10-20-2021

Nye vs. Disney: Applying Legacy Profit Participation Contracts to the Digital Age

Raven Berzal
Cardozo Arts & Entertainment Law Journal

Recommended Citation

Berzal, Raven, "Nye vs. Disney: Applying Legacy Profit Participation Contracts to the Digital Age" (2021). *AELJ Blog*. 296.
https://larc.cardozo.yu.edu/aelj-blog/296

Nye vs. Disney: Applying Legacy Profit Participation Contracts to the Digital Age

BY RAVEN BERZAL/ON OCTOBER 20, 2021

Photo by Glenn Carstens-Peter on Unsplash

Many television shows that have concluded and/or gone off the air have found second lives via streaming services. "Friends" and "Sex & the City," which both aired their last episodes in 2004,[1] are available on HBO Max.[2] "Seinfeld," which concluded in 1998,[3] is available on Netflix,[4] and "The Office (U.S.)," which ended in 2013,[5] is available on Peacock.[6] However, as the public enjoys consuming older content on demand, both companies and talent are wrestling with how to interpret older contracts that did not contemplate, or expressly provide for, distribution of content on digital platforms that did not exist at the time that the shows were produced. This challenge is particularly acute when accounting to profit participants[7] whose backend definitions were conceived and drafted in the era of linear television, VHS, and DVD. To that end, a recent case heard by the Superior Court of California asked the question: should digital streaming services be treated more like physical home video or television for purpose of accounting to participants?

"Bill Nye, the Science Guy" was an educational television program for children that originally aired in the mid-to-late 1990s on PBS and in national syndication.[8] The series starred mechanical engineer and television host, Bill Nye, and was produced by Buena Vista Television,[9] a division of the Walt Disney Company (Disney).[10] "Science Guy" is currently available to stream on Netflix and available for purchase via iTunes and Amazon Prime Video.[11] In August 2017, Nye filed suit against Disney for fraudulent concealment, breach of contract, and breach of fiduciary duty.[12] Nye alleged that he and other owners of the "Science Guy" series were deprived of millions of dollars in profits from subscription video on demand (SVOD) (i.e., Netflix) and electronic sell-through (EST) (i.e., purchase via iTunes).[13] "When a view of financial statements showed Buena Vista was claiming $20 million in deductions for a show that was earning $26M, and was largely funded by contributions from the Department of Energy and the National Science Foundation, eyebrows were raised."[14] Nye's complaint challenged Disney's accounting structure pertaining to revenue from these new-age platforms, equating it to yet another example of "Hollywood accounting."[15]

"Disney ha[d] been keeping 80% of the revenue from older shows that it distributes to streaming platforms, leaving only 20% available to stars and other profit participants . . . by classifying the revenue as 'home video.'"[16] In their original contract, Buena Vista agreed to distribute, market, and promote the series, and Nye and his partners were entitled to 50% of the "net profits" from the series.[17] The agreement defined net profits as "receipts remaining from gross receipts after certain specified deductions."[18] However, if the income was derived from a "video device," Buena Vista was only required to recognize 20% of that income as "gross receipts" for purpose of its recoupment waterfall and calculation of net profits.[19] That meant that only 20% of revenues received by Buena Vista would be applied towards recoupment of the series' costs. It also meant that once net profits had been reached, Nye would only be entitled to receive 10% of net profits arising from home video, with Disney retaining 80% of home video gross, free and clear, in addition to its share of net profits.[20] This is what is referred to in the entertainment industry as accounting on a "royalty basis."[21]

The parties' dispute revolved around whether SVOD/EST revenues are included within gross receipts, which ultimately depended on the question of whether streaming can be classified as home video or not.[22] Nye argued that revenue was included in gross receipts (i.e., 100% to be split 50/50), relying on the intent of the contract at the time of drafting. He posed the question: how could streaming, which did not exist at the time of contract execution, be equated to physical products like VHS tapes?[23] Disney argued that this revenue should be classified as deriving from a "video device" (i.e., 20% to be split 50/50, 80% retained by Disney off the top), as these concepts are more analogous than not.[24] The Los Angeles Superior Court ultimately interpreted the 1993 agreement at issue to define SVOD/EST as within the scope of video devices, leaving Nye 10% of SVOD/EST revenue instead of 50%.[25]

The decision of the Court fell heavily on the fact that under Nye's assertion that SVOD/EST did not fall into any category of distribution in the 1993 agreement, Buena Vista would not receive any fee for SVOD/EST distribution at all. The Court did not find this to be a fair outcome.[26] Despite this justification, the Court in *Nye* set forth a decision allowing a windfall to studios and a serious inequity to artists and other profit participants. Although the holding of this particular court is not persuasive precedent unless upheld on appeal,[27] the *Nye* decision is alarming for profit participants, such as talent, producers, directors, and writers, and the representatives negotiating their deals.

The Court failed to consider how easy and cheap it is for studios to distribute content to Netflix and other streaming services.[28] "The math in selling to streamers is easy – worldwide rights go to the highest bidder."[29] Studios receive substantial fees from streamers, like Netflix, for the upfront license of a property. However, the costs associated with traditional distribution and marketing budgets that studios endure are astronomical compared to distribution to SVOD/EST platforms. For this very reason, studios justify giving streaming services a cut of the revenue generated online.[30] Further, in 1993 (when Nye's agreement was executed), anticipated distribution costs included physical VHS components, which were a major expense built into the studio's royalty fee.[31] However, today, "the creation of one master file for mass distribution – without the . . . manufacturing and distribution cost for a physical object – [is] a far less expensive process."[32] Digitization for streaming merely involves the click of a button.[33]

How does this justify a 90% profit windfall to Disney? Critics argue that it does not: Disney's "home video" argument was simply a means to an end of marginalizing the most profit possible for the entertainment giant, with a blatant disregard for artists and other profit participants.[34] A ruling in Disney's favor on appeal would set forth a very harmful precedent that would have lasting repercussions for actors and filmmakers. It would allow studios and distributors to continue, as critics see it, "raking millions of dollars off the top without justification," while their actual distribution costs for streaming platforms are minimal.[35]

Moreover, this case should serve as a prompt for license-holders, such as Nye, to occasionally exercise their contractual right, if one exists, to perform an audit of the licensee's records.[36] Artists and their representatives should be cognizant of how future contracts are written, giving special attention to how distributors treat SVOD/EST in relation to accounting to profit participants.

Raven Berzal is a Second Year Law Student at the Benjamin N. Cardozo School of Law and a Staff Editor at the Cardozo Arts & Entertainment Law Journal. Raven is interested in transactional entertainment law. Raven is the current Secretary of the Cardozo Entertainment Law Society and Treasurer of the Women's Law Initiative, as well as a Legal Intern at the Cardozo Filmmakers Legal Clinic this semester.

1. See Friends Episode List, IMDb, https://www.imdb.com/title/tt0108778/episodes?ref_=tt_eps_sm; (last visited October 4,

2021); Sex and the City Episode List, IMDb, https://www.imdb.com/title/tt0159206/episodes?year=2004 (last visited Oct. 4, 2021).

2. See Friends, HBO Max, https://www.hbomax.com/series/urn:hbo:series:GXdbR_gOXWJuAuwEAACVH (last visited Oct. 4, 2021); Sex and the City, HBO Max, https://www.hbomax.com/series/urn:hbo:series:GVU2cAAPSJoNJjhsJATt6 (last visited Oct. 4, 2021).
3. See Seinfeld Episode List, IMDb, https://www.imdb.com/title/tt0098904/episodes/?ref_=tt_ov_epl (last visited Oct. 4, 2021).
4. See Seinfeld, Netflix, https://www.netflix.com/title/70153373 (last visited Oct. 4, 2021).
5. See The Office Episode List, IMDb, https://www.imdb.com/title/tt0386676/episodes/?ref_=tt_ov_epl (last visited Oct. 4, 2021).
6. See The Office, Peacock, https://www.peacocktv.com/stream-tv/the-office (last visited Oct. 4, 2021).
7. "Profit Participant" is a term used to refer to recipients of net profits, particularly creative talent and investors in motion pictures and television series. Neal Robin, Hit Losers: the Good (Faith) Fight for Net-Profits Payments from Blockbuster Hollywood Productions, 4 Case Western J. of L., Tech. & the Internet 446, 447 (2013) (quoting Steven D. Sills & Ivan L. Axelrod, Profit Participation in the Motion Picture Industry, L.A. Lawyer, Apr. 1989, at 31).
8. Bill Nye the Science Guy, The Disney Wiki, https://disney.fandom.com/wiki/Bill_Nye_the_Science_Guy (last visited Oct. 4, 2021).
9. Id.
10. Subsidiaries of the Company, U.S. Securities and Exchange Commission, Exhibit 21 (2021), https://www.sec.gov/Archives/edgar/data/1001039/000119312507252227/dex21.htm.
11. See Bill Nye the Science Guy, TV Guide, https://www.tvguide.com/tvshows/bill-nye-the-science-guy/1030140956/ (last visited Oct. 4, 2021).
12. Nye v. Walt Disney Co., 2018 Cal. Super. 1, 14 (L.A. Supper. Ct. 2018).
13. Media, Entertainment and Technology Litigation Update – Mar. 2021, Gibson Dunn (Mar. 18, 2021), https://www.gibsondunn.com/media-entertainment-and-technology-litigation-update-march-2021/.
14. A $28M Lesson from Bill Nye: Get an Audit Guy, Nat. L. Rev. (Sept. 27, 2017), https://www.natlawreview.com/article/28m-lesson-bill-nye-get-audit-guy-0.
15. David Ng, Bill Nye, the 'Science Guy,' says Disney owes him and others $28 million in profits from '90s TV series, L.A. Times (Aug. 25, 2017, 3:00 PM), https://www.latimes.com/business/hollywood/la-fi-ct-bill-nye-disney-20170825-story.html; See also Derek Thompson, How Hollywood Accounting Can Make a $450 Million Movie 'Unprofitable', The Atlantic (Sept. 14, 2011),

https://www.theatlantic.com/business/archive/2011/09/how-hollywood-accounting-can-make-a-450-million-movie-unprofitable/245134/ (explaining that the phrase "Hollywood accounting" refers to the creative accounting practices used to minimize loss and maximize profit for studios in the film and television industries).

16. Gene Maddaus, Disney Keeps 80% of Streaming Revenue by Calling It 'Home Video', Variety (Aug. 25, 2017, 10:00 AM), https://variety.com/2021/tv/news/disney-bill-nye-streaming-1234910834/.
17. Anousha Sakoui, Bill Nye's $28-million Profit Fight with Disney Can Go to Trial, Judge Rules, L.A. Times (Dec. 5, 2019, 2:29 PM), https://www.latimes.com/entertainment-arts/business/story/2019-12-05/bill-nyes-28-million-profit-fight-with-disney-can-go-to-trial-judge-rules.
18. Media, Entertainment and Technology Litigation Update, supra note 13.
19. Id.
20. Id.
21. Green Hasson & Janks, The Evolution of Profit Participations / Navigating Disruption in the Motion Picture and Television Industry, Ent. and Media Report 1, 37 (2017), https://www.ghjadvisors.com/wp-content/uploads/2017/10/2017-Entertainment-and-Media-Whitepaper.pdf.
22. Media, Entertainment and Technology Litigation Update, supra note 13.
23. Id.
24. Id.
25. Id.
26. Id.
27. Maddaus, supra note 16.
28. Id.
29. Rebecca Rubin, Streaming Salvation: How Studios Made Bank Selling Movies to Netflix and Amazon During the Pandemic, Variety (Dec. 9, 2020, 8:45 AM), https://variety.com/2020/film/features/hefty-streamer-deals-covid-pandemic-theater-shutdowns-1234848687/.
30. Allegre L. Hadida et al., Hollywood Studio Filmmaking in the Age of Netflix: A Tale of Two Institutional Logics, 45 J. of Cultural Econ. 213, 221 (2021), https://link.springer.com/content/pdf/10.1007/s10824-020-09379-z.pdf.
31. Media, Entertainment and Technology Litigation Update, supra note 13.
32. Id.
33. Maddaus, supra note 16.
34. Sakoui, supra note 17.
35. Maddaus, supra note 14.
36. A $28M Lesson from Bill Nye, supra note 12.