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Based on True Events

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Los Angeles Lawyer (ISSN 0162-2900) is published monthly, except for a combined issue in July/August, by the Los Angeles County Bar Association, 1111 West 7th Street, Suite 2700, Los Angeles, CA 90017-2913 (213) 896-6700. Periodicals postage paid at Los Angeles, CA and additional mailing offices. Annual subscription price of $44 included in the Association membership dues. Nonmember subscriptions: $38 annually; single copy price: $5 plus handling. Address changes must be submitted six weeks in advance of next issue date. POSTMASTER: Address Service Requested. Send address changes to Los Angeles Lawyer, P. O. Box 55020, Los Angeles CA 90055.
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The fun part of practicing as a lawyer in the entertainment industry now is the degree of dynamism in the legal landscape and the business itself. Practitioners are daily challenged to solve novel problems that may affect the industry for a generation or more. Litigation more and more has “bet the company” consequences, as business models and consumer preferences change, and deals must address unique deal points for the same reasons. This year’s entertainment issue is a reflection of the dynamic forces in play.

As Saul S. Rostamian, Diana Hughes Leiden, and Lev Tsukerman write in their article about the Olivia de Havilland litigation regarding her depiction in the television series *Feud: Bette and Joan*, “Hollywood is keeping a watchful eye on a lawsuit that could have a lasting impact on how real-life personalities are depicted in television and movies.” Although FX successfully prevailed on an anti-SLAPP motion striking de Havilland’s claims, a request for review to the California Supreme Court will doubtless follow.

With the sheer volume of allegations of improper sexual conduct in the entertainment industry and beyond, it comes as no surprise that some deeply entrenched legal norms may be eliminated. Ann Fromholz and Jeanette Laba explain how the long-standing concept of strictly enforced confidentiality provisions in settlement agreements may be coming to an end concerning sexual harassment matters.

An artist’s “quote” (payment on prior projects) was often the foundation of negotiating compensation provisions in talent deals. After enactment of last year’s AB 168, codified in Labor Code Section 432.3, however, as Nestor Barrero, Sayaka Karitani, and Jade Brewster explain, studios may be prohibited from requesting them. Whether this spells the demise of a traditional negotiating tool for talent deals and a corresponding effect on strategy is an open question.

Drew Wilson looks at the substantial shift in trademark law effected by the Supreme Court’s decision in *Matal v. Tam* regarding the Slants’ trademark. Music groups and others often desire to brand themselves with “sharper, more shocking marks” that jump out at viewers. Long before *Tam*, shocking marks that crossed the line with “immoral, scandalous, or disparaging” matter were prohibited from obtaining registration. The *Tam* Court concluded the prohibition against such marks was constitutionally vague and ruled against it but left in place other similar prohibitions.

Net neutrality is a significant issue for the entertainment industry. For telecommunications companies and Internet service providers that control the pipelines through which content flows to consumers, freedom to monetize that traffic, to prefer certain types of content over others, and to create and offer “sponsored content,” is potentially a significant source of revenue. The FCC’s reclassification of broadband Internet services paves the way for that possibility, which would pose big risks to content creators and consumers. James E. McMillan presents a powerful argument in this month’s Closing Argument against preferential treatment of content and why an open Internet is of vital importance.
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New LACBA Position Focuses on Diversity and Inclusion

RECOGNIZING THE OPPORTUNITY to do more, to be an even better example, your board of trustees has established the officer-level position of Vice President of Diversity/Affiliate Outreach and selected LACBA officer and trustee Philip H. Lam to lead this initiative.

Phil has a 20-year history of civic, pro bono, and bar service, nationally and locally, having served as president of the Southern California Chinese Lawyers Association, the oldest Asian American bar association in California; as co-president of the LGBT Bar Association of Los Angeles, one of the oldest bars for lesbian, gay, bisexual, and transgender people in the state; and as a member of the Diversity and Inclusion Advisory Board to Los Angeles City Attorney Mike N. Feuer.

A key component of this initiative will be the development of a new LACBA Leadership Training Academy, which will create a pipeline of leaders for the association and the legal community. In addition, Phil will serve as the dedicated outreach officer for the affairs of our 18 affiliate bar partners who share nearly 1,400 common members with LACBA.

Working with staff and volunteers to coordinate LACBA’s diversity and inclusive initiatives, while building stronger relationships with our affiliate bars, will enhance LACBA’s relevance to the rapidly expanding, diverse population of lawyers, increase LACBA’s long-term viability, and position the county bar to improve the legal profession and promote a close-knit legal community throughout Los Angeles and beyond.

We are extremely fortunate to have someone with Phil’s experience leading the association’s diversity and affiliate bar outreach.

LACBA will also establish a Diversity Leadership Award, which will be given annually to recognize those who have sought to increase diversity and inclusion in the practice of law and to inspire others to do the same.

In the end, this focus on diversity, inclusion, and affiliate bar relationships will make us a stronger organization, reflecting the multicultural city and county we call home.
Jeffrey B. Valle  Founding Partner, Valle Makoff LLP

What makes you happiest? I am proud of my firm. I have a great wife and two great kids. The office is in Brentwood, the home is in Brentwood. I can actually walk to work. Each day is a good day.

How is your last name pronounced? Like valley, as if it had a “y.” In Italy, it might be pronounced with more flair.

In 2002, you formed your own firm, Valle Makoff, LLP. Why? I had been a partner at Skadden. I was not unhappy there, but I wanted a new challenge.

What kinds of cases do you most enjoy? What I most enjoy about litigation is all the different types of cases. We do business- and entertainment-related cases. Each case involves a new industry or a new business, and I really enjoy getting to know their niches.

What do you enjoy about having your own firm? The least enjoyable thing is having the nuts and bolts of the administration part.

You went to UCLA for undergraduate work and to Boalt for your J.D. What is the biggest cultural difference between L.A. and the Bay Area? I love both places, and now we have offices in both places. San Francisco is a little gem, but it tends to look down at Los Angeles. Los Angeles is a huge, overwhelming metropolis that loves San Francisco.

Why did you want to become a lawyer? I started out as a philosophy and music major. I always wanted to pursue an intellectual life but also be in the real world. Philosophy only provides half of that. The law does provide that perfect mix. It’s a great profession: it’s intellectual, and you’re in a battlefield. I like that combination.

Were you frightened the first time you were in front of a judge? No, I’ve always been very comfortable speaking.

You taught a class at UCLA on First Amendment law. Is the First Amendment under attack today? Yes. I worry that the core point of it is less deeply woven into society than it should be. The whole point is to protect speech that you don’t like or don’t support.

How do we fix that? Education is one way; litigation is another. People are so upset about the NFL players, but this is the whole point of this country: freedom. Kneeling is a dignified gesture. You may not like it; you may disagree with it. But the idea that it should be shut down is so foreign to my conception of this country that it makes me sad.

You chaired the board of directors for the Western Center on Law & Poverty. What is the greatest legal issue facing the poor? Access to a lawyer. Anytime you’ve got a lawyer helping people, the chances of the result is 90 percent improved.

You received the Pro Bono Civil Liberties Award from the ACLU. Do you think lawyers have a duty to provide pro bono services? I know they do. There is a difference between a business and a profession. A profession has an obligation to serve, not just to make money.

In a 2011 book titled How Leading Lawyers Think, you were quoted as to the importance of visualization in your cases. How so? Every case is going to turn on two dimensions: the equitable dimension and the legal dimension. By the equitable, I mean what side is wearing the white hat? That is where understanding your client and their business is going to be very important. You can present to a judge or a jury a visual picture, even if it’s oral, of your client and the business to help put the whole thing into context.

You’ve been selected as a Super Lawyer in 2009 and from 2013-2017. What makes you super? I think I have a pretty good understanding about how to win legal cases.

You’ve written that lawyers often lose cases because they make too many arguments. How so? I understand the lawyer mentality, which is afraid to give up any potential argument. There is a certain laziness in not finding the right two or three arguments. At a minimum, you
know the jury is going to be talking about those things.

What do you always make sure is in your brief case? Pad and pen.

Your client list reads like America’s Who’s Who—Pepsi, Estée Lauder, and Lockheed. Do these high-profile clients need special handling? A number of entertainment and sports figure often need some special care. The high-profile cases also have a press dimension to them that has to be taken care of.

Do you have an example? When I represented Brandon Jennings—a star high school player who decided to play in Europe rather than do the more traditional “one and done” college route—I received an avalanche of calls from the press, not just sports press, but The New York Times and Wall Street Journal.

For Disney, you handled the Winnie the Pooh royalty dispute. Wasn’t Mickey Mouse enough? The plaintiff was the niece of the Slesinger family. She was under the constant feeling that she was being cheated. I had the impression while I was deposing her that she was miserable because she thought she was missing a penny here and a penny there.

You took her deposition for seven days, and The New Yorker magazine described the case as a modern epic. Do you agree? Yes. The plaintiff would cry; we would go back and forth. It was very emotional.

It was an 18-year feud. What took so long? For a good part of that time, there was a five-year rule that you were supposed to finish cases in five years. But, typically, cases would go on for so long that people would settle out of exhaustion. If either party had any colorable reason to continue, it would get continued.

What was your best job? This one.

What was your worst job? My first job in high school, selling Fuller brushes door-to-door.

What characteristic did you most admire in your mother? She had a well-honed sense of justice.

If you were handed $10 million dollars tomorrow, what would you do with it? Put some of it in a savings account, give some of it to causes I care about, and invest in some ventures that seem like they need a little kick-start.


Which magazine do you pick up at the doctor’s office? The New Yorker or People.

Where do you go on a three-day weekend? Get down to Laguna, go to the Montage, and hang out.

When you travel, do you answer your e-mail? I always answer my e-mail.

What is your favorite hobby? Playing the piano.

You are a jazz pianist in a band called Evolution. Are you a musician at heart? I considered making music a career but ultimately decided to make it a serious hobby. That was an important decision that I made.

Where do you play? We’re looking for a gig.

Other than jazz artists, who is on your music playlist? Steely Dan.

What is your hidden talent? I’m a magician. I used to have a magic act and now I just show magic to my friends and my kids.

What are your retirement plans? I’m not thinking about retirement.

What is your favorite sport as a participant? Tennis.

What is your favorite spectator sport? I love hockey.

How do you get your news? Boy, did that change! Various news websites throughout the day and a news channel at the end of the day.

Which person from your past would you like to take out for a beer? My mom and dad. My dad would have a manhattan, and my mother would have a martini.

You’re stranded on a deserted island, and a magic genie says you that you can only have one meal, over and over, until you’re rescued. What is it? Pasta Bolognese.

What are the three most deplorable conditions in the world? Poverty; the refugee situation; violence.

Who are your two favorite U.S. presidents? George Washington—he modeled how to be a president and not a king. FDR—he saved the nation with bold solutions when it was in serious trouble.

What is the one word you would like on your tombstone? Kind.
WHETHER REPRESENTING your client’s interests or your own, negotiating is an essential process for establishing fair and consistent wages for employees performing the same or similar work. It is also a method of identifying knowledge, skills, experience, performance, and bona fide factors that may differentiate an individual employee’s potential earnings from his or her peers. Both employers and employees can benefit from engaging in wage negotiations if they are committed to understanding the other party’s position and giving it consideration. To effectively negotiate wages, it is important for both parties to establish reasonable expectations, communicate proposals effectively, and close the deal professionally.

Establish Reasonable Expectations

Wage negotiations, which may occur in the context of collective bargaining or on an individual basis, are often thought to be a contentious process with a winner and a loser. However, this is not necessarily the case. While both parties seek to leave the proverbial negotiating table with the best possible deal, if they have established reasonable expectations in advance, the end result can be a win-win. Accordingly, it is critical for both parties to research information to support their expectations before establishing a goal and strategy. In California and several other states, recent developments in minimum wage, fair pay, and other wage-related laws require employers to adjust existing wages and salaries, reevaluate pay practices and policies, and fine tune record-keeping methods. It is important for employers and employees to understand the legal requirements and wage trends to establish the applicable changes that affect their respective business and personal earnings.

From an employer’s perspective, establishing reasonable expectations requires financial analysis to establish and/or adhere to a budget from which the employer may allocate a certain percentage for wages. This analysis requires evaluation of the entire financial package, including insurance benefits, paid leave, vacation, holidays, and other benefits. Training and other ancillary costs associated with hiring employees are also a consideration. Further, an employer must balance its financial needs with current market conditions affecting wages for a position. For instance, if there is a shortage of employees who maintain a certain skill or license, a relatively higher wage may be appropriate to attract employees with these credentials and to remain competitive in the employer’s market under the circumstances.

Employees should engage in similar market research prior to arriving at an ideal target wage for their prospective position. In traditional labor negotiations, a prudent labor representative might survey its bargaining unit to determine what improvements they seek, gather historical wage and benefit data for the represented group and compare it to that of similar employers in the area, evaluate market trends and cost of living increases, and understand applicable legal changes affecting employee wages and benefits. Likewise, an individual employee seeking to negotiate his or her wages should engage in similar research to determine comparable wages or salaries for the prospective position, taking into consideration the geographical area, experience level, and other factors.

For both employers and employees, wage negotiations require an evaluation of the overall financial package and how other components affect the target wage rate. Parties should prioritize wages against other benefit goals, ranking them in order of importance. For example, if having specific health insurance is more important than a wage increase, these priorities should be noted and, if necessary, communicated during negotiations.

Once the employer and employee establish reasonable expectations, goals, and priorities, someone must play the first card. Unless the starting point is clearly defined, the first offer generally anchors or sets the stage for the remainder of the negotiations. The concept of anchoring generally refers to a person’s tendency to rely on the first piece of information presented as benchmark for subsequent judgments. Therefore, it is important that the first offer is thoroughly considered and realistically based on reasonable expectations previously established. Otherwise, the other party may perceive that the process is not being taken seriously or make an unreasonable counter in return to reset the process. It is also important to communicate all aspects of the financial package up front if they are a consideration in the wage negotiations.

Furthermore, the parties should not be afraid to show their cards, or at least some of them. Confidently discussing with an employer or employee justifications supporting the offer often helps develop a level of rapport and trust that can positively affect the outcome for both parties. This is the case even when providing information to the other party that is unrelated to the offer but has the effect of making him or her more comfortable with the process, such as sharing a relevant personal experience. Sharing information and clearly communicating an offer also saves valuable time by reducing unnecessary speculation about the motivations behind the other party’s offer.

Closing the Deal

Assuming both parties have established reasonable expectations and communicated effectively during negotiations, it is likely the process will end in a positive outcome. However, one party may be unsatisfied with the outcome, so it is important to consider the ongoing employer-employee relationship. Ultimately, since both parties must continue business as usual, maintaining constant professionalism and respecting the process of wage negotiations is of the utmost importance.

Melissa Hailey practices in the areas of labor and employment law as in-house counsel for FirstGroup America, Inc. in Los Angeles. She also serves on the Barristers Executive Committee.
REVELATIONS ABOUT SEXUAL MISCONDUCT have dominated the national conversation in recent months. In early October 2017, The New York Times and The New Yorker published detailed exposés regarding the alleged serial sexual abuse of women in the entertainment industry by producer Harvey Weinstein and an elaborate cover-up system that included secret payoffs, legal threats, nondisclosure agreements, and other intimidation tactics.1 The reports, along with an increased number of victims willing to put their names “on the record” (whether in the press or on social media), cracked open a floodgate of allegations against powerful men across industries, including hospitality, journalism, tech, and law.

In mid-October 2017—less than two weeks after the Weinstein stories were published—approximately 140 women, including state legislators, senior legislative aides, and lobbyists, signed on to a letter complaining of rampant sexual misconduct in California’s capitol.2 The letter described groping, other unwanted sexual advances, and quid pro quo sex harassment by men in positions of power in the state legislature.

The #MeToo movement has exposed untold numbers of allegations of sexual harassment and resulted in serious consequences for the alleged perpetrators, ranging from criminal investigations to job loss or public disgrace. Yet, there are many more cases that have not seen the light of day (or social media) because of private contractual obligations and the fear of legal retribution.

In the wake of this cultural reckoning, more people (and lawmakers, in particular) have begun to question the use of nondisclosure agreements and confidentiality agreements in cases of sexual assault or harassment. Do the provisions that buy secrecy enable harassers and permit continued abuse?

Confidentiality Provisions

Confidentiality provisions are a common and material component of nearly every settlement agreement resolving a legal dispute. In settlement agreements regarding an employee’s allegations of sexual harassment or other unlawful discrimination, a confidentiality provision frequently prohibits the employee from disclosing to anyone any details about the settlement or any facts that led up to the settlement. Exceptions may be negotiated for disclosures to the employee’s spouse, attorneys, or tax advisors. It is not uncommon for these provisions to be one-sided—in other words, only the complainant is prohibited from disclosure. Sometimes, these provisions also provide an exception for the employee to be able to testify truthfully if subpoenaed for deposition or trial (but sometimes they do not).

In other cases, the lawyers negotiating these confidentiality provisions on behalf of the defendant or employer, however, may be an unlawful restraint on the attorney’s right to practice law.3

Under Title VII of the Civil Rights Act,4 settlement agreements in employment cases that prohibit employees from filing charges with or assisting the Equal Employment Opportunity Commission (EEOC) in its investigations are unlawful. As the U.S. Court of Appeals for the First Circuit explained: “[T]he EEOC acts not only on behalf of private parties but also ‘to vindicate the public interest in preventing employment discrimination.’”5 Therefore, settlement agreements that prohibit employees from filing charges or assisting with investigations could impede the enforcement of Title VII. The First Circuit explained that “[i]n many cases of widespread discrimination, victims suffer in silence. In such instances, a sprinkling of settlement agreements that contain stipulations prohibiting cooperation with the EEOC could effectively thwart an agency investigation.”6

In December 2017, amidst the barrage of revelations regarding continued sexual misconduct across industries—and related cover-ups—EEOC Commissioner Chai Feldblum said that the EEOC will be closely watching settlement agreements to ensure that such agreements do not prohibit employees from filing an EEOC charge relating to sexual harassment (or to any other protected status). “It is important for employers to know that we are looking at these agreements,” Feldblum told Reuters.7 Feldman stated in the same interview that the EEOC will be scrutinizing settlements in the workplace agreement resolving a legal dispute.
that include nondisclosure agreements, in order to ensure that accusers are not being unlawfully barred from filing complaints with the commission.

A confidentiality provision is generally a material—and, so far, lawful—part of a settlement agreement that protects an employer’s interests. To many employers and their counsel, the absence of a confidentiality provision in any settlement agreement could be a deal breaker. However, the employer must be careful in drafting the language. The confidentiality provision should make clear that, despite the confidentiality obligation, an employee is still allowed to file a charge with the EEOC (or to participate in an EEOC investigation).

**Nondisclosure Agreements**

Aside from confidentiality provisions entered into as part of a settlement of a claim, some employers require their employees to sign nondisclosure or nondisparagement agreements as a condition of employment. These clauses can also be quite broad. For example, *The New York Times* reported that “Mr. Weinstein enforced a code of silence; employees of the Weinstein Company have contracts saying they will not criticize it or its leaders in a way that could harm its ‘business reputation’ or ‘any employee’s personal reputation,’ a recent document shows.”

Preemployment nondisclosure agreements are prevalent in the entertainment industry where salacious details about the private lives of public figures can easily be sold to tabloids for a significant profit. These types of nondisclosure agreements are also common in positions of employment related to public figures in other fields.

Confidentiality agreements concerning trade secrets and other proprietary business information have a legitimate business purpose in protecting a company’s profitability and commercial investments. However, recent revelations about the potential for misuse and abuse of mandatory confidentiality agreements in employment have opened a discussion about whether and when broader agreements relating to confidentiality and nondisclosure might be contrary to public policy or law.

Broad nondisparagement or nondisclosure agreements may run afoul of federal labor law, for starters. The National Labor Relations Act (NLRA) makes it unlawful for employers to prevent workers from talking about the terms and conditions of their employment. Section 7 of the NLRA protects the rights of workers to engage in concerted activity, and the protections of Section 7 apply to both union and nonunion workplaces. The National Labor Relations Board (NLRB) has held that discussions of, and gripes about, wages are protected concerted activity. Even individual complaints that employees make to each other—without any intent to engage in group action—are per se protected under the NLRA. In recent years, the NLRB has emphasized that employee complaints on social media about their workplaces are protected concerted activity. Specifically, the NLRB held that an employer may not maintain a policy that prohibits employees from making disparaging, false, or misleading statements on social media and elsewhere.

This NLRB rule also means that an employer may not prohibit an employee from making complaints about sexual harassment on social media or elsewhere. What then of nondisparagement provisions that are in some employment contracts? They are prohibited, too. Section 8(a)(1) of the NLRA makes it an unfair labor practice for an employer “to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7” of the NLRA. It is an unfair labor practice—a violation of Section 8(a)(1) of the NLRA—for an employer to require its employees to agree not to “publicly criticize, ridicule, disparage or defame” a company or its “directors, officers, shareholders, or employees.”

Despite this prohibition under federal labor law, some employers require such nondisparagement or nondisclosure agreements to be signed as a mandatory condition of employment. Yet, California Labor Code Section 432.5 provides that employers cannot compel an employee to agree, in writing, to any term or condition known to be prohibited by law.

The provisions also might be unenforceable and therefore unenforceable under California law because of an imbalance of power between the employer and the employee or if the employee did not have a meaningful opportunity to negotiate the provisions. Unenforceability has both a procedural and a substantive element: “[T]he former focusing on oppression or surprise due to unequal bargaining power, the latter on overly harsh or one-sided results.” In addition, a person who is fired for refusing to sign an unlawful nondisclosure agreement—or for violating one—may have a claim for wrongful termination in violation of public policy under California law.

Often, nondisclosure or confidentiality provisions in settlement agreements contain “liquidated damages” clauses. These clauses provide that, in the event of a breach, the damages will be set at a predetermined amount. The liquidated damages might be set at a percentage of the settlement amount or might require that the plaintiff return the full settlement amount in the event of a breach. For example, CNN reported on one such case a few years ago in which the plaintiff in an age discrimination suit lost $80,000 in settlement proceeds because his daughter posted about the settlement on Facebook in breach of his confidentiality agreement with his former employer.

Employers explain the need for liquidated damages provisions by arguing that the damage caused by a breach, while real, can be very difficult to quantify and prove. The argument against liquidated damages, however, is that they are unnecessary punitive on occasions when a breach of confidentiality results in no provable monetary damages. Moreover, even if there are no liquidated damages provided in the contract, the threat of being forced to defend a breach of contract lawsuit is enough to deter many individuals from speaking out.

**“Me Too” Evidence**

Long before the hashtag, “me too” was (and still is) a legal doctrine permitting the discovery and admissibility of evidence of similar complaints of wrongdoing against the accused in California employment cases. “Me too” evidence can bolster the credibility of a complainant if witnesses testify and provide evidence about harassment that they experienced at the hands of the same alleged harasser. For an individual prosecuting harassment cases it is critical to discover whether any previous complaints were made against the same accused and how the employer responded to those complaints. A plaintiff likely will seek to introduce the testimony of prior complainants to bolster his or her own case.

Under California law, “me too” evidence is also relevant to the issue of punitive damages. An employer can be liable for punitive damages if prior complaints of sex harassment or assault were known and the employer failed to respond appropriately. A prominent example of this is a case from the 1990s against one of the country’s largest law firms, Baker & McKenzie, and one of its partners. Six women testified at trial regarding prior complaints of bad acts by the partner. The jury awarded over $7 million in punitive damages.

From a plaintiff’s lawyer’s perspective, it is difficult or impossible to get witnesses to corroborate a client’s case by way of a voluntary declaration or through an inves-
tigative interview if the witnesses have signed nondisclosure agreements. Although the witnesses might be compelled to provide testimony under subpoena, the fear of breaching a nondisclosure agreement might result in a less than forthcoming witness.

Simultaneously, as technology and the Internet have evolved, there has been an increase in the publication of deeply personal narratives through social media networks (e.g., Facebook, Twitter, and Instagram) and various blogs. There also has been an increase in “confessional” essays through sites such as XO Jane and Jezebel. This trend does not apply just to “millennials.” Many women of every generation now are using technology to publish extremely personal details about their lives, whether on “private” Facebook groups, participating in a hashtag on Twitter, contributing to a blog, or writing a book. Ellen Pao, the high-profile plaintiff in an employment discrimination suit that included allegations of sexual harassment, wrote in her memoir that she turned down significant settlement offers because she wished to tell her side of the story. lane

Increasingly, the freedom to tell the story is a right that sexual assault or harassment victims do not want to sign away.

Recent Opposition

Perhaps some of the stigma of experiencing sexual assault or harassment has been stripped away by the sheer volume of recent revelations about the prevalence of this conduct in the workplace and elsewhere. Victims in previous generations may have blamed themselves or had no desire to speak of their wrongful treatment due to feelings of shame.

A prominent example of testimony that reflects this changing attitude is that of singer-songwriter Taylor Swift. Swift recently testified at a trial regarding a DJ whom she alleged reached under her skirt and groped her buttocks during a photo op. The DJ later was found to have engaged in the groping. During trial Swift repeatedly described the incident in frank and unapologetic terms (later quipping, “I’m told it was the most amount of times the word ‘ass’ has ever been said in Colorado federal court”). When cross-examined about how she felt when the DJ lost his job because of her complaint, Swift testified, “I am not going to allow your client to make me feel like it is any way my fault, because it isn’t.” Taylor Swift’s testimony was praised by one publication as “sharp, gutsy, and satisfying.” An increasing refusal to be shamed into silence may explain the rising value of the right to speak about one’s personal experiences with sexual harassment or assault.

Since October 2017, opposition to confidentiality provisions in cases of sexual assault or sex harassment has grown due in part to a belief that such provisions may have protected powerful predators from accountability. California Senator Connie Leyva announced that she will introduce legislation in 2018 to ban confidentiality provisions in settlement agreements in cases of sexual assault, sexual harassment, and sexual discrimination.12

McKayla Maroney, an Olympic gymnast, recently filed a lawsuit regarding the confidentiality provision in her sexual abuse settlement which, she argued, would have prohibited her from testifying at the sentencing hearing of her abuser.23 It was reported that the confidentiality clause would have resulted in a $100,000 fine to her if breached.24 Maroney’s attorney argued that the agreement provided she could only testify in court if subpoenaed but could be in breach of the agreement if she gave a voluntary statement as part of the sentencing hearing.25 It appears USA Gymnastics ceded to public pressure after an outcry about the confidentiality provision at issue. Several public figures offered on Twitter to pay this fine for Maroney and criticized the confidentiality provision at issue.26 The gymnastics organization later issued a statement that it would not pursue any money from Maroney if she spoke publicly about the abuse.27

Most parties to a confidentiality provision do not have a high profile, however. If an employer discovers that an employee has breached a nondisclosure or confidentiality agreement, the employer can seek to enforce contractual rights under the agreement. Unless there is a liquidated damages provision, the employer likely will need to weigh the cost of proceeding with legal action against whether it can actually be proven that the breach caused any monetary damages (and whether the employer can actually recover any damages from the employee, if proven).

Even armed with a contractual right to proceed against a former employee, some employers may still opt to avoid the public relations risk of filing suit against a victim of harassment for making truthful statements in violation of a nondisclosure or confidentiality agreement. In a high-profile case, such action might do the company more harm than good. In a low-profile case involving a smaller employer, however, legal action against a former employee for breach of a confidentiality agreement likely would not receive much, if any, media attention.

Another way companies and employers keep allegations of sexual harassment and assault secret is through the use of mandatory arbitration provisions. These provisions have also been the subject of proposed legislation. California Assemblywoman Lorena Gonzalez Fletcher announced plans to introduce legislation that would prohibit mandatory arbitration of sexual harassment claims.28

There is no question that employers and their counsel generally place a high value on confidentiality provisions. Confidentiality provisions can not only keep a lid on alleged bad conduct but also prohibit discovery of the price a company paid to resolve the legal dispute. As noted, companies can also use these provisions to try to prevent former claimants from becoming witnesses on behalf of subsequent claimants.

Benefit to Employee

Confidentiality provisions can also benefit employees who make a claim and settle situations in which the employees want to keep the facts of the harassment quiet. A mutual confidentiality or nondisparagement clause might also benefit an employee by protecting the employee from the difficulty that going public with a complaint against an employer—or filing a lawsuit—can do to one’s job prospects. This assumes, of course, that a settlement is reached before a lawsuit (or other publicly available document) is filed or published. Many employers conduct background checks or other research on applicants to discover, among other things, if they have ever been a party to a lawsuit. If an applicant has been a plaintiff in a lawsuit alleging discrimination or harassment against a former employer, this might be a deterrent to a prospective employer.

Some of these issues may become moot if proposed legislation prohibiting confidentiality provisions in settlement agreements of sex harassment or sexual assault becomes law. Even if such a law does not pass, however, it appears likely that there will be more protection of employees in California in the future. Outside of California, the EEOC has promised more oversight of employees’ rights with respect to settlement agreements, despite the Trump administration’s efforts at deregulation.

The reignited conversations around sexual harassment in the workplace that began in October 2017 with the exposés on Harvey Weinstein have had many and varied consequences. These include a greater push for transparency and more people using the power of social media and journalism to shed light on issues otherwise hidden, confidentiality provisions notwithstanding.
Lawyers representing individuals in employment or sexual assault cases may start pushing back on the nature of the confidentiality provisions requested by defense counsel considering these recent developments. For example, confidentiality provisions might be negotiated so that only the amount of the settlement payment is made confidential, but the underlying facts leading up to the settlement are not subject to the restriction. Given the increased media spotlight, claimants may be less willing to sign away their right to tell their story. Companies, on the other hand, place a high value on confidentiality and likely will insist on confidentiality provisions until and unless a law prohibits it.


3 See CAL. RULES OF PROF’L CONDUCT R. 1-500(A); MODEL RULES OF PROF’L CONDUCT R. 5.6(b).
Los Angeles Lawyer
May 2018

by SAUL S. ROSTAMIAN, DIANA HUGHES LEIDEN, and LEV TSUKERMAN

BASED ON TRUE EVENTS

Olivia de Havilland’s lawsuit against FX raises questions about docudramas precisely because the genre exists somewhere between fact and fiction

HOLLYWOOD is keeping a watchful eye on a lawsuit that could have a lasting impact on how real-life personalities are depicted in television and movies. Last year, Olivia de Havilland, a two-time Academy Award winning actress best known for her performance in Gone with the Wind, sued the makers of the FX anthology television series Feud: Bette and Joan, claiming that the series paints her in a false light and inaccurately portrays her as endorsing the show. However, FX succeeded in striking her claims under the auspices of the First Amendment as a result of the California Court of Appeal’s reversal of the trial court’s denial of FX’s anti-SLAPP motion. The appellate decision, which de Havilland has vowed to appeal, has far-reaching implications for both networks and studios involved in the production of docudramas, as well as actors and other public figures seeking to control who can profit from the commercialization of their identities.

Feud: Bette and Joan is an anthology television series created by producer Ryan Murphy, which dramatizes the rivalry between Bette Davis and Joan Crawford by focusing on the shooting of the 1962 horror film that would become a cult classic, What Ever Happened to Baby Jane? Olivia de Havilland, played by Catherine Zeta-Jones, is depicted in six of the eight episodes of Feud (for about 18 of the show’s 400 minutes), her character appearing in a series-long interview used as a framing device to explore the relationship between the battling stars. Feud is one of many recent high-profile docudramas—an increasingly popular genre defined by “dramatic interpretations of [real-life] events and dialogue with rhetorical flourishes.”

Docudramas have enjoyed popularity in both television and film in past years with the successes of The Social Network, The Crown, and I, Tonya, the anthology series American Crime Story (also executive produced by Feud’s Murphy) with recent installments focused on the O.J. Simpson murder trial and the assassination of fashion designer Gianni Versace, and FX’s new series Trust, which dramatizes the kidnapping of John Paul Getty III. Saul S. Rostamian and Diana Hughes Leiden are litigation partners in the Los Angeles office of Winston & Strawn LLP with significant experience in the technology, media, and entertainment sectors. Lev Tsukerman is a litigation associate in the Los Angeles office of Winston & Strawn.
Like other docudramas, *Feud* blends fact and fiction, incorporating dramatized interviews with Hollywood stars about the Davis-Crawford rivalry, including de Havilland. It is this dramatization that lies at the heart of the actress’s lawsuit against FX. De Havilland claimed that *Feud* falsely portrayed her as a foul-mouthed gossip and also gave the inaccurate impression that she endorsed the series. De Havilland urged that these actions did not fall under the umbrella of First Amendment protection and instead infringed her right of publicity and constituted a “false light” invasion of privacy claim.

The underlying policy behind de Havilland’s invasion of privacy claim was that individuals have the right to protect themselves from unwarranted publicity that casts them in a false, negative light. Similar to a defamation claim, a plaintiff alleging the “false light” species of invasion of privacy must establish 1) that the defendant was responsible for false publicity that would be “highly offensive” to a reasonable person and 2) that the publicity caused the plaintiff harm. Further, because de Havilland is a public figure, she must prove that FX acted with malice—i.e., with knowledge or reckless disregard of the false light in which de Havilland would be viewed.

De Havilland alleged that *Feud* falsely portrayed her by giving viewers the impression that she 1) gave an interview at the 1978 Academy Awards about the Davis-Crawford rivalry; 2) referred to her sister, Joan Fontaine, as her “bitch sister”; 3) implied that Frank Sinatra was an alcoholic; and 4) told director Robert Aldrich that she does not “play bitches” in acting roles. The actress claimed that these events never occurred and that the statements attributed to her are in direct contravention of her public image as one who would not speak about her fellow Hollywood stars in “crude and vulgar” terms, an image that she says she spent decades cultivating. Moreover, her lawsuit alleged that by leading viewers to believe that these events occurred in real life, *Feud* painted her as a hypocrite and “petty gossip” and caused her significant economic and reputational damage.

De Havilland’s lawsuit also included two right-of-publicity claims. California’s common law right of publicity protects against the unauthorized commercial exploitation of an individual’s name, likeness, and identity. A statutory action also exists under California Civil Code Section 3344 and requires a similar showing. These causes of action give individuals the right to control and profit from the commercial value of their identities and recognize that celebrities have a proprietary interest in developing a marketable image. Applied to the lawsuit, de Havilland argued that the use of her identity in *Feud* was intended to increase the appeal and success of the show and to create the impression that she endorsed the series. It was undisputed that FX neither obtained her consent nor compensated her for the use of her identity.

**FX’s Anti-SLAPP Motion**

To score an early exit from the lawsuit, FX moved under California’s anti-SLAPP statute for an order striking all of de Havilland’s causes of action as improperly targeting FX’s First Amendment rights. An anti-SLAPP motion “provide[s] for the early dismissal of unmeritorious claims filed to interfere with the valid exercise of the constitutional rights of freedom of speech.” In deciding this motion, courts employ a two-step analysis. First, the moving party must make an initial threshold showing that the challenged causes of action arise from protected First Amendment activity. If this prong is met, the burden shifts to the opposition to establish a likelihood of prevailing on such claims. Here, the main focus of the parties’ briefing on the anti-SLAPP motion was whether de Havilland demonstrated a likelihood of prevailing on her invasion of privacy and right-of-publicity claims.

FX raised three challenges to de Havilland’s false light cause of action. First, the network argued that *Feud* did not falsely portray the actress because the four challenged statements are “substantially true.” For example, FX noted that de Havilland has, in fact, referred to her sister as “dragon lady” and argued that this phrase is synonymous with “bitch.” Second, FX urged that the portrayal of the actress in *Feud* was “not reasonably susceptible [to] defamatory meaning” given that viewers of the docudrama “would have understood that *Feud* relies on dramatic interpretations of historical events and private conservations that were, by necessity, fictionalized.” Third, FX challenged that it acted with malice because its writers carefully “investigated and consulted numerous resources to ensure a factual basis for their dramatic narrative and to actually depict” the actress. Thus, FX argued, it did not act with knowledge that its portrayal of de Havilland was false or with reckless disregard of that falsity.

With respect to the right-of-publicity causes of action, the bulk of FX’s attack focused primarily on four affirmative defenses that would preclude recovery for de Havilland. First, FX argued that the depiction of de Havilland in *Feud* is immune from liability because “[a] right of publicity claim cannot be maintained for the use of a person’s name or likeness in a constitutionally protected motion picture or television program.” FX argued that *Feud* is shielded from right-of-publicity liability for the same reasons that other fictional works inspired by actual events and people have historically been protected. Second, FX claimed that because the Davis-Crawford rivalry is a matter of “public interest,” these causes of action are barred. Third, and of particular importance, FX argued that *Feud* is sufficiently “transformative”—and thus, protected from right-of-publicity claims—because its writers used the de Havilland character as one piece of a larger mosaic that “created new expression by dramatizing a decades-old rivalry so as to comment on modern-day Hollywood and current social issues.” Similarly, FX argued that the economic value of *Feud* did not stem primarily from de Havilland’s fame but rather from the prestigious cast (including Susan Sarandon and Jessica Lange as Davis and Crawford, respectively), the acclaimed writing and directing, and the docudrama’s subject matter. Finally, and as with its attack on the false light cause of action, FX argued that de Havilland could not prove that FX acted with malice by clear and convincing evidence.

The trial court denied FX’s anti-SLAPP motion, finding that based on the allegations and preliminary evidence presented, de Havilland “met her burden in showing that she has a likelihood of prevailing on the merits” and allowed the case to proceed. The trial court held that with respect to the false light claim, de Havilland provided sufficient evidence that the four challenged statements were factually inaccurate, in that the exact substance of each did not occur (e.g., even though de Havilland may have referred to her sister as “dragon lady” and previously uttered the word “bitch,” she never actually directed that term at her sister).

The court also determined that de Havilland had presented sufficient evidence that the four statements were also defamatory, holding that “a viewer of the television show, which is purported to be based on historical facts, may think Plaintiff to be a gossip who uses vulgar terms about other individuals, including her sister.” Further, the court held that because FX “sought to portray the show ‘consistent with the historical record,’” the statements made in the show may lead a reasonable viewer to believe the statements were actually made by Plaintiff.

As for de Havilland’s right-of-publicity claims, the trial court rejected FX’s argument that docudramas are entitled to blanket First Amendment protection. Citing California precedent, the court found that “the right of publicity would trump the First Amendment” in situations in which a celebrity’s likeness is used to promote a television show such that viewers are left with the impression that the individual actually endorses the series. Relying on industry custom, the court held...
that de Havilland had actionable right-of-publicity claims because the show’s producers did not compensate her for using her name and likeness to increase the marketability, public appeal, and success of *Feud*.49

With respect to malice, the trial court impliedly found that de Havilland met her burden “because Defendants never sought her consent or verified any of the statements made by her in the movie.”46

Finally, on the issue of the purported “transformative” nature of the docudrama, the court decided that “because the Defendants admit that they wanted to make the appearance of Plaintiff as real as possible, there is nothing transformative about the docudrama” and that “even if Defendants imagined conversations for the sake of being creative, such does not make the show transformative.”41 FX immediately appealed the decision, and oral argument was held on March 20, 2018.

**Court of Appeal Decision**

Six days later, the trial court’s decision was overturned by the California Court of Appeal. The court found that *Feud* is entitled to First Amendment protection, grounding its decision in an oft-cited concurring opinion from *Guggenheim v. Spelling-Goldberg Productions*, a right-of-publicity case involving a television show that fictionalized the life of actor Rudolph Valentino.42 Importantly—and fatal to de Havilland’s arguments—the appellate court reiterated *Guggenheim’s* core principle that fact-based and fictional works receive equal constitutional protection.43 Moreover, notwithstanding de Havilland’s arguments that *Guggenheim’s* concurring opinion is not binding, the justices noted that California courts have been applying the case’s reasoning for nearly four decades.44 The court concluded that “*Feud* is speech that is fully protected by the First Amendment, which safeguards the storytellers and artists who take the raw materials…and transform them into art.”45

The appellate court also found that the supposed industry custom of compensating individuals portrayed in film and television was irrelevant to the analysis: “The First Amendment simply does not require such acquisition agreements.”46 The court went on to note that, in any event, *Feud*’s portrayal of de Havilland was transformative because the docudrama’s value and marketability were derived from the skill and reputation of its creators and actors—not primarily from de Havilland’s fame.47 For these reasons, the appellate court held that de Havilland’s right-of-publicity claims were not likely to succeed.

The court of appeal further held that de Havilland failed to meet her burden of showing that she would prevail on the merits of her false light claim.48 The court concluded that reasonable viewers, when considering *Feud* in its entirety, would not see the show as conveying factual statements that de Havilland is a hypocrite, gossip, or someone who speaks ill of others.49 To the contrary, the court found that Catherine Zeta-Jones’s portrayal of de Havilland was “overwhelmingly positive” and depicted a “wise, witty, sometimes playful woman.”50 Further, the court noted that Zeta-Jones’s uses of the word “bitch” were not highly offensive to a reasonable person, and also were “substantially truthful characterizations of her actual words,” given de Havilland’s documented use of the term “dragon lady” to refer to her sister.51 Relying in part on Murphy’s statement that he changed “dragon lady” to “bitch” because he believed the latter “would be better understood by the modern audience,” the court declined to “dissect the creative process” of *Feud’s* writers.52

Finally, diverging once again from the trial court, the court of appeal held that de Havilland failed to prove that FX acted with “actual malice” because simply “[p]ublishing a fictitious work about a real person cannot mean the author, by virtue of writing fiction, has acted with actual malice.”53 In this case, de Havilland was unable to meet her burden given that *Feud*’s portrayal of her was positive and that *Feud’s* writers intended to cast de Havilland as a Hollywood icon.54

**Impact of the Appellate Decision**

The sheer volume of amici curiae briefs submitted to the court of appeal sheds light on the importance the various industry players place on this case. Netflix, the Motion Picture Association of America (MPAA), A&E, the International Documentary Association, the Electronic Frontier Foundation (EFF), and the Wikimedia Foundation were among those who weighed in on behalf of FX, while the labor union, the Screen Actors Guild-American Federation of Television and Radio Artists (SAG-AFTRA), voiced its support for de Havilland. Netflix, the MPAA, A&E, and others took the position that an affirmation of the trial court’s ruling would have a chilling effect on future docudramas and biopics. A&E argued that, if this ruling had been in place years ago, critically acclaimed films based on historical people and events such as *Citizen Kane*, *Saving Private Ryan*, and *Almost Famous* may never have been made.55 The International Documentary Association pointed out that the ruling could also have an impact on unauthorized documentaries such as *The Jinx: The Life and Deaths of Robert Durst* and *OJ: Made in America*.56 These documentaries, unlike docudramas or historical fiction, are much less likely to be transformative because they hew closer to fact than fiction and, therefore, could face an increased risk of right-of-publicity lawsuits from their subjects who—particularly in the case of documentaries involving criminal activity—are unlikely to consent to their portrayal. The EFF argued that the trial court’s ruling, if upheld, could have an impact beyond film and television, pointing out that many websites, books, and songs also feature real personalities without their consent.57

On the other side, SAG-AFTRA urged the appellate court to carefully balance the need for filmmakers to introduce some fictional aspects when dramatizing historical events against the rights of living individuals, such as de Havilland, to protect their reputations from reckless falsifications of fact.58 The union also argued that most docudramas featuring real individuals will not pass the “transformative use” test because the very point of a docudrama is to depict famous individuals as themselves.59

Siding with FX and the amici, the court of appeal’s opinion noted that the trial court’s ruling “leaves authors, filmmakers, playwrights, and television producers in a Catch-22”—if a docudrama portrays real-life celebrities with complete historical accuracy, the work may not be sufficiently “transformative” to survive a right-of-publicity claim from an uncompensated public figure.60 At the same time, docudramas that significantly fictionalize events surrounding these celebrities could face defamation or invasion of privacy liability for a negative portrayal.61

While the court of appeal’s decision was a complete victory for FX, it does leave some uncertainty regarding the feasibility of creating docudramas in the future. In particular, content creators may still be wary about potential false light claims if a reasonable person might find a television show, movie, or book to be both a primarily factual portrayal and either defamatory or offensive. The appellate court viewed Zeta-Jones’s portrayal of de Havilland as “overwhelmingly positive” and “the most favorable of any character in the docudrama”—a finding that was key to its holding that de Havilland was not likely to succeed on her false light defamation claim.62 This reasoning, however, leaves much room for future plaintiffs to craft successful defamation claims against content creators who paint their subjects in a more negative light. Furthermore, the specter of de Havilland overturning the decision at the California Supreme Court creates additional uncertainty in the production of docudramas.

If the appellate decision is overturned, content creators may have to expend more resources to ensure the factual accuracy of their representation of living celebrities. In *Feud*’s case, FX pointed out that it engaged in substantial research and reviewed “well-respected nonfiction books, news articles,
and producers from the “Catch-22” identified sides of this dispute will continue to tune in identities are exploited for commercial gain. But this proved inadequate—at least at the trial court stage—to demonstrate that it was likely to defeat de Havilland’s claims.63

Networks and producers may also decide to take the safer route of obtaining the consent of, and compensating, living celebrities featured in future docudramas. Notably, de Havilland argued that she deserved up to $2.1 million (a conservative estimate) for Feud’s use of her image.64 Obtaining the consent of living celebrities for their portrayal in television and film also raises the issue of censorship, as public figures are not likely to sign off on docudramas that highlight their wrongdoings or shortcomings.

The procedural posture of this case is significant as well. Anti-SLAPP motions provide a mechanism for defendants to end lawsuits aimed at chilling free speech early on, before the expenditure of significant litigation expenses.65 A victory for de Havilland would only have sent this case back to the lower court for an eventual trial of the merits of the case. FX’s victory in striking de Havilland’s claims will likely provide future defendants with more ammunition for an early escape route from similar lawsuits. However, the mere threat of litigation costs could deter studios from taking on docudrama projects, even if they believe that their creations would ultimately survive scrutiny from the courts. The same could also provide meaningful leverage to celebrities or others engaged in contract negotiations for a motion picture or television show’s depiction of those individuals.

By their very nature, docudramas toe the line between fact and fiction. Unlike most documentaries, docudramas rely on actors to portray real people and mix in a sometimes heavy dose of fiction to tell their stories and, to portray real people and mix in a sometimes

3 Defendants’ Motion to Strike at 1, De Havilland v. FX Networks, LLC et al., No. BC667011 (Cal. Super. Ct. filed June 30, 2017) [hereinafter FX’s Motion to Strike].
5 Ruling on Defendants’ Motion to Strike, supra note 3, at 2
6 Relevant Defendants’ Motion to Strike, supra note 4, at 17.
7 FX Networks is the cable television network on which Feud aired, and Pacific 2.1 Entertainment Group is the production company behind Feud. Both are named as defendants in the lawsuit and are collectively referred to as “FX” within the context of this article.
8 De Havilland’s Appellate Brief, supra note 5, at 12.
9 See generally Third Amended Complaint, De Havilland v. FX Networks, LLC, et al., No. BC667011 (Cal. Super. Ct. filed June 30, 2017) [hereinafter Third Amended Complaint]. Although there are some differences between the common law and statutory right of publicity, the trial court, as well as the parties, evaluated the substance of de Havilland’s claims together, and the trial court specifically noted that California’s codified version “complements the common law tort.” Ruling on Defendants’ Motion to Strike at 9, De Havilland, No. BC667011 (Cal. Super. Ct. filed June 30, 2017) [hereinafter Ruling on Motion to Strike].
10 De Havilland’s Motion to Strike, supra note 9, at 12.
13 Ruling on Motion to Strike, supra note 11, at 2.
15 Id., ¶¶ 23, 26.
18 Ruling on Motion to Strike, supra note 11, at 2.
20 Id., ¶¶ 23, 26.
22 CIV. CODE §3344.
23 Plaintiff’s Opposition to Defendants’ Motion to Strike at 3, De Havilland, No. BC667011 (Cal. Super. Ct. filed June 30, 2017).
24 Club Members for an Honest Election v. Sierra Club, 45 Cal. 4th 309, 315 (2008); CODE CIV. PROC. §425.16(b)(1).
25 See CODE CIV. PROC.§425.16(b)(1).
26 See id.
27 Jackson v. Mayweather, 10 Cal. App. 5th 1240, 1262 (2017) for the proposition that “[a]llegory cannot be shown if the challenged statements appear substantially true”).
28 FX’s Motion to Strike, supra note 3, at 10, 11.
29 Id. at 12.
30 Id. at 11–12.
31 Id. at 13 (citing Guglielmi v. Spelling-Goldberg Prods., 25 Cal. 3d. 860, 872–73 (1979)).
32 See FX’s Opening Appellate Brief, supra note 4, at 50–54.
33 FX’s Motion to Strike, supra note 3, at 13–14.
35 FX’s Motion to Strike, supra note 3, at 14–15.
36 Id. at 15.
37 Ruling on Motion to Strike, supra note 11, at 2.
38 Id. at 3–5.
39 Id. at 6.
40 Id. at 9.
41 Id. at 10–12.
42 Id. at 10.
43 See id. at 10–12 (“Here, because no compensation was given despite using her name and likeness, plaintiff has adequately met her burden.”).
44 See id. at 15.
45 Id. at 13.
46 Appellee Decision, supra note 1, at 19. Guglielmi involved a “television program that was a ‘fictionalized’ version of the life of actor Rudolph Valentino. Valentino had died years earlier and his nephew Guglielmi sued, alleging misappropriation of Valentino’s right of publicity.” Id. at 17–18. In the famous concurring opinion, the Chief Justice “framed the issue as whether the use of a celebrity’s ‘name and likeness in a fictional film exhibited on television constitutes an actionable infringement of that person’s right of publicity.’” Id. at 18 (citation omitted). At its core, the concurring opinion found that “truthful and fictional accounts have equal constitutional stature,” thus entitling both to First Amendment protection. Id. (internal quotation marks and citation omitted).
47 Id. at 18 (internal quotation marks and citation omitted).
48 Id. at 10.
49 11 19.
50 Id. at 19.
51 Id. at 21.
52 Id. at 26–27.
53 Id. at 30.
54 Id. at 30.
55 Id. at 32.
56 Id. at 33.
57 Id. at 34.
58 Id. at 35.
59 Id. at 36.
64 Id. at 7.
65 Appellee Decision, supra note 40, at 37.
66 Id. at 37.
67 Id. at 32.
68 FX’s Motion to Strike, supra note 3, at 5.
69 Ruling on Motion to Strike, supra note 11, at 14.
70 CODE CIV. PROC.§425.16. The filing of an anti-SLAPP motion stays all discovery in the case. CODE CIV. PROC. §425.16(g).
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talent and representatives are in a panic to adopt a fresh framework for negotiating projects in compliance with the California Legislature’s enactment of last year’s Assembly Bill 168, which is codified in Labor Code Section 432.3. As of January 1, 2018, employers may no longer request salary or compensation history information (commonly referred to as an artist’s “quote” in the entertainment industry) from a prospective candidate or rely on this information to determine whether to hire an applicant or pay that applicant a certain wage or salary.1

One primary concern with a law that influences multiple industries and directly affects the way employers fundamentally determine salary is whether it provides the opportunity for litigation based on industry practices. This is particularly true in the entertainment industry, which typically relies on salary and compensation history to negotiate future compensation, primarily with talent, along with the free flow of information between studios and talent representatives.2 Moreover, this new statute is of concern to many entertainment executives since salary, which includes compensation and benefits, is not always easy to determine in Hollywood. Compensation in the entertainment industry commonly consists of not only an initial form of payment—e.g., fixed or up-front compensation for services rendered on a project—but also contingent future earnings—e.g., box office bonuses and “back end” participation in the form of “points” or a percentage of the gross or net profits derived from exploitation of any given project.

On its surface, the new law seems that it could be fairly disruptive, from changing the way talent deals are negotiated to affecting the way information is gathered regarding the pay scale for production workers. However, many in Hollywood have already adjusted the way they conduct business to comply with the new law, mainly in the form of talent representatives’ obtaining advance voluntary waivers from their clients to allow them to share this type of information with prospective employers.3 On the other hand, some talent agents have flatly refused to give a quote, citing the statute. A seemingly innocent question of “How much did you make on your last project?” or “What’s your quote?” is now prohibited. Further, even if a client voluntarily gives a quote, there is a question as to whether an advance vol-
The new law also is changing how studios and talent representatives approach the salary negotiation process. Studios requesting that talent representatives provide a client’s quote and thereafter verify the quote with the previous employer is a fairly common practice in Hollywood. An artist’s quote is often based on the fixed and contingent compensation received on the artist’s most recent projects. This quote typically evolves and often increases over time based on the artist’s success and stature (such as awards recognition) in the entertainment industry. However, the announcement of the new law initially created waves of surprise and unease throughout Hollywood, forcing the entertainment industry to quickly adjust. New York City previously enacted a similar and more complete statute prohibiting inquiries about an employee’s salary history, which may provide affected Californians some insight into the application of its California counterpart.

A Budding Acceptance

Outside of the entertainment industry, companies recently have voluntarily elected not to ask for a prospective candidate’s pay history, even though no legal restriction applies to them. This trend suggests a budding acceptance of the practice across the country—and possibly a broadly developing view that merely asking for salary history inherently perpetuates the gender pay gap.

Nonetheless, professionals involved in hiring talent in Hollywood—including business affairs executives and human resources recruiters—should be wary of the more seemingly innocuous provisions of the new statute, for example, what is “voluntary” and the requirement that the employer provide a “pay scale” upon “reasonable request.” It is also unclear how far the new statute’s provision for voluntary disclosure by the employer of prior salary history extends. While this new law may be seen as another useful tool to advance equal pay, which has historically been a problem in Hollywood, employers should also be mindful of other possible discriminatory pay practices prohibited under California and federal law.

California has a history of enacting statutes to promote equal pay across the state. In 1949, the legislature enacted the California Equal Pay Act to target wage discrimination against women by prohibiting disparities in wages based on gender. Many decades later, in 2015, California enacted the California Fair Pay Act. Specifically, this act may be seen as an adjunct to the California Equal Pay Act, which already prohibits an employer from paying an employee wage rates less than the rates paid to employees of the opposite sex for “substantially similar work” requiring the exact same skills, effort, and type of responsibility when performed under similar working conditions.

In 2016, the California legislature enacted Senate Bill 1063, which added race and ethnicity as protected categories to Labor Code Sections 1197.5 and AB 1676, which prohibit employers from justifying sex-, race-, or ethnicity-based pay differences on the grounds of prior salary alone. Based on available legislative history, Section 432.3 was intended to flesh out the weaker AB 1676.

To further foster equal pay practices across the state, the California legislature sought to pass additional laws, including Section 432.3, to narrow the disparity. A review of the legislative history of Section 432.3 demonstrates the legislature enacted this provision with the presumption that requesting a job candidate’s salary perpetuates a presumed prior wage gap between men and women. Thus, Section 432.3 complements the California Equal Pay Act, by attempting to place men and women on equal footing during the recruitment and interview stages of the employment process.

While typically an employment law trendsetter, California is not the first jurisdiction to enact a statute that bans requesting prior salary information, as various municipal and state governments across the country have already passed similar statutes. In August 2016, Massachusetts became the first state to bar employers from requesting salary history from job applicants. Other state and municipal jurisdictions have since followed suit, including Delaware, Oregon, New York City, Philadelphia, San Francisco, and Puerto Rico.

The salary history law in New York City—the largest hub of entertainment industry activity in the United States outside Los Angeles—is considered by many the most significant regulatory effort thus far and one that has had the greatest impact on the hiring process in the entertainment industry to date. New York City’s ban is lengthier than California’s recently enacted statute and includes clarifications to the existing law for which the government has posted on its website a “Frequently Asked Questions” section. Unlike the bans implemented in other jurisdictions across the country, California’s statute banning salary history inquiries by employers is short—less than 300 words—and does not include the detailed clarifications for most of the provisions in the statute, which has partly contributed to the widespread confusion and uncertainty in the entertainment industry.

Presently, California’s statute does not include a clear monetary penalty for its violation. This is in contrast to New York City’s ban on salary history information, which specifies a high penalty for non-compliance. The fine assessed in the New York City law may consist of a civil penalty up to $125,000 for an unintentional violation and up to $250,000 for a violation that is willful and malicious. Similarly, Delaware’s ban carries a civil penalty of $1,000 to $10,000 per violation.

California’s new statute only makes clear that the criminal penalties under Labor Code Section 433 do not apply to violations of the ban. This does not mean, however, that the statute is completely without force. There remains a risk for civil penalties under class actions and exposure due to the California Private Attorneys General Act (PAGA), along with gender discrimination statutes.

On its face, Section 432.3 is deceptively straightforward. Unlike other Labor Code provisions, Section 432.3 is not riddled with a slew of definitions or exceptions. The statute generally prohibits employers from relying on the salary history information of an applicant as a factor in offering employment or what to offer as a salary. Additionally, an employer cannot “seek salary history information.” The pertinent provisions state:

(a) An employer shall not rely on the salary history information of an applicant for employment as a factor in determining whether to offer employment to an applicant or what salary to offer an applicant.
(b) An employer shall not, orally or in writing, personally or through an agent, seek salary history information, including compensation and benefits, about an applicant for employment.
(c) An employer, upon reasonable request, shall provide the pay scale for a position to an applicant applying for employment....
(g) Nothing in this section shall prohibit an applicant from voluntarily and without prompting disclosing salary history information to a prospective employer.

Areas of Confusion

The statute’s simplicity, however, has bred confusion, particularly among employers who do not necessarily seek salary history in a linear fashion. For example, many
1. Salary and compensation history have not historically been relied upon in negotiation of future compensation with talent in the entertainment industry.
   - True.
   - False.

2. A “quote” in entertainment industry negotiations is the customary price for services for the talent rendered and is largely based on the development of the talent’s fees over time and can fluctuate depending on the talent’s success.
   - True.
   - False.

3. California was the first state to enact a legislative ban on salary inquiries of applicants for employment.
   - True.
   - False.

4. California does not have a history of enacting statutes to promote equal pay across the state.
   - True.
   - False.

5. Criminal penalties are not available under the new salary ban law, Labor Code Section 432.3, in California.
   - True.
   - False.

6. It is permissible to consider salary history for determining salary if an applicant voluntarily and without prompting discloses salary history to a prospective employer.
   - True.
   - False.

7. It is not clear whether a general inquiry by an assistant at a studio about what actors typically earn for different roles without having a particular actor in mind for an upcoming job would violate Labor Code Section 432.3.
   - True.
   - False.

8. Although determining pay scale may be difficult for entertainment industry talent roles, larger employers may already have salary scales or salary bands for more traditional nontalent roles.
   - True.
   - False.

9. An entertainment industry employer may not seek salary history information, including compensation and benefits, about an applicant for employment orally or in writing but may do so through an agent.
   - True.
   - False.

10. Similar to the jurisdictional reach of New York City’s salary history law, Section 432.3 limits its reach to an interviewer, employer, applicant, or position located in California.
    - True.
    - False.

11. Section 432.3 requires employers to disclose on applications that they are prohibited from requesting salary history.
    - True.
    - False.

12. Penalties under the California Private Attorneys General Act (PAGA) are not available to private litigants under Section 432.3.
    - True.
    - False.

13. One desired effect of Section 432.3 may be to require companies evaluating nontalent jobs to assign a value to particular jobs rather than rely on prior salary.
    - True.
    - False.

14. An unintended consequence of Section 432.3 may be that refusal of talent to provide a quote may signal a studio that the actual quote or desired compensation is low, thereby providing an advantage to more established talent and their agents.
    - True.
    - False.

15. Virtually no agents in the entertainment industry are seeking voluntary waivers to avoid ambiguity about salary information that has already been revealed.
    - True.
    - False.

16. Pay disparities among the top male and female actors in the entertainment industry continue and can probably be explained by a number of reasons.
    - True.
    - False.

17. Websites like Glassdoor, Indeed, and Salary.com provide some compensation data for nontalent jobs but they are self-reported and usually not broken down by gender.
    - True.
    - False.

18. One reading of Section 432.3 would not permit a studio to verify what was paid to talent on the talent’s last project for the same studio.
    - True.
    - False.

19. Employers are not permitted to ask applicants for a role what compensation they are seeking, even if the employers do not inquire about prior salary or reveal the assigned value of a particular job.
    - True.
    - False.

20. Employers in industries outside of entertainment have expressed the view that Section 432.3 will have little influence on their operations.
    - True.
    - False.
entertainment industry employers rely on multiple sources of information to obtain a fair assessment of talent. A producer merely looking to verify the last salary of an actress with a studio may be interpreted as “seeking” salary history under the new provision. In another example, an assistant making a few calls to work colleagues and unwittingly asking about salary information for a prospective hire may be unknowingly violating the statute, even if the assistant had no intention of gathering information for the purposes of negotiating the prospective hire’s salary.

California employers now cannot “seek salary history information, including compensation and benefits, about an applicant for employment” whether “orally or in writing” or “personally or through an agent.”22 Even relying on this salary history writing” or “personally or through an assistant.”22 Even relying on this salary history information, including compensation and benefits, about an applicant for employment whether “orally or in writing” or “personally or through an assistant.”

The statute makes it difficult to determine when the salary request begins, since a studio may not necessarily know who will be considered an applicant when considering talent for a particular project. It is also unclear under what circumstances an employee of a studio or production company may be acting as an agent of his or her employer, or whether violations by casting directors or other third parties working on a project will trigger violations by the studio. For example, an eager entry-level studio assistant or a person in a similar role in a casting department looking for an upcoming project’s actors may make a few calls off work hours to talent agents. To spark interest in the role, the assistant may ask agents how much actors are generally being paid for a role. On its face, this inquiry may seem like a violation of the statute since employers are not allowed to “seek salary history information;” however, the statute does not address the issue of generally gathering background to seek out salary data, even when there is no specific person or applicant in mind for a role.

Applicant Issue

The applicant issue is also difficult to determine. A studio may unilaterally determine whom it wants to pursue for a role rather than the talent requesting the role. In this scenario, the talent technically has not applied for, or sought out, the position. Is it then legal for the studio to request a quote from the talent’s representative in contemplation of consideration for the role? As written, the statute merely seems to address those persons who are affirmatively applying for a position while providing no guidance concerning those who are recruited. The distinction, however, is illusory and overlooks the balance of bargaining power between agents and studios, along with the dynamics of how hiring—at least for talent—actually occurs. It is unlikely that the California legislature intended such a distinction between individuals affirmatively applying for a position and those who are recruited. It appears that both categories may qualify as applicants, as the term is interpreted broadly across the entertainment industry.

Generally, employers have more gaining power during wage negotiations than individuals seeking a role, since employers dictate what they want to pay and whom they want to pay. This is true for most industries—not just entertainment—since the employee typically has less information and negotiating experience than the hiring manager. The imbalance of power may not always be so clear-cut, however. For example, agents who negotiate for the benefit of high-level job candidates like actors and directors are usually very seasoned, which presumably makes the balance of power a little more equal for participants in the entertainment industry than for employees in other industries. In contrast, high-level prospective candidates at tech companies usually do not have experienced negotiators representing them when negotiating salary with hiring managers.

Another possible area for confusion in the entertainment industry relates to loan-out corporations that are often established by talent mainly for tax purposes to provide professional services to a third party, e.g., a studio. Although the talent is an employee of the loan-out corporation instead of the studio, it is likely that these loan-out corporation employees may also be subject to the new statute since there is still an employment relationship, albeit indirectly, with the studios. More importantly, the goals of the statute are not focused on the status of employees but rather applicants for employment. The legislative intent was plainly aimed at helping assure that qualified candidates for employment of different genders or backgrounds are paid fairly and equally for similar work. It is not likely that there was any intent to exempt a “loaned out” employee of a loan-out corporation from the protections of the law.

The statute provides for a single exception, which may be a source of widespread confusion for entertainment industry professionals involved in hiring. This exception involves applicants who “voluntarily and without prompting” disclose salary history.24 Only when the employee voluntarily provides this information is the employer permitted to rely on it to determine salary. However, the standards to establish whether information is voluntary and “without prompting” are not clear. Some applicants may feel pressure to disclose the information, which may raise questions as to the voluntary nature of a salary history disclosure, even when the disclosure may appear on its face to be voluntary. Although the statute makes clear that voluntary information given by the prospective candidate can be used when determining an applicant’s salary, it is silent as to whether voluntary information may be used to determine whether to even offer employment to an applicant.

Pay Scale and Job Location

The statute also requires employers, upon “reasonable request” to provide a “pay scale” to the prospective candidate. This is an additional area of confusion for employers since the terms “pay scale” and “reasonable request” are not defined. The statute, as written, arguably may allow an employer to provide a potential candidate a pay scale of $1 to $1 million, and this may be considered a pay scale as required under the statute. In regard to hiring of talent in the entertainment industry, a pay scale may be difficult to determine, since it may be unclear what is included as “pay,” considering that talent contracts consist of different forms of fixed and contingent compensation.

Generally, historical wage ranges even of current employees are not required. An employer may even provide a range that is considered within the industry standard and is higher or lower than what is expected of the specific applicant. Alternatively, an employer may provide a pay scale based on experience or education, which may in that particular industry include a historical gender disparity. Larger entertainment industry employers may already have salary scales or salary bands for more traditional nontalent roles that are similar to other industries, such as a salary band for persons who work in different levels in promotions, marketing, production, finance, or even legal departments. Compliance with these types of roles and requests—if they are made—will be much easier than for unique talent positions.

The guidance provided to employers under the New York City salary history law specifically limits the reach of the ban to inquiries occurring during a job interview in New York City or outside New York City when an impact will be felt in New York City. In California, however, it is unclear from the statute if the interviewer, employer, applicant, or the position must
be located in California. This can become an issue if a potential applicant who is not selected brings a claim seeking damages from a prospective employer alleging that he or she was illegally asked about prior salary and did not receive a job offer because of this violation. It is quite possible that to circumvent this statute, some employers may simply move the process out of state for selection purposes. For example, a company in Texas may search for talent in Texas, but the ultimate position may be located in California. Although unlikely, these types of scenarios highlight the statute’s ambiguity. Ultimately, it is probable that the law will be focused on the place of the harm or location of the prospective role itself rather than the physical location of the applicant.

Section 432.3 places the onus on employers to inform and train their hiring teams on the impact of the ban on requesting salary history. For example, simply disseminating a memorandum to prohibit asking about salary history, setting up a reminder to human resources, and deleting the salary history questions on job applications may help to decrease exposure. There is no posting or notice requirement for this statutory change, which means that there is no obligation for employers to disclose on their applications or other job boards that they cannot ask for salary history.

Predictably, the statute potentially exposes employers to expensive litigation for broad penalties available for Labor Code violations under PAGA. Specifically, although damages to a single plaintiff may be low compared with a class action, embarrassment of a single plaintiff may arguably be liable for damages. In this scenario, both the agent and studio may be reviewable for purposes of seeing whether a studio or any other applicant. Pay disparities in Hollywood have been in the news lately, even when women and men are represented by many of the same agents. Specifically, there is a roughly $40 million difference between the highest paid actor and actress for the 2017 fiscal year. Forbes magazine reported that the highest-paid actor in Hollywood—Mark Wahlberg—received $68 million while Emma Stone—the highest-paid actress—received $26 million. Stone is only 15th on the list of the highest paid actors in Hollywood. Many reasons can be cited to explain a pay disparity of this magnitude, including negotiating leverage, as well as the types of roles available to women of different ages and experience.

By itself, Section 432.3 does not seem likely to significantly decrease the female pay gap for comparable male and female high-profile roles in Hollywood. However, the law may encourage better transparency and has already affected whether agents disclose a client’s quote, sometimes refusing to provide the information at all. The law is expected to have the desired effect on nontalent and support positions, e.g., sales, marketing, publicity, distribution, finance, postproduction, and editing, thus requiring companies to develop methods within their compensation structures to assign value to jobs rather than basing compensation on what an applicant discloses as his or her prior salary and using that as a floor or benchmark.

Salaries Verification

One of the most immediate effects of Section 432.3 on Hollywood deal-making concerns the agent salary verification process, when studios attempt to determine whether a quote by an agent or talent is accurate. Under the new law, studios can no longer simply ask talent agents for quotes on what clients made for previous projects. Similarly, under the statute, requesting the information from an outside source may also be an impermissible way to discover past compensation for an applicant. Generally, under the statute agents must receive consent from a client to disclose such information and an expansive reading of the statute appears to permit an agent to do so, with the client’s consent, as part of a voluntary disclosure. Even though the statute prohibits employers from requesting salary information, agents may still find themselves volunteering prior salary information to a studio or production company. However, the issue of whether such a disclosure with the client’s permission is “without prompting” as required by the statute and a loophole that results in the agent’s speaking “voluntarily” for the client without having been asked or “prompted by an employer” remains.

Arguably, once the agent has given this information, the studio is merely verifying volunteered information and may therefore be within the exception in the statute. Salary information voluntarily given to a studio is permissible under the new law. If a past quote is particularly favorable for a client, agents may find it in their best interest to provide the quote. However, in many instances, the quote may be lower than the amount that talent wants to earn on a new production, and the agent may seek to withhold this information. An unintended consequence of Section 432.3 in the entertainment industry may be that refusing to provide a quote signals to the studio that the quote will be low. As may be the case already, established talent may more freely volunteer compensation information through their agents leaving those with less renown to fall back on withholding quotes, citing the statute as a prohibition. How this will shake out and impact long-standing industry practices is unknown, but it may be that, at least at the talent level, pressure exists to sign waivers to allow agents to disclose and studios to receive prior salary history in order to increase the possibility at arriving at a number that makes sense for a particular project.

Another unknown aspect of the new law is whether Section 432.3 will have the effect of studios modifying how they obtain and receive compensation information, even from their own records. For example, studios now can view publicly available data about talent compensation, to the extent they believe it is accurate and relevant. This information is widely available on the Internet and on services like IMDb, Studio System, and Variety Insight, which in some cases provide salaries for artists on prior projects. For a specific artist, this will most likely be a violation as looking at these sites may be challenged as “seeking” salary history information. Further, for nontalent roles, websites like Glassdoor, Indeed and Salary.com provide some compensation data, although, again, reliability of self-reported wage information may be suspect.

The statute also may be read to prohibit a studio from even verifying what was paid to talent on the last project at that studio, since to do so may be an example of seeking salary history information “personally or through an agent.” Contracts with talent who already worked for a studio may not be reviewable for purposes of seeing whether it is relevant to the proposed compensation on his or her next film or series.

What Employers May Ask

Employers—including entertainment companies—are not completely adrift in devel-
oping an informed opinion about what a position should pay and what an applicant should receive. It is certainly permissible to ask an applicant what compensation range they are looking for without further asking if that is what was earned at the last job. Employers who make the effort to assign a value to a role in terms of a range may also freely provide that information to the applicant. Additionally, hiring personnel should be clear on what they can afford to pay a candidate as well as the market rate for the position. Many employers in other industries have expressed the view that this new statute may have little influence on their operations.

As with any new law, the devil is in the details and that is true with Section 432.3. Its application to long-standing practices in Hollywood will not be known until there is sufficient time and experience and perhaps even litigation and appellate interpretation of the intent behind the law and its application to unique industries, for example, entertainment. Initially, some predict an impact on the way salary or wage information is exchanged by talent representatives who are sophisticated in negotiations, and the entertainment industry has already observed some of these changes taking effect. The impact on the myriad of other nonunion jobs in Hollywood will not be insignificant and will promote transparency, hopefully helping to create a level playing field for women and other groups who historically lag behind in starting wages, which may carry with them throughout their careers.

1 Lab. Code §432.3.
3 Id.
4 Id.
8 Lab. Code §432.3.
9 Lab. Code §1197.5.
11 Lab. Code §1197.5, as amended by SB 358.
12 Lab. Code §1197.5.
16 Tit. 8, supra note 14.
17 In addition, Oregon’s ban permits employees to sue for unpaid wages starting in January 2024, and San Francisco’s ordinance comes with a $100 to $500 fine per violation after an initial warning and notice to correct for the first violation.
18 Lab. Code §432.3.
19 Lab. Code §§2698 et seq.
20 Lab. Code §432.3.
21 Id.
22 Id.
23 Id.
24 Id.
25 Salary History Law, supra note 15.
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SLANTS RULE

Now that the prohibition against the use of vulgar, scandalous, or immoral language in branding has been struck down, similarly prohibited language may not be far behind

THE SAYING goes: “What’s in a name?”

For a company looking to protect—or create—a brand, quite a lot. For companies operating in edgier markets, a traditional trademark like Ford, Apple, or even Google will not let the brand stand out in a crowded field. Thus, they choose to brand themselves with sharper, more shocking marks—something that jumps out at the viewer, possibly in a way that may be considered scandalous, immoral, or disparaging.

Use of these types of marks is not without problems, however. Formerly, marks that fell within certain broadly defined categories that may have comprised “immoral, deceptive, or scandalous matter; or matter which may disparage or falsely suggest a connection with persons, living or dead” were long prohibited from obtaining federal registration under 15 USC Section 1052(a). While owners of a mark that might have been scandalous, immoral, or disparaging could sue to defend these marks under a common law theory of trademark infringement, or even under Section 43(a) of the Lanham Act,1 lack of federal registration meant that users of these marks were missing many of the unique benefits conferred by federal registration.

Chief among these benefits is constructive nationwide notice of the registrant’s claim of ownership of the mark.2 Registration on the Principal Register of the United States Patent and Trademark Office (USPTO) makes the mark searchable on the USPTO website. Any moderately sophisticated company searches the Trademark Office before adoption of a trademark to ensure that they do not invest tens, hundreds, or even millions of dollars in developing a mark to which a third party is already claiming trademark rights. A search of the Principal Register not only reveals if a third party claims rights to a mark but also when the party first started using the mark, and if the third party cares enough about the continued use of the mark to file the necessary maintenance paperwork and fees to keep the mark’s status as “live.”

Second, and almost as important, registration on the Principal Register “is prima facie evidence of the validity of the registered mark and of the registration of the mark, of the owner’s ownership of the mark, and of the owner’s exclusive right to use the registered mark in commerce on or in connection with the goods or services specified in the certificate.”3 Without the prima facie presumption of ownership, any purported trademark owner must prove ownership of a valid trademark during the course of a lawsuit. For certain categories of marks, such as those that are “descriptive” or based on product design (trade dress) or color, this is accomplished by demonstrating that the mark has acquired “secondary meaning” in the minds of the consuming public.4 In other words, the mark, color, or design has

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come to signify the source, or origin of the goods. Often, this is accomplished via expensive surveys. For trade dress—a species of mark that is based on the ornamental design of a product—the trademark owner of an unregistered trademark must also demonstrate that the design is not functional.5

Third, after five consecutive years of continuous use, a trademark that has been registered on the Principal Register can file a request to have that registration deemed “incontestable.”6 Although “incontestability” is somewhat of a misnomer, the status pre-

vents a registration from being attacked on certain grounds.

There is a plethora of other rights that are conferred as a result of federal registration, including the right to recover treble damages for willful infringement,7 a complete defense from state or common law claims of trademark dilution,8 the right to prevent cyber squatters from misappropriating a domain name,9 and the qualification for a simplified process for obtaining international registrations through the Madrid Protocol.10 Registration on the Principal Register also allows the trademark to be registered with U.S. Customs and Border Protection. This gives the mark’s owner the ability to block the importation of goods that infringe the mark into the United States.11

The SLANTS Trademark
By now, most people in the intellectual property community are familiar with the trademark U.S. Supreme Court case of Matal v. Tam.12 In Tam, the lead singer of an Asian rock band attempted to register the trademark SLANTS for “entertainment in the nature of live performances by a musical band.”13 “Slant” is considered to be a derogatory or disparaging term for people of Asian descent. The singer wanted to “‘reclaim’ and ‘take ownership’ of stereotypes about people of Asian ethnicity.”14

During the review of Tam’s application, the USPTO examiner applied the traditional two-part test to determine if the SLANTS mark was disparaging. The examiner first considers “the likely meaning of the matter in question, taking into account not only dictionary definitions, but also the relationship of the matter to the other elements in the mark, the nature of the goods or services, and the manner in which the mark is used in the marketplace in connection with the goods or services.”15 The examiner then moves to the second step asking “whether that meaning may be disparaging to a substantial composite of the referenced group.”16 “If the examiner finds that a ‘substantial composite, although not necessarily a majority, of the referenced group would find the proposed mark...to be disparaging in the context of contemporary attitudes,” a prima facie case of disparagement is made out.”17 Notable, too, is “[t]he fact that an applicant may be a member of that group or has good intentions underlying its use of a term does not obviate the fact that a substantial composite of the referenced group would find the term objectionable.”18

After reviewing dictionary definitions, which universally identified the term SLANTS as being disparaging to people of Asian ancestry, the mark was quickly rejected. The mark’s offensiveness was further bolstered by the fact that the band’s name had been found offensive a number of times. The examiner cited to a number of bloggers who indicate they find the term and applied-for mark offensive, and even found a performance by the Slants that was canceled due to objection to their name.19

Tam appealed the decision to the Trademark Trial and Appeal Board, which upheld the examiner’s rejection. Tam then appealed the board’s decision to the Federal Circuit, which heard the case en banc.20 The majority found that the disparagement “clause engages in viewpoint-based discrimination, that the clause regulates the expressive component of trademarks and consequently cannot be treated as commercial speech, and that the clause is subject to and cannot satisfy strict scrutiny.”21 The Federal Circuit rejected the government’s argument that registration constituted government speech and that it was a form of government subsidy. Even if the disparagement clause were analyzed as though it were “commercial speech,” the clause would still fail the intermediate scrutiny test. Ultimately, the prohibition against registering disparaging trademarks was found unconstitutional by the Federal Circuit under the First Amendment’s free speech clause.22

The Supreme Court agreed. It began by quickly dismissing the notion that a trademark registration was government speech not bound by the constraints of the First Amendment. As the Court made clear: “None of our government speech cases even remotely supports the idea that registered trademarks are government speech.”23 That is in part because “[t]he Federal Government does not dream up these marks, and it does not edit marks submitted for registration.”24 “Trademarks have not traditionally been used to convey a Government message. With the exception of the enforcement of 15 U.S.C. § 1052(a), the viewpoint expressed by a mark has not played a role in the decision whether to place it on the principal register. And there

“Speech that demeans...race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful; but...we protect the freedom to express ‘the thought that we hate.’”
speech expressing ideas that offend.” However, as the Supreme Court has “explained, that idea strikes at the heart of the First Amendment. Speech that demeanes on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful; but the proudest boast of our free speech jurisprudence is that we protect the freedom to express ‘the thought that we hate.’”

The second interest that the government argued was that of protecting the orderly flow of commerce. The government claimed that invidious discrimination is recognized to have an adverse effect on commerce. The Court countered this argument by pointing out that the clause is not narrowly drawn. It reaches any trademark that disparages any person, group, or institution (including racists and cancer). “It is not an anti-discrimination clause; it is a happy-talk clause. In this way, it goes much further than is necessary to serve the interest asserted.”

Ultimately, the disparagement clause was found to violate the free speech clause of the First Amendment.

Trademark Post-SLANTS

The prohibition against disparaging marks was found to be constitutionally vague, but what about the other limitations on registration of marks? What about marks that are scandalous or immoral? Can I have a registration for a T-shirt that tells the viewer to F*%# OFF? What about an image of an erect penis as a trademark for a strip club?

These questions and more were left unanswered, but given that the disparagement clause fell even under the lower intermediate scrutiny standard of Central Hudson, commentators believed that the prohibition against scandalous and immoral trademarks would fall as well.

The prediction turned out to be correct. On December 15, 2017, the Federal Circuit issued its ruling in In re Brunetti, holding that the “immoral and scandalous” provision of the Lanham Act did not advance a substantial government interest, striking that provision as an unconstitutional infringement of the free speech clause of the First Amendment.

In Brunetti, the applicant was attempting to register the mark FUCT for clothing. The application was initially rejected for being vulgar, which is sufficient to show that it consists of immoral or scandalous matter. “A showing that a mark is vulgar is sufficient to establish that it ‘consists of or comprises immoral…or scandalous matter’ within the meaning of section 1052(a).”

What makes a mark vulgar and, therefore, scandalous and immoral is a moving target. The “PTO makes a determination as to whether a mark is scandalous ‘in the context of contemporary attitudes’ and ‘in the context of the marketplace as applied to only the goods described in the application.’” A “substantial composite of the general public needrs to find the mark vulgar, scandalous, or immoral, or a combination of all three, in order for the mark to be rejected.” A mark is determined to be vulgar, scandalous, or immoral, or a combination of all three, if “the mark was ‘shocking to the sense of truth, decency, or propriety; disgraceful; offensive; disreputable;…giving offense to the conscience or moral feelings;…or calling out for condemnation.’”

The government conceded that the bar on scandalous marks was a content-based restriction on speech. It then appeared to ignore the Supreme Court’s holding in Tam by arguing once again that trademark registrations were a form of a government subsidy program. This was quickly dismissed by the Federal Circuit.

The government next tried to argue that the trademark registration process was akin to a limited public forum subjecting content-based restrictions on speech to a lower degree of scrutiny. The Federal Circuit disagreed: “The Supreme Court has found the existence of a limited public forum only when the government restricts speech on its own property. At one end of that spectrum are venues that are owned and controlled by government entities.” These include schools, telephone poles, and military bases. At the other end of the spectrum, there are “metaphysical” limited public forums, but even in those instances “the effect of its restrictions on speech were felt on the government’s property.” The example that was given was a restriction on a university’s distribution of funds through a student activities fund intended to support a broad range of extracurricular student activities that are related to the educational purpose of the university. Any restrictions on the distributions of these funds would undeniably be felt on the university campus, which was itself a limited public forum.

The Federal Circuit went on to state: Because trademarks are by definition used in commerce, the trademark registration program bears no resemblance to these limited public forums. The speech that flows from trademark registration is not tethered to a public school, federal workplace, or any other government property. That registered marks also appear on the government’s principal register does not transform trademark registration into a limited public forum. The government does not open the principal register to any exchange of ideas—it is ancillary to trademark registration. The principal register is simply a database identifying the marks approved for use in commerce. The government fails to articulate a reason why the government’s listing of registered trademarks in a database creates a limited public forum. And if it did then every government registration program including titles to land, registration of cars, registration of wills or estates, copyrights, even marriage licenses could similarly implicate a limited public forum.

The Federal Circuit then analyzed the scandalous or immoral prohibition under a strict scrutiny framework, reasoning that a trademark was more than merely commercial speech subject to intermediate scrutiny because trademarks also often have an expressive component. Indeed, the test for the immoral or scandalous prohibition that evaluates the marks to determine if they convey offensive ideas is targeted at the mark’s expressive component. The Federal Circuit then found wisdom in the Supreme Court’s statement in Tam that “[t]he central purpose of a trademark registration is to facilitate source identification…. Whether a mark is disparaging bears no plausible relation to that goal.” The same holds true for scandalous and immoral marks.

Because the Supreme Court did not state whether or not the restrictions on trademarks should be analyzed under strict or intermediate scrutiny—as the disparagement clause failed both—the Federal Circuit proceeded to analyze whether the prohibition on scandalous or immoral marks would survive intermediate scrutiny. As with the disparagement prohibition in Tam, the prohibition against scandalous or immoral marks did not satisfy the “substantial interest” prong of Central Hudson:

First, the government does not have a substantial interest in promoting certain trademarks over others. Second, Supreme Court precedent makes clear that the government’s general interest in protecting the public from marks it deems ‘off-putting,’ whether to protect the general public or the government itself, is not a substantial interest justifying broad suppression of speech. ‘[T]he fact that society may find speech offensive is not a sufficient reason for suppressing it.’

Finally, the government does not have a substantial interest in protecting the public from scandalousness and profanities.

The case at bar was different from the content-based restriction on broadcast proflanity of FCC v. Pacifica Foundation. Unlike public broadcasts over the radio, which are injected into the homes of listeners nationwide, “[a] trademark is not foisted upon lis-
teners by virtue of its being registered. Nor does registration make a scandalous mark more accessible to children.”

There is also inconsistency in the application of the prohibition that makes the bar on scandalous or immoral marks fail the final prong of the 

Central Hudson test. That is, whether the restriction on speech “is not more extensive than is necessary to serve [a substantial government] interest.”62 “The Trademark Trial and Appeal Board has itself noted the vague and subjective nature of the scandalous inquiry.”63 For example, The mark for MILF—an acronym for “Mom I’d Like to F*$#”—was rejected 20 of 40 times and allowed the other 20.64 There is simply no definition of the term scandalous that would allow the prohibition to survive under even intermediate scrutiny.65 Therefore, as the Brunetti court found, it is unconstitutional.66

Deceptive Marks

With three of the major prohibitions of Section 2(a) struck down as unconstitutional, the next logical question is what will happen with the two “deceptive” prohibitions, namely the prohibition against marks that are “deceptive” or that “falsely suggest a connection with persons” might run afoul of the First Amendment. This is because the Supreme Court has consistently held that “false and misleading commercial speech is not entitled to any First Amendment protection.”68 “[T]he State may ban commercial expression that is fraudulent or deceptive without further justification.”69 There is after all, a substantial government interest in preventing confusion in the consuming public and encouraging companies to invest in their brands.70

The prohibitions against disparaging, scandalous, and immoral marks are gone. The Trademark Office should expect a flood of profanity-laced, racist slogans about sex at any moment. Less than a month after the decision in Brunetti, there were 63 applications for marks containing the word “FUCK” in its full, uncensored, and proper spelling. But who cares? It is ultimately the consumers’ choice if they want to support a company that resorts to profanity, racism, or vulgarity to promote their products. Let the free market decide what an appropriate trademark is, not an examiner who is inconsistently applying an arbitrary test.

3 B & B Hardware, 135 S. Ct. at 1300 (citing 15 U.S.C. § 1057(b)).
14 Tam, 137 S. Ct. at 1754.
16 Tam, 137 S. Ct. at 1753-54.
17 Id. at 1754.
18 Id.
19 Id.
20 Id.
21 Id. (citing In re Tam, 808 F. 3d 1321, 1334-55 (C.A. Fed. 2015)).
22 Tam, 137 S. Ct. at 1754.
23 Id. at 1759.
24 Id. at 1758.
25 Id. at 1760.
26 Id. at 1761.
27 Id.
28 Id.
30 Tam, 137 S. Ct. at 1764.
31 Id.
32 Id.
33 Id. (citation omitted).
34 Id. at 1764-65.
35 Id.
37 In re Brunetti, 877 F. 3d 1330 (Fed. Cir. 2017).
38 Id. at 1335.
39 Id. at 1339 (citing In re Fox, 702 F. 3d 633, 635 (Fed. Cir. 2012)).
40 In re Boulevard Entm’t, Inc., 334 F. 3d 1336, 1340 (Fed. Cir. 2003).
41 Brunetti, 877 F. 3d at 1336 (citation omitted).
42 Id.
43 Id. (citation omitted).
44 Id. at 1342.
45 Id. at 1342-45.
46 Id. at 1345.
47 Id.
48 Id. at 1346 (citation omitted).
49 Id. at 1346-47.
50 Id. at 1347.
51 Id. (citing Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 824-30 (1995)).
52 Id. at 1347-48.
53 Brunetti, 877 F. 3d at 1349 (citing Matal v. Tam, 137 S. Ct. 1744, 1760 (2017)).
54 Brunetti, 877 F. 3d at 1349.
55 Id. (citing Tam, 137 S. Ct. at 1768 (Kennedy, J.)).
56 Brunetti, 877 F. 3d at 1349.
57 Id. at 1350.
58 Id. at 1351 (quoting Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 55, 108 (1988)).
59 Brunetti, 877 F. 3d at 1349.
61 In re Brunetti, 877 F. 3d at 1353.
63 Id. In re Brunetti, 877 F. 3d at 1354. (citation omitted).
64 Id.
65 Id. at 1356.
66 Id. at 1357.
67 Parfums Givenchy, Inc. v. Drug Emporium, Inc., 38 F. 3d 477, 484 (9th Cir. 1994); Sterling Drug, Inc. v. Bayer, AG, 14 F. 3d 733, 746 (2nd Cir. 1994) (“Lanham Act’s goals of protecting American consumers against confusion”).
68 Central Hudson, 447 U.S. at 593.
69 Edenfield v. Fane, 507 U.S. 761, 768 (1993); E. & J. Gallo Winery v. Gallo Cattle Co., 967 F. 2d 1280, 1297 (9th Cir. 1992) (there is no First Amendment defense to actions otherwise infringing because “misleading commercial speech can be restricted”).
The FCC’s Worrisome Repeal of Net Neutrality Rules

I AM WORRIED. In fact, I am very worried. I’m worried because net neutrality, the policy that has allowed content providers—and thus consumers—to enjoy equal access to the Internet, is threatened by the FCC’s recent ruling that broadband providers like AT&T, Comcast, and Verizon, be reclassified as lightly regulated information providers instead of closely regulated telecommunications companies.1 This would allow the telecoms to favor or disfavor and control content delivered to consumers and at what download speeds. The telecoms will have the power to throttle, or slow down, content they disfavor or that is not paying for premium access. The implications of this frighten me on several levels. It threatens the way I practice law, run my businesses, and spend my leisure time. Most importantly, it threatens the futures of many of my clients.

During my career, I have been the lawyer for such acts as New Edition and Justine Skye, and the production partner of Machine Gun Kelly. But for every such musician, I have represented scores of other talented individuals whose opportunities for success were made possible through an open Internet. These are the folks who rely on the Internet’s ability to allow start-up production companies to tout their wares, who bank on the World Wide Web to provide promotion and merchandising opportunities, and who count on an equal access system to sell concert tickets.

Yet, FCC Chairman Ajit Pai claims that by eliminating net neutrality, “[b]roadband providers will have stronger incentives to build networks, especially in unserved areas, and to upgrade networks to gigabit speeds and 5G.”2 This may or may not be true, but it must be weighed against the fact that musicians without major recording contracts will no longer be able to share their talents with an enthusiastic audience. While proponents of the new approach claim that “competition” and antitrust laws will preempt the inclinations of Internet service providers (ISPs) to block or throttle content provided by smaller enterprises (in this case, musicians and production companies), the costs to get on the “fast lane” of Internet connectivity will prove an intolerable burden. For proof, one need only look to the payola schemes of radio networks that only play music the well-heeled can afford to finance. Ditto for paid prioritization and the high entry costs of starting a new cable station. In short, under the FCC’s new ruling, the Verizons and AT&Cs of the world will be able to determine what we watch and what we do by charging fees based on the user, the application, the content, and the platform.

Because of technology, producing music today costs less than ever. That will change with this ruling. Although I am an entertainment law attorney concerned about opportunities for musicians, I am also a consumer of Internet content who may not be able to keep the access I currently enjoy or will have to pay a premium to do so. As an entrepreneur, I worry about the opportunities I will have to locate and discover new talent and whether my intellectual property will be given a fair chance to see the light of day in an open environment. But it goes even deeper than that.

Net neutrality allows organizations and movements with good intentions but perhaps limited resources to tell their story without censorship, to make a case for a meaningful cause, to demand fair treatment, and to awaken the masses when necessary. Should ISPs really have the right to determine who is heard?

Fortunately, the lawsuits are coming. U.S. Senate Minority Leader Chuck Schumer of New York is attempting to pass legislation that will undo the FCC’s ruling. Major creative organizations such as the Writer’s Guild of America, the Directors Guild of America, the Independent Film and Television Alliance, and the Internet Association (which claims powerful members such as Google, Facebook and Amazon) have voiced their concerns.

New York Attorney General Eric Schneiderman said he filed a lawsuit in December because the FCC “broke essentially all the rules of the administrative process. Agencies aren’t just allowed to make any arbitrary decision. In fact, courts have held that if a decision is arbitrary and capricious...it has to be rejected.”3 Indeed, questions have been raised as to whether the FCC based its decision to overturn Title II of the Telecommunications Act on a faulty premise—that ISPs were information providers (versus telecommunications companies) and thus not subject to regulations imposed by the FCC.

An open Internet is the natural evolution of the values we hold dear. Keeping it that way is about who we are as a people. As Chad Dahlstrom, CEO of Discogs, the online music marketplace, stated:

The idea that all information online aka data should be treated equally is one of the core principles in an open internet. Threats to that principle are threats to open dialogue, freedom of speech and the ability to choose what and how you get information online. We should not allow content to be throttled, blocked or removed based on a telecom or influential individuals’ decisions. That is an open door to censorship and big corporations once again choosing what we can see, hear and learn about.4

This is why, as a lawyer, an entrepreneur, and a citizen, I am more than just a little worried about where we are heading.

2 Interview with Eric Schneiderman, All In with Chris Hayes, MSNBC, Dec. 14, 2017.

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