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New Federal Tax Act Gives New Life, and Twists, To Treatment of Film, TV and Stage Productions

By Thomas D. Selz and Bernard C. Topper Jr.

Section 181 of the Internal Revenue Code (IRC) was first introduced in 2004 and, with some gaps in time, lasted through its expiration at the end of 2016. It has provided benefits to both producers of movies and television programs (and, for a shorter period of time, to producers of live stage productions) and — under pass-through legal structures such as limited liability companies — to their investors. Now, with the enactment at the end of 2017 of the sweeping new federal tax law, commonly referred to as the Tax Cuts and Jobs Act (the Jobs Act), §181 has been given new life, with a couple of additional benefits and a couple of additional twists.

First: When can the deduction for production costs be taken? Under §181, prior to the Jobs Act, production costs incurred during a year could be deducted for such year if the costs were incurred with a reasonable certainty that the production would be completed (as a practical matter, the year in which funds for the budgeted costs had been fully raised and were beginning to be spent on production costs). That meant that unlike income forecast depreciation (the alternative in effect prior to §181's enactment), costs could be deducted even before a film was released, a television show broadcast or a live stage production had it first paid public performance.

Of course, if a project was not yet in release in the year in which production costs were incurred, there would not yet be revenue to report to take advantage of the deduction for cost of production. In that case, the production costs would produce a loss that could be carried forward and used to offset income when revenue started to come in or, alternatively, investors in a pass-through entity such as an LLC that owned the copyright to the project could take immediate advantage of the loss as a deduction against other qualifying passive income (subject to

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Decision of Note

TV Reality Show Release Overrides Objection Clause

By Stan Soocher

The U.S. District Court for the Southern District of New York upheld a release clause signed by an entertainment attorney who appeared in WE network's reality TV show *Money. Power. Respect*. *Shapiro v. NFGTV Inc.*, 16 Civ. 9152.

Entertainment attorney Kelly Shapiro filed suit alleging fraudulent inducement, among other things, over how she was depicted in the series. District Judge Paul G. Gardephe noted Shapiro claimed "the production company falsely represent[ed] that the series was intended to 'shed light' on 'minority females in the entertainment business,' when Defendants actually intended to use the show to 'defame and disparage her.'"

Shapiro had been able to get a clause inserted in the participation agreement that allowed her to object to scenes that "cause[d her] to directly violate a rule of professional conduct." But District Judge Gardephe determined Shapiro's causes of action were barred because the agreement included a release of "any and all claims … whether now known or unknown, suspected or unsuspected, and whether or not concealed or hidden in any way directly or indirectly related to or arising directly or indirectly out of" the reality show, and because she didn't allege fraud separate from the release.

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applicable limitations). And if the deduction for costs of production were not fully used against other qualifying passive income, then it could be used to offset project income when the revenue comes in.

Under the Jobs Act, the deduction occurs when the production is "placed in service," which is defined in the Jobs Act. For a film or television project, it is the year in which a film is initially released; for a television project, it is the year in which it is first broadcast, streamed or otherwise made available to the public; and for a live stage production, the year in which it has its initial live staged performance (note: not "opening," so previews presumably count). There is now greater certainty about the year in which the costs can be deducted.

Second, under §181 prior to the Jobs Act, an election had to be made to take advantage of the section on the tax return for the first tax year in which there was a reasonable certainty that the project would be completed. No affirmative election, no 100% deductibility. Under the Jobs Act, the 100% deductibility is assumed, so no election needs to be made; the tax return is just filed claiming deduction of 100% of production costs in the year in which the production is placed in service.

This approach removes the uncertainty under the pre-Jobs Act §181 about when a production has a reasonable certainty of being completed. The drawback is that production costs cannot be deducted before the year in which a project is placed before the public — as they could have been under §181 before the Jobs Act, if those costs were incurred prior to a project becoming available to the public but after there was a reasonable certainty of being completed. For example, if a film started principal photography in one year, the financing to cover the budget had been raised, and the project was not released until the next year, production costs could have been deducted if a Section 181 election were made, to the extent incurred in each year.

Third, the Jobs Act provides that this 100% deductibility of production costs incurred after Sept. 27, 2017, will be in effect for five years for productions placed in service from Sept. 28, 2017, until Dec. 31, 2022 (after which there is a declining deductibility over the next several years). This five-year window means that producers can raise money pointing out the deductibility of 100% of production costs with greater certainty about this potential benefit to investors. This is particularly so for investors investing in a production through an LLC who expect to have other qualifying passive income during this five-year period against which (subject to applicable limitations) they can offset the tax loss from the LLC production company arising in the tax year the production is placed in service or, alternatively, can use the deduction to offset income in a fund for a number of film, television or live stage productions.

We mentioned above the potential benefit to producers and investors from a fund to finance several motion picture, television or live stage productions. If the production company produces only one production, the likelihood is that the 100% deduction for the costs of production will not be fully utilized in the first year in which each project is placed in service. (Very few projects in these fields recover from revenues their full cost of production in the first year of public release.)

As a result, there will be loss carry-forwards (unless the excess costs

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Entertainment

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How Ticket Software Lost Trade Secret Protection

By Richard Raysman and Peter Brown

Trade secret protection applies only to confidential information. In almost all circumstances, broadcasting to the world the intricate details and applications of a trade secret extinguishes whatever "property right" an entertainment industry holder once possessed. What is a sufficient method of contractually notifying a software user of the trade secret status of certain information is a closer question.

According to a recent case from the U.S. District Court for the Southern District of New York involving live-event ticket sales, a purported holder of a trade secret cannot omit a confidentiality provision from its terms of use and then claim trade secret status afterward. *Broker Genius v. Zalta*, 17-cv-2099. In *Broker Genius*, the district court held that the inconspicuous language of the licensor's terms of use, coupled with its routine and frequent disclosure of the entire architecture of the user interface of the software supposedly protectable as a trade secret, precluded the licensor's successful motion for injunctive relief for trade secret misappropriation.

Plaintiff Broker Genius created software called "AutoPricer v.3," which assists in automating the pricing of live event tickets in secondary markets. The founder of Broker Genius claimed he started the company to create software that allowed brokers to build on their existing manual ticket implementation strategies. Broker Genius's innovation was purportedly to allow the implementation of these strategies "within a user interface in which the user could engage with the software dynamically and have the ability to change strategy very quickly."

According to Broker Genius, because such software did not previously exist in the marketplace, Broker Genius expended considerable time and resources on developing AutoPricer, including honing the user interface through trial and error and customer feedback. As such, Broker Genius created multiple versions of AutoPricer. The third version, released in 2015, gave access to the complete software interface and architecture to every user. Broker Genius filed a patent application in which it described the functionality of AutoPricer identically to its description in the case.

Defendant NRZ Entertainment is involved in the ticket broker business. In May 2015, one of its owners signed NRZ up for a 30-day trial of Broker Genius's "full-service" subscription service. On Feb. 3, 2016, Broker Genius and NRZ executed a one-year service agreement granting NRZ full use of the Broker Genius software and requiring NRZ to agree to Broker Genius's terms of use. Throughout the course of the license, Broker Genius employees conducted training sessions and explained to NRZ the capabilities of AutoPricer.

NRZ concurrently began to develop its own automatic ticket pricing software, named TickPricer. Although there was no evidence that NRZ accessed the source code of AutoPricer, the Southern District of New York noted it was "abundantly clear from the documentary evidence and witness testimony that defendants closely modeled TickPricer on AutoPricer v.3 and relied heavily on their own knowledge of Broker Genius's product to build their own software."

TickPricer became operational in December 2016 and NRZ terminated its license with Broker Genius a month early. That same month, Broker Genius filed against defendants: a complaint alleging, among other causes of action, violations of trade secret misappropriation under New York law and the federal Defend Trade Secrets Act, 18 U.S.C. §1831 *et seq.*; and a request under Rule 65 of the Federal Rules of Civil Procedure Federal for an *ex parte* temporary restraining order to, *inter alia*, seize any of the defendants' property containing Broker Genius's trade secrets and to restrain NRZ from marketing TickPricer.

However, the district court held that Broker Genius was not likely to prevail on its misappropriation of trade secrets claim — the sole claim on which it sought a preliminary injunction — because the user interface of AutoPricer did not qualify as a trade secret, even though AutoPricer is undoubtedly valuable to Broker Genius and its competitors, and Broker Genius expended roughly $4 million developing the software.

Courts in New York refer to the Restatement of Torts to formulate a definition of trade secret. *See*, Restatement of Torts §757 (defining a trade secret in relevant part as "any formula … or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it"). Courts have routinely held that software user and architecture is a protectable trade secret, despite being "inherently broad concept[s]." *See, e.g.*, *Integrated Cash Mgmt. Serv. v. Dig Transactions*, 920 F.2d 171 (2d Cir. 1990) (also holding that a trade secret can exist in a combination of constituent elements, irrespective of whether each element by itself is deemed in the public domain).

Absolute secrecy is not required, but the information claimed to be a trade secret must be shrouded with a "substantial secrecy." "Reasonable measures" is the lodestar for a trade secret being sufficiently guarded. Of course, the holder can forfeit trade secret protection by making certain

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Ticket Software

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disclosures. If a person reveals a trade secret to individuals who are under no obligation to protect its confidentiality, or otherwise publicly discloses the trade secret, the right is extinguished.

The *Broker Genius* court concluded the plaintiff failed to undertake "reasonable measures" to ensure the secrecy of the protectable elements of AutoPricer. The discreet disclosures in Broker Genius's patent application and by its sales representatives in demonstrations, as well as its publication of screenshots of an AutoPricer predecessor software that exposed aspects of AutoPricer, evaluated individually did not extinguish its property rights in AutoPricer. However, the court stated that "these types of disclosures — especially taken together — *do* strongly suggest that Broker Genius did not consider AutoPricer v.3's software architecture or user interface to be trade secrets prior to initiating this litigation."

More fatal to Broker Genius's claims was the "unfettered access" it offered to all users. This is the "one disclosure that *did* destroy Broker Genius's claim that [AutoPricer is] a trade secret," the court wrote. Broker Genius granted each user access to the software itself as well as technical manuals, and sent update emails to explain the operational advantages of AutoPricer's functionalities. Its customer service staff provided answers to user questions centered on elements of AutoPricer that Broker Genius elsewhere claimed were trade secrets. Unfortunately, the avalanche of disclosures about AutoPricer "explains why defendants were able to duplicate major portions of AutoPricer v.3's user interface … with such speed and for relatively low cost," the court observed.

Broker Genius notified users only in the terms of use that AutoPricer contains trade secrets. The Southern District of New York found this insufficient. To convey the confidentiality obligations associated with using AutoPricer, the court held that "it would have been reasonable to do something more to notify users of the software's confidentiality." Broker Genius failed to do so. The terms of use were not accessible through the AutoPricer application, but instead only through its website. The terms of use also "simply does not contain a confidentiality provision." Most important, the terms of use provision proscribing users from reproducing or distributing AutoPricer did not notify the user of the secrecy of the software, nor that the user was precluded from "describing to others the software's function, structure, and appearance."

Broker Genius's "widespread and comprehensive disclosures extinguished the trade secret status" of the components of AutoPricer that it claimed NRZ had misappropriated. Accordingly, the district court denied Broker Genius's motion for a preliminary injunction.

However, the parties agreed to a settlement through which the permanent injunction was issued enjoining NRZ from distributing or selling the TickPricer product. NRZ paid Broker Genius a settlement payment and acknowledged that TickPricer was "improperly derived from [the] AutoPricer software in violation of our contractual obligations with Broker Genius including under Broker Genius' Terms of Use."

The parties dismissed the case with prejudice.

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of production over revenues in the first year of release are deducted by investors against other qualifying passive income outside the fund). These loss carry-forwards will be available to defer taxes in subsequent years to the extent the production generates future revenues. If the production is part of a film fund that will produce several motion picture, television or live stage productions, the deduction for production costs will be available to offset the revenues from *all* the projects financed by a fund until all the costs of production across all projects have been deducted from all revenues from all projects in the fund; in other words, a deferral of taxes until an investor has fully recovered his or her or its investment in the fund.

This tax deferral with respect to income from all projects in a fund could become a useful marketing aspect in raising financing for a fund, particularly in light of the five-year period for 100% deductibility offered by the Jobs Act.

Note that the new §181 treatment discussed in this article is part of the Jobs Act as amendments to the new bonus depreciation rules. The new treatment therefore does not actually appear in §181, which remains in the IRC for purposes of cross-reference in the Jobs Act's bonus depreciation rules. So to understand fully the resuscitation of §181, that section in the IRC needs to be read together with the applicable bonus depreciation rules in the Act, which apply to a variety of industries.

Also note that after Dec. 31, 2022, the Jobs Act provides for ongoing bonus depreciation at a rate that declines 20% per year, that is, 80% of costs for a project put in service in 2023, 60% for a project placed in service in 2024, etc. It appears that the balance of costs incurred in the applicable year can still be depreciated in accordance with pre-Jobs Act rules, so, for example, for a film, television or live stage project, income forecast depreciation could be used for the portion of costs of production which are not eligible for immediate deduction in the year the project is placed in service.

But wait: Despite the enactment of the Jobs Act, Congress was not yet done with §181: As part of the Bipartisan Budget Act of 2018, (the Debt Act) (http://bit.ly/2Fepe89) passed

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Smart Contracts And Blockchain

By Paige M. Boshell

As the entertainment industry continues to assess digital blockchain-distribution technology for tracking transactions, it's essential to consider the legal implications for smart-contracting and contract management.

The blockchain is a series of permanent files of record or transaction data. Its blocks are referenced by hash pointers to form a chain sequence that grows in a linear fashion over time as blocks are added sequentially using cryptography. These chains cannot be pulled apart, however, and blocks may not be swapped out. The chain, sequence and content of each block are permanent. Additional blocks may be added in accordance with the underlying rubric or coding of the chain. Any additional blocks are viewable by each person or entity that has access to the original chain via the blockchain platform.

In addition, the blockchain may be distributed as a shared private or public database across platforms and locations. Consider a spreadsheet accessible by various parties that may view or add cells, but not revise or delete existing cells. For this distributed ledger technology, there is no centralized database to be hacked and the blocks are accessible according to permissions and visible in real time to all parties who have access to the blockchain platform.

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Because blocks may not be removed, substituted, copied or altered, the blockchain is considered inherently authenticated, secure and immutable.

Smart contracts are self-executing agreements written in code on the blockchain. Parties contract digitally using distributed ledger technology, and agree to certain terms and outcomes to be accomplished by the contract.

The blockchain is well-suited to simple and repetitive contracts, like a series of purchases and payments. There is only one blockchain, but it is accessible from anywhere. The final terms are deployed to the blockchain and distributed throughout the underlying platform. Therefore, the contract may be executed at the same time from various locations and effectiveness can be immediate.

Contract draft terms are deployed to the blockchain. Coding facilitates the review of the draft terms and the sequential revision of contract documents concurrently by parties in the multiple locations. Using the spreadsheet example, draft terms can be instantly viewable, and other parties' responses and counter-terms all immediately logged and viewed digitally.

The smart contract code contained in the blocks renders the contract a set of self-executing and self-enforcing protocols. If A happens, then B occurs. If A does not happen, then C occurs.

As autonomous and automated processes, smart contracts lend themselves well to agreements with clear conditions and repetitive transactions. These contracts may be fairly complex in terms of scope, volume and types of terms and conditions, and number of parties, but the terms must be susceptible to conversion to self-performing code. Payment can be effected digitally via the blockchain using cryptocurrency; payment and receipt would be instantaneous.

As an immutable and secure technology, the blockchain can be used to complete transactions typically requiring a trustee or other centralized authority to authenticate the parties, verify that certain contract terms have been met, and execute certain contract terms, such as transfer of ownership or payment.

For example, an escrow agreement can be formed and implemented on the blockchain by linking blocks of defined conditions to the release of certain payments. Independent verification of the satisfaction of the conditions is not required because the fulfillment of each condition is memorialized or effected by the blockchain. Independent disbursement of funds is not necessary because immediate transfers of cryptocurrency can be effected by the blockchain.

In this manner, smart contracts can facilitate certain types of contracts without an intermediary or trustee, at a faster pace, and at lower transactional costs than those associated with traditional trusted intermediary contracts.

The blockchain forms a permanent, trackable record of both the contract terms and the successful performance or failure of the contract terms. All the parties have access to the blockchain to confirm that contract terms have been met and monitor contract performance directly.

No separate recordkeeping or management process may be required. Blocks are accessible at any time and from any location in their permanent form. No separate method of authentication should be required. This could greatly reduce the cost of contract management, while enhancing and simplifying the administration of a vendor management program.

Note for the self-executing smart contract code, parties must use terms that are clearly defined, have measurable performance metrics or objectives, include concrete steps or conditions, and provide for a series of pre-determined outcomes and results.

For example, the smart escrow contract described above provides that the occurrence of specified

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Iglesias's Music Streaming Suit Confronts Big Industry Issue

By Samantha Joseph

Music superstar Enrique Iglesias wasn't dancing around the point when he recently filed a lawsuit in Miami federal court against Universal International Music. The "Bailando" singer's music has generated billions of streams for Universal, which he alleges has shortchanged him on royalties, according to the complaint filed by Miami attorneys at Stroock & Stroock & Lavan. *Iglesias v. Universal International Music BV*, 1:2018cv20283.

The case is part of the larger issue of how the music industry treats the sale of digital music versus physical counterparts like compact discs. "Few business relationships in the history of the music industry have achieved the commercial success attained by Enrique Iglesias and Universal: 100 million albums sold, billions of streams and repeat appearances at the top of the Billboard charts," Iglesias's attorney James Sammataro, who is national head of Stroock's entertainment litigation practice group and managing partner of the firm's Miami office, said in a statement. "Despite this record-breaking success, Universal has wrongly insisted that artists like Enrique be paid for streams in the same manner as they are paid for physical records despite the fact that none of the attendant costs — production, distribution, inventory, losses — actually exist in the digital world."

Iglesias is a Grammy Award winner who has outpaced all other artists on the Billboard Latin Chart by achieving more than two dozen No. 1 singles, and has surpassed music legends Prince and Michael Jackson as the male performer with the most top-selling dance singles, according to the lawsuit. Iglesias has also proven to be a hitmaker on social media and streaming services that deliver digital content via computers and mobile devices. His 2014 summer hit, "Bailando," for instance, has amassed more than 2.46 billion views on YouTube.

The lawsuit claims Universal International systematically underpaid the singer, offering "a small fraction of the contractually required 50% royalty rate." The single-count complaint alleges breach of contract.

"This is not what Enrique's contract or the contracts of many other artists call for," Sammataro said. "Artists, producers and songwriters should benefit from the reduced costs of streaming, not have their musical works spin unwarranted profits" for the distributor.

Universal International did not immediately respond to requests for comment.

Iglesias's pleading claims the company applied a lower royalty — due on sales of albums — instead of the higher rate. It alleges an amendment to the singer's contract did not specifically cover streaming, keeping a 50% royalty in play.

The litigation is the latest in a series of disputes over royalties for digital products. It follows growing support from music industry groups, including the American Society of Composers, Authors and Publishers and the National Music Publishers' Association, for legislation to require a uniform digital royalty rate for all music. The sparring is also playing out in a $1.6 billion lawsuit by music publisher Wixen against streaming service Spotify over royalties for compositions.

Sammataro suggests the filing in federal court was the singer's last resort. "Universal has long ignored and is now attempting to distort the clear terms of its artist agreements so that it alone reaps the savings from digital streams," he said. "After lengthy efforts to have Universal honor its contractual obligations, Enrique's team regrettably concluded that he had no choice but to file this lawsuit."

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Samantha Joseph is a reporter for the *Daily Business Review*, the Miami, FL-based ALM sibling of this newsletter in which this article also appeared.

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triggers automatically and autonomously effect certain pre-determined triggered results. These escrow terms are self-executing and do not require human intervention to verify the occurrence of the triggers or effect the triggered results.

Consider, for example, an entertainment software license. Conceivably, terms governing the development of customizations according to specifications, delivery and/or installation of the software, testing and acceptance, and payments could all be memorialized, verified, and executed by smart contract code.

Traditional but more complex terms may not, however, be susceptible to realization on the blockchain. For example, the software licensee will require certain indemnities for intellectual property infringement and data breach. Determination of whether or not intellectual property infringement has occurred or claims trigger liability are not easily reduced to code. Similarly, apportionment of blame and liability for data breach may require external legal analysis.

Disclaimers of warranties, limitations of liability, indemnities, force majeure, arbitration or other conflict-resolution clauses, and other boilerplate legal terms all pose the same difficulty in this context.

Conclusion

To use the blockchain for smart contracts, the dependencies and contingencies must be expected or reasonably foreseeable. The protocols may be less effective for unlikely or ambiguous events or outcomes or events that require an independent legal determination to be enforced.

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Monk Estate Suit Against Beer Co. Moves Forward

By Ross Todd

A Northern California craft brewery lost an early attempt to knock out a lawsuit brought by the son of jazz legend Thelonious Monk, who claims the brewery uses Monk's name and likeness without permission.

For more than a decade, North Coast Brewing Co. has been brewing "Brother Thelonious" beer, named after the pianist and composer whose songs are the second-most recorded in the jazz catalog, behind only Duke Ellington. The packaging for the Belgian-style abbey ale features a portrait of Monk stylized to make him look like a sort of patron saint of suds.

According to both sides in the litigation, the brewery initially had an oral agreement with Monk's estate to use his name in exchange for donating a portion of the beer's profits to the nonprofit Thelonious Monk Institute of Jazz.

Lawyers for Thelonious Monk Jr., however, claim that North Coast also used Monk's likeness on merchandise, something they claim wasn't part of the oral agreement, and that the estate revoked the brewery's rights to use the Monk name at all in January 2016.

Monk Jr. sued North Coast on behalf of the estate of his father in the U.S. District Court for the Northern District of California in August 2017 claiming the brewery's continued use of the name and image constituted trademark infringement, and a violation of the estate's right of publicity. *Monk Jr. v. North Coast Brewing Co.*, 3:2017cv05015.

North Coast's lawyers at McDermott Will & Emery asked Northern District Judge Haywood Gilliam Jr. to dismiss the suit late last year noting that it came after Monk Jr. had a disagreement with the Monk Institute and was removed as its chairman. Monk Jr., they argued, was seeking to "secure a personal income stream from North Coast's decade-long charitable largesse to the nonprofit Monk Institute" and that he didn't have a viable claim.

But in a recent decision, District Judge Gilliam found that disputes remain over the nature of North Coast's initial oral agreement and that the "fact-intensive" issues at play in the case need to be fleshed out before the case can be decided.

McDermott's Robert Zelnick passed along the following statement from North Coast: "While we are disappointed that the court did not dismiss the Monk Estate's claims out of hand, we are eager to proceed to litigation to reveal the facts underlying these meritless claims."

Monk Jr.'s lawyer, Joel Rothman in the Boca Raton, FL, office of Schneider Rothman Intellectual Property Law Group, said there never was a written agreement concerning North Coast's right to continue to use the Monk name, image and likeness. "We attempted to work it out with North Coast and they refused," Rothman said. "Jazz and beer go together, but only if both sides agree."

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Ross Todd is bureau chief for *The Recorder*, a San Francisco-based ALM sibling of *Entertainment Law & Finance*.

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on Feb. 9, 2018, Congress added an amendment to §181 making it retroactive to Jan. 1, 2017. It did not, however, give any indication about how that retroactivity — generally, permitting immediate expensing of production costs for a project commencing production in 2017 — is to be reconciled with the provisions of the Jobs Act permitting deduction of costs incurred after Sept. 27, 2018, in the year in which the project is placed in service.

Conclusion

This article is written based on the terms of the Jobs Act as read by the authors of this article. Given how recently the Jobs Act was passed and the length of the Jobs Act, and now the confusion created by the Debt Act, IRS regulations providing guidance about how the Jobs Act is to be interpreted — and how the Jobs Act and the Debt Act can be reconciled — have not yet been issued. Such regulations may affect the guidance offered by this article, if and when the IRS issues regulations. In addition, the IRC is still subject to further Congressional amendment between now and Dec. 31, 2022 (and thereafter).

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The efficacy of smart contracting in the entertainment industry thus depends not just on technical coding and system capabilities. The ability of the parties to foresee and define a set of terms, events, and outcomes is critical to the reduction of the contract to self-executing code. Further, the type or content of the term will impact how or whether or not the term may be suitable for the blockchain.

In the near future, use of the blockchain for smart contracts is likely to proliferate for agreements that are conducive to the technology. For more complex transactions, it will be interesting to see if these contracts will be excluded from the blockchain, effected using a hybrid approach of smart contracts and traditional contracts, or if the technology will ultimately be developed to implement these sorts of terms directly or impact the content of contract terms themselves by developing an alternative set of terms susceptible to reduction to self-executing code.

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BIT PARTS

By Stan Soocher

"Dead Man Statute" No Bar to Testimony About Alleged Oral Contract for Share of Royalties from Ben E. King Songs. The U.S. District Court for the Southern District of New York decided that New York's "dead man statute," N.Y.C.P.L.R §4519, which bars an "interested" litigation party from testifying about communications with a deceased person, didn't bar Chuck Rubin, the founder of plaintiff Artists Rights Enforcement Corporation (AREC), from testifying about discussions he had with the late artist Ben E. King — in which Rubin claims King orally agreed that AREC had a right to share in the King's royalties. *Artists Rights Enforcement Corp. v. Estate of King*, 16-CV-1121. King died in April 2015. AREC sued King's estate in February 2016 for songwriting royalties from King's share in the hits "There Goes My Baby" and "Stand by Me." Rubin, who continues as AREC's president, transferred his AREC stock to his wife in June 2017. District Judge J. Paul Oetken found: "Here, the 'direct legal operation' of any judgment would benefit only AREC and its sole shareholder, Marcia Rubin. While the factfinder at trial may certainly consider the Rubins' spousal connection when it comes to credibility determinations, Charles Rubin is not an 'interested' party solely by virtue of marriage." The district judge added: "Second, the fact that Rubin transferred his shares on the eve of his deposition, presumably so he could testify, does not make him interested." … **Eleventh Circuit Sees No Personal Jurisdiction in Malpractice Lawsuit Against Law Firm that Handled Concert Industry Litigation.** The U.S. Court of Appeals for the Eleventh Circuit affirmed the dismissal of a legal malpractice lawsuit brought in Georgia federal district court by Georgia plaintiffs who were unsuccessfully represented by a Florida law firm in a concerts-booking race discrimination case in New York federal court a decade before. *Rowe v. Gary, Williams, Parteni, Watson & Gary, P.L.L.C.*, 16-17798. Determining the Georgia federal district court lacked personal jurisdiction over the law firm, the Eleventh Circuit explained: "Plaintiffs point to few actual contacts that occurred in Georgia — mainly to the one litigation preparation meeting in December 2002, the taking of one deposition for the New York action, and the initial contact between Plaintiffs and the Gary Firm. As to the initial meeting, we find that it was 'fortuitous' that Willie Gary happened to be in Atlanta working on an unrelated case at the time Rowe initiated contact with the Gary Firm." The appeals court added: "Plaintiffs argue the Gary Defendants regularly communicated with them via phone, e-mail, and even fax about the New York action, including the contested discovery e-mails and the offer of settlement. While [Leonard] Rowe might have been in Georgia for some of the discussions about the ongoing litigation, he clearly admits that he also spoke to the Gary Defendants about his case from New York and in the Gary Firm office in Florida." … **Tax Court Finds No Profit Motive in Music Club Operation.** The U.S. Tax Court ruled that the owner of the Bell Cove Club in Hendersonville, TN, near Nashville, wasn't operating the music venue for profit and thus couldn't deduct the club's financial losses. *Ford v. Commissioner of Internal Revenue*, Memo 2018-8. Petitioner Joy Ford and her husband, music producer Sherman Ford, had established Bell Cover as a songwriters' showcase. In the tax proceeding, Joy Ford challenged the federal government's denial of her bid to deduct the club's monetary losses from income she received from trusts set up by her late husband. Tax Court Judge Maurice B. Foley noted Ford "selected the performing artists, devoted most of her time to Bell Cove, and paid all of its expenses. [She] charged a $5 admission fee and a nominal amount for snacks and beverages and received annual gross receipts of $17,006, $14,156, and $13,581 relating to 2012, 2013, and 2014, respectively. Bell Cove's expenses, which [Ford] paid in cash or from her personal checking account, consistently exceeded its revenue." Tax Judge Foley concluded: "[P]etitioner did not have the requisite intent to make a profit and thus may not deduct the losses in dispute. … [She] was primarily motivated by personal pleasure, not profit, and simply used the club's losses to offset her trust and capital gain income."

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