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The Honorable Tani Gorre Cantil-Sakauye
Chief Justice and Associate Justices
Supreme Court of California
350 McAllister St.
San Francisco, CA 94102

April 27, 2016

Re: Gilkyson v. Disney Enterprises, Inc., No. S233510
Amicus curiae letter in support of Petition for Review

To the Honorable Chief Justice and Associate Justices:

Pursuant to California Rule of Court 8.500(g), the Motion Picture Association of America, Inc. ("MPAA") and the Recording Industry Association of America, Inc. ("RIAA") write in support of the petition for review submitted in the above-referenced case by Defendants/Respondents Disney Enterprises, Inc. and Wonderland Music Company, Inc. (collectively, "Disney").

I. DESCRIPTION OF AMICI

The MPAA is a not-for-profit association founded in 1922 to address issues of concern to the U.S. motion picture industry. Its members are the six major motion picture studios in the United States: Paramount Pictures Corporation; Sony Pictures Entertainment Inc.; Twentieth Century Fox Film Corporation; Universal City Studios LLC; Walt Disney Studios Motion Pictures¹; and Warner Bros. Entertainment Inc. The MPAA's members and their affiliates are the leading producers and distributors of filmed entertainment in the theatrical, television, and home entertainment markets. All of the MPAA's members have their principal places of business in California. Overall, the motion picture and television industry directly employs more than 188,400 people in California, and is responsible for more than 549,300 jobs and \$43.8 billion in total wages in this state, including indirect jobs and wages.

The RIAA is a non-profit trade organization that supports and promotes the creative and financial vitality of the major recorded music companies in the United States. Its members, including Sony Music Entertainment, Universal Music Group, and Warner Music Group Corp., are the music companies that comprise the most vibrant recorded music industry in the world. RIAA members create, manufacture, and/or distribute approximately 85% of all recorded music produced in the United States. California has the largest music industry in the country, by state. In California, nearly 25,000 people work in the industry as performers, musicians, managers, and at music labels. Nearly one-fifth (17%) of this country's music professionals live and work in California, nearly twice as many as in the state with the second-largest music industry. California's music industry also supports over 7,500 local businesses.² Numerous music labels are incorporated or do business in California, including Universal Music Group, whose headquarters are located in Santa Monica.

II. THE NATURE OF CONTRACTS IN THE MOTION PICTURE, TELEVISION, AND RECORDING INDUSTRIES

This case concerns the scope of the “continuous accrual” exception to statutes of limitations in contract actions, pursuant to which “a series of wrongs or injuries may be viewed as each triggering its own limitations period, such that a suit for relief may be partially time-barred as to older events but timely as to those within the applicable limitations period.” *Aryeh v. Canon Business Solutions, Inc.*, 55 Cal. 4th 1185, 1192 (2013). The MPAA's and RIAA's members have a strong, and particularized, interest in the proper application of statutes of limitations, including the continuous accrual rule, in breach of contract actions. That is because they – as is exceedingly common in the entertainment industry – frequently enter into long-term

¹ MPAA member Walt Disney Studios Motion Pictures is a corporate affiliate of Defendants/Respondents Disney Enterprises, Inc. and Wonderland Music Company, Inc.

² See RIAA, *Economic Impact of the Music Community in the United States* (2009), available at <http://riaa.com/media/F53126EF-A04BEEC4-BA3D-398C68909018.pdf>.

contracts that obligate them to make periodic payments for use of creative material, or for services rendered as part of a production or recording contract.

In the motion picture industry, sometimes these agreements involve licenses whereby the MPAA's member studio acquires rights in a pre-existing work (*e.g.*, a novel, comic book, or screenplay), which is then made into a motion picture. Other times the studio will hire an individual to perform specific services – produce a television show, direct a movie, or, as in this case, write songs – which contribute to the ultimate creative work. In all these instances, as in this case, the producing studio pays the contributors for their rights or services, and the studio owns the copyright in the final motion picture. Similarly, in the recorded music industry, the record label will typically enter into recording contracts with recording artists, with the label holding the copyright in the resulting sound recordings. The term of a typical recording contract between a record label and an artist can last for several years, and the obligation of a record label to pay royalties to artists (or their heirs) from sales and other commercialization of the artists' recordings (which include digital downloads and streams) can continue for many more years, especially since the record companies often sell and monetize those recordings for decades after they were initially released.

In most industries, a firm simply pays its suppliers a lump sum for the goods it buys, and pays its employees regular salaries, with no further ongoing obligations. But in the motion picture, television, and music industries, creators, particularly the highest-profile and best-compensated, are often not paid lump sums, or salaries, for their work. Rather, they are typically paid with a combination of fixed compensation (*e.g.*, Terry Gilkyson's initial flat fee in this case, *see Gilkyson v. Disney Enters., Inc.*, 244 Cal. App. 4th 1336 (2016)), and contingent compensation (royalties, residuals, or so-called “back end” participation) based on the financial performance of the studio's project. Such back-end royalty payments are triggered by specific events and terms defined in the contract. Here, the royalty due Gilkyson was “Fifty Percent (50%) of the net amount received by [Disney's] music publisher on account of licensing or other disposition of mechanical reproduction rights in and to material so written by” him, *id.* at 1443, but specifically excluding “motion pictures, photoplays, books, merchandising, television, radio and endeavors of the same or similar nature,” *id.* at 1338. The parties' underlying dispute here is whether VHS and DVD sales fell within this exclusion language, thereby negating any obligation by Disney to pay Gilkyson for such sales of the film. Significantly, this is not a dispute over whether an already-established continuing obligation to pay had in fact been satisfied.

III. THIS COURT SHOULD GRANT REVIEW TO CLEARLY AND APPROPRIATELY DELINEATE THE SCOPE OF THE CONTINUOUS ACCRUAL DOCTRINE, AN ISSUE OF WIDESPREAD IMPORTANCE TO CALIFORNIA'S ENTERTAINMENT INDUSTRIES.

If, as here, parties are allowed to come forward, long after the initial purported breach, to claim that a contractual right that had never been recognized to exist suddenly exists, it would create undeserved uncertainty for the MPAA's and RIAA's members, as well as countless other

entertainment companies in California. Once created, movies and television programs often remain in distribution long after their initial release through a wide variety of secondary markets including television, home video and on-demand channels. So too do record labels enter into contracts to distribute their recordings through new platforms. These new agreements in turn involve complex royalty and participation systems honoring the companies' contractual commitments related to the underlying works. These financial operations in turn are connected to the financing of new pictures and albums.

These operations should not be subject to endless new opportunities to dispute the meaning of contractual language drafted and negotiated decades earlier – and involving alleged breaches that could have been litigated much earlier as well. Such suits present factual issues that can be difficult to litigate if important evidence has been lost or witnesses have become unavailable—which is precisely why statutes of limitations exist. *See Aryeh*, 55 Cal. 4th at 1191 (“[T]he statute of limitations exists to promote the diligent assertion of claims, ensure defendants the opportunity to collect evidence while still fresh, and provide repose and protection from dilatory suits once excess time has passed.”). Indeed, this case presents a textbook example of such difficulties: the agreement at issue dates from 1963; Disney released a VHS version of *The Jungle Book* (which, under Plaintiffs'/Appellants' theory, triggered royalty obligations) in 1991; Gilkyson, who presumably could have testified as to his understanding of the 1963 contract's meaning, passed away in 1999; and his heirs did not file their complaint until 2013.

Despite the commonplace nature of the types of contracts described above, there is a surprising dearth of guidance in California case law about the scope of the continuous accrual doctrine in breach of contract actions, and *none* in the context of agreements in the entertainment industry. Supreme Court review of this case would thus provide the MPAA's and RIAA's members, as well as the myriad other entertainment companies located in California, with increased certainty, and predictability, in the resolution of disputes involving their long-term contracts. As Disney argued in its Petition for Review:

This Court should grant review to provide a framework to decide when it is fair to apply the continuous accrual doctrine to breach of contract actions. This Court should explain how to balance the plaintiff's right to seek redress of alleged ongoing contractual breaches with the defendant's right to rely on settled expectations developed over years of contract performance without objection.

Pet. at 26. The MPAA and RIAA agree, and, should this Court grant review, would urge that it adopt the substantive rule that Disney proposes:

[W]here the plaintiff alleges the existence and breach of an ongoing duty, continuous accrual should not apply if the following conditions exist: (1) the defendant never performed the alleged duty; (2) the plaintiff had actual or constructive knowledge that the defendant was not performing the alleged duty; and (3) the plaintiff never previously asserted to the defendant that it was in breach of the alleged duty.

Id. at 27.

For the foregoing reasons, the MPAA and RIAA respectfully urge this Court to grant Disney's Petition for Review.

Very truly yours,



Benjamin S. Sheffner
Vice President, Legal Affairs
Motion Picture Association of America, Inc.
Affairs



George M. Borkowski
Senior Vice President, Litigation and Legal
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Recording Industry Association of America, Inc.

cc: John Logan Hunter, Esq. (counsel for Plaintiffs/Appellants)
Frederic D. Cohen, Esq. (counsel for Defendants/Respondents)

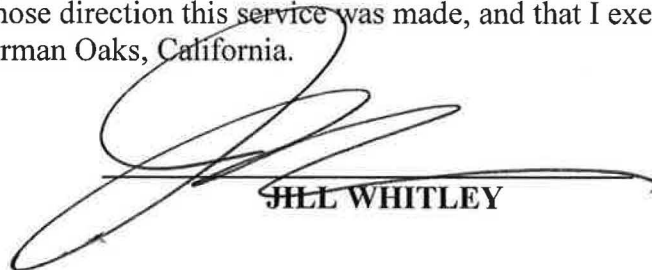
PROOF OF SERVICE

I am employed in the County of Los Angeles, State of California. I am over the age of eighteen and not a party to the within entitled action. My business address is 15301 Ventura Boulevard, Building E, Sherman Oaks, California 91403.

On April 27, 2016, I served the within document(s) described as **AMICUS CURIAE LETTER IN SUPPORT OF PETITION FOR REVIEW** on the interested parties to this action who are listed on the attached Service List.

- (X) **BY MAIL:** By placing a true copy thereof in sealed envelopes and causing them to be deposited in the mail at Sherman Oaks, California. The envelopes were mailed with postage thereon fully prepaid. I am readily familiar with our company's practice of collection and processing correspondence for mailing. It is deposited with the U.S. postal service on that same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing affidavit.
- () **BY HAND:** By placing a true copy thereof in sealed envelopes and causing such envelopes to be hand-delivered to the offices of the parties listed on the attached Service List.
- () **BY FAX:** By transmitting a true copy thereof via facsimile machine to the offices or the parties listed on the attached Service List. I caused the copy to be transmitted from the facsimile number of the Motion Picture Association of America (818) 382-1785. The transmission was reported as complete and without error. A copy of the transmission report is attached to this Proof of Service.
- () **BY OVERNIGHT MAIL (VIA FEDERAL EXPRESS):** By placing a true copy thereof in sealed envelopes and causing them to be deposited in the Federal Express Depository maintained at 15301 Ventura Boulevard, Sherman Oaks, CA 91403. The envelopes were sent with Federal Express fees therefor fully paid, with written instructions for "next-day" delivery.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct of my own personal knowledge, that I am employed in an office of a member of the Bar of this Court at whose direction this service was made, and that I executed this document on April 27, 2016 at Sherman Oaks, California.


JILL WHITLEY

SERVICE LIST

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