, it may impede their ability to travel outside the United States.
and thus impact the travel plans of some in the entertainment industry.\textsuperscript{52}

During President Trump’s address to a joint session of Congress on February 28, 2017, he introduced the idea of implementing a merit-based immigration system.\textsuperscript{53} While it was the first time that Trump mentioned a merit-based system, in 2007, Congress proposed a similar system during immigration reform talks. During his address, Trump noted that “it’s a basic principle that those seeking to enter a country ought to be able to support themselves financially, yet in America, we do not enforce this rule, straining the very public resources that our poorest citizens rely on.”\textsuperscript{54} Trump offered no details about his vision, but his remarks suggest a shift away from the current immigration system that gives priority to family members of U.S. citizens and residents who are living abroad, and towards a skill-based system. During the address to Congress, Trump cited Canada’s merit-based system as a model to follow.\textsuperscript{55} The Canadian system awards points to would-be immigrants based on educational achievement, employment background, financial means, and language proficiency. The United Kingdom, Australia, and several other countries have similar systems.

Merit-based immigration systems are often associated with permanent residence rather than a temporary employment visa. However, the merit-based concept could certainly apply to temporary employment visas as well. For example, two congressional proposals currently circulating call for using a priority system to allocate new H-1B visas. One proposal is from Democratic Representative Zoe Lofgren of California and the other is from Republican Senator Charles Grassley of Iowa and Democratic Senator Dick Durbin of Illinois. Both measures prioritize new H-1B visas for individuals holding positions that pay high salaries and require graduate academic degrees, among other factors.\textsuperscript{56} Another tactic the government could take is to require a second level of review on top of basic visa eligibility. For instance, once the immigration officer makes a determination on whether the applicant meets the basic eligibility requirements, the officer could then be required to determine whether the applicant’s employment in the United States is in the “national interest.” This type of analysis would not be unprecedented in U.S. immigration law.\textsuperscript{57}

The key question is how would a points-based system work for the entertainment industry? While it may work well for traditional professions such as a software engineer, research scientist, nurse or college professor, would it work for an industry with many professionals with nontraditional backgrounds or who are employed pursuant to nontraditional work arrangements? For example, a highly regarded actor may have earned a diploma or certificate from a prestigious acting school in the United Kingdom. Would the acting school certificate be awarded under a points-based system the same way as a bachelor’s degree from the London School of Economics? That same actor may have 30 acting credits in his or her career. Would those acting credits be awarded the same way as five years of work experience at a global financial institution or technology company? Any points-based system would need to be flexible enough to work for nontraditional careers in entertainment and the arts. One silver lining is that a merit-based system could create more employment-based visas for the business community as a whole, and the entertainment industry would be among the industries that benefits.

Global Revenue Growth

There is little debate the U.S.-based entertainment industry has become increasingly globalized over the past decade. Last year’s top 10 grossing movies netted $8.8 billion in revenues for Hollywood, almost half of which, $4.2 billion, resulted from box office sales outside the United States.\textsuperscript{58} However, the changed U.S. immigration climate raises a critical question for entertainment executives who are watching global revenue growth: will a less welcoming immigration policy have the effect of turning off global audiences to American-produced content?

Furthermore, as streaming services such as Netflix and Amazon try to capture an increasingly global audience, one smart strategy would be hiring cast members from other parts of the world who attract fans from their home countries. For example, Ruby Rose, the actress and model who stars in the Netflix series, \emph{Orange Is the New Black}, has a strong following in her native Australia. When she joined the cast, she brought many Australian fans with her. If fewer foreign nationals are able to come to the United States to work in the industry, will studios and production houses experience more difficulty creating global interest in new content? This phenomenon could be classified as an unintended consequence of a more restrictive immigration policy. Time will tell if there are others.

The impact of a tighter U.S. immigration policy on the entertainment industry is multi-faceted and potentially far-reaching. A more stringent government review of visa petitions and applications could result in a decreased inflow of talent to the United States at all levels of the industry and in all positions. In addition, a more restrictive policy could potentially impact the industry’s bottom line because of its increasing reliance on a global audience. As the new administration balances its priorities and objectives, the question for many is whether immigration will continue to occupy a top spot on President’s Trump’s executive agenda. If so, will the administration forge ahead with immigration policies and actions that reflect its strident tone? Or will it change courses and take a more moderate approach that suggests business as usual? One thing is for certain: the entertainment industry will be watching.

\textsuperscript{2} Id.
\textsuperscript{6} At the time of the writing of this article, President Trump’s revised Travel Ban Executive Order had also been struck down as unconstitutional in State of Hawaii v. Trump, No. 1:17-cv-00050 (D. Haw. 2017); see also Press Release, Department of Attorney General of Hawaii, Travel Ban Case Update: Court Grants Conversion of Temporary Restraining Order to Preliminary Injunction (Mar. 29, 2017), available at https://ag.hawaii .gov/wp-content/uploads/2017/01/News-Release -2017-34.pdf.
\textsuperscript{7} 8 C.F.R. §214.2(o)(1).
\textsuperscript{8} Id.
\textsuperscript{9} Id.
\textsuperscript{10} Id. §214.2(o)(3)(ii).
\textsuperscript{11} Id. §214.2(o)(1)(iii)(A)(1).
\textsuperscript{12} Id. §214.2(o)(2)(iv)(E).
\textsuperscript{13} Id. §214.2(o)(5)(i).
\textsuperscript{14} Id. §214.2(o)(6)(iii)(A).
\textsuperscript{15} Id. §214.2(p)(1)(i).
\textsuperscript{16} Id.
\textsuperscript{17} Id. §214.2(p)(4)(i)(B).
\textsuperscript{18} Id. §214.2(p)(5).
\textsuperscript{20} 8 C.F.R. §214.2(p)(6)
\textsuperscript{21} Id.
\textsuperscript{22} Id.
\textsuperscript{23} Id. §214.2(p).
\textsuperscript{24} Id. §214.2(b).
\textsuperscript{25} Id.
\textsuperscript{26} 20 C.F.R. §655.731(a).
\textsuperscript{27} INA §§214(g)(1)(A), 5(I(C).
\textsuperscript{29} Id.
\textsuperscript{32} Id.
34 22 C.F.R. §§41.31, .31(a); 9 FAM §§402.2-2(C).
36 Hauslohner & Ross, supra note 31.
37 Id.
38 9 FAM §402.2-5(F).
40 Id.
43 Id.
48 Id.
49 20 C.F.R. §655.670(a).
52 Generally, an H-1B visa holder must have a valid visa in his or her passport to reenter the country after traveling internationally. To obtain the visa, the individual must present the original H-1B approval notice issued by U.S. Citizenship and Immigration Services during a visa appointment at a U.S. Embassy or Consulate abroad. With the suspension of the premium processing program, USCIS will take longer to issue approval notices. In many cases, it is likely the approval notice will not be issued until after the individual’s prior visa has expired.
54 Id.
55 Id.
57 Kazarian v. U.S. Citizenship and Immigration Servs., 596 F. 3d 1115 (9th Cir. 2009).
High-Tech Art Authentication May Prevent Costly Litigation

THE ROBUST GROWTH IN DEMAND for investment-grade art has been accompanied by a sharp increase in litigation over questions of authenticity and provenance. This has shone a harsh light on the difficulties of conducting adequate due diligence in such a notoriously opaque and unregulated market. At the same time, several emerging technologies suggest that the dynamics of how art is created, sold, and authenticated may be due for change. Some of these technologies have enabled arms-length transactions in which works of art can be discovered, bid upon, purchased, and delivered over long distances. Others have allowed artists to tag their work at the point of creation both as a guarantee of authenticity and as a deterrent to counterfeiting. Still others are providing advanced forensic tools that can match existing artworks to their creators with a precision previously unattainable. Taken together, these new techniques and tools promise to change the very nature of due diligence in art transactions going forward.

The rise of social media has had a disruptive effect on art marketing. Instagram, in particular, has emerged as an online marketplace in which artists can display their work, dealers can market it, and collectors can discover it—all at a distance. This has, despite its benefits, increased the vulnerability of all players to sophisticated counterfeiters, fraudulent sellers, and other bad actors who thrive in online environments. Some works on Instagram have been created digitally and thus can be easily replicated by unauthorized owners. Reliable ways to restrict dissemination of works before they are new, but whether the artwork is digital or not, remote Instagram-facilitated transactions have brought into focus the need for a new breed of advanced authentication techniques. Several have emerged to fill the void, including four possible game-changers.

Forensic Breakthroughs

Among the most promising of these new technologies, two are forensic in that they can be used on existing works to verify their authenticity. The first, anti-forgery algorithms, uses big data and artificial intelligence methods to apply “deep learning” to the materials, compositional techniques, and stylistic signatures of the artist in question. The algorithms analyze and codify the characteristics that uniquely identify an artist in order to distinguish them from those of skilled forgers. With all artificial intelligence, the knowledge gained is cumulative—the algorithms add information over time, constantly improving their accuracy in detecting forgeries.

Peptide mass fingerprinting (PMF) uses mass spectrography to analyze proteins at the molecular level. As animal proteins have been used for centuries in paints, adhesives, and coatings, PMF identifies the unique markers that make up the “fingerprint” of a sample, allowing works to be matched precisely to similar works by the same artist. A mismatch strongly indicates forgery.

Two other nascent forensic technologies are being applied to new works, including digital art, as effective deterrents to counterfeiting and unauthorized replication. Synthetic DNA lets artists stamp an inconspicuous tag on new works. Made from bioengineered DNA material, this unique identifier can be scanned to verify provenance. The tag is tamper-proof—it cannot be removed without leaving microscopic evidence—and is linked by encryption to metadata about the work, its history, and its creator.

Blockchain, a transaction-recording technology commonly associated with digital currencies, is now being used to track the movement and verify the provenance of digital art. Just as every bitcoin transfer is permanently recorded in a distributed public ledger, the ownership data of digital artworks now can be permanently recorded in a similarly distributed database. From then on, all subsequent transactions are time-stamped and publicly linked to the database, confirming that the work has been properly licensed. Clear provenance is established at the creation of the work and securely tracked over its lifespan.

Simplifying Authentication

All four new technologies arrive at a time when the traditional means of artwork authentication are increasingly being tested by litigation. Settling authenticity claims has always been plagued by ambiguity, relying on the sometimes contradictory findings of two different types of experts: scientists performing forensic tests and connoisseurs making informed evaluations of the works in question. As lawsuits have grown in frequency and financial consequence, mistakes inevitably have been made and many connoisseurs themselves have been sued. This has caused a number of connoisseurship committees to withdraw from the practice, declining to render opinions that might subject them to litigation. In such a fraught setting, the ability to render a simple yes-or-no verdict based on dependable scientific indicators can greatly reduce the time, expense, and uncertainty of resolving authenticity questions.

It is now incumbent upon all players in the art field—artists, collectors, investors, gallery owners, and the lawyers who represent them—to adjust their practices in light of changing technology. The implications for due diligence are clear. While transactions involving older works will continue to rely on the laborious, time-consuming, and ultimately subjective authentication processes of the past, the path for new works will be considerably simpler. Artists should be advised to take precautionary measures, such as tagging their works and recording metadata, even at the earliest stages in their careers. Buyers and sellers should be apprised, in advance of any online transaction, of the more precise authentication techniques now available to them.

These new protections, when fully implemented, will bring a welcome measure of transparency to the entire art market, even as they dramatically reduce the time and money spent on due diligence and authentication. The ultimate promise is that transactions will be safer and more efficient, thereby raising productivity and profitability for all involved.

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