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PERSPECTIVE

## Black Windows: Scarlett Jo vs Disney

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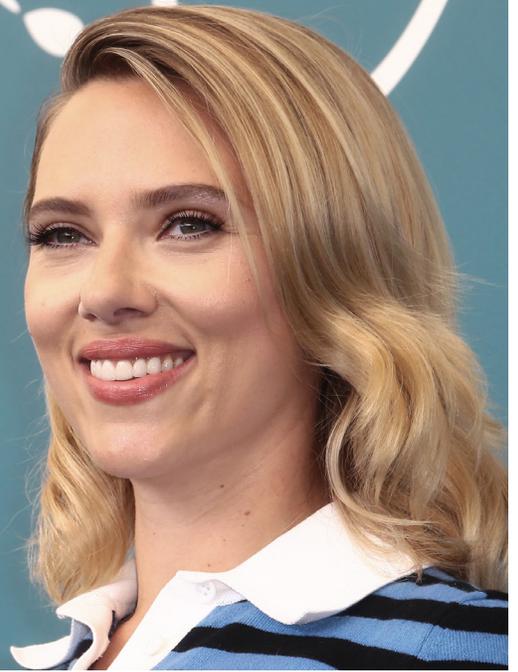
The truth rarely makes sense when you omit key details.” These words, spoken by Florence Pugh to Scarlett Johansson in “Black Widow” — Marvel Studio’s latest blockbuster superhero film — aptly summarize the public messaging disconnect between Johansson and the Walt Disney Company over the latter’s decision to simultaneously release “Black Widow” to both movie theaters and the Disney+ streaming service — a rollout that recently provoked a headline-grabbing lawsuit from Johansson. The case represents a shocking fissure in the longstanding and lucrative relationship between one of the world’s highest-paid actresses and the venerable House of Mouse, and appears poised to test the outer limits of studio autonomy in the wake of the COVID-19 pandemic.

To better understand how the parties got here, a short history lesson is in order: For decades, most Hollywood films were released to market in a staggered fashion across various delivery formats, a process known as “windowing.” Typically, movie theaters were given the first opportunity to make a film available to the public, eventually giving way to formats such as pay-per-view, home video, digital download, and on-demand streaming. This process was intended to drive customers to movie theaters and maximize a film’s box office numbers to the presumed benefit of both studios and talent (the latter of whom often enjoy a contractual entitlement to a specified share of the film’s backend profits).

The ascent of Netflix kicked off an arms race between studios now keen to establish their own dedicated streaming services from



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Scarlett Johansson in Venice, Italy, August 29, 2019.

which they could draw reliable monthly subscription fees, rather than having to rely on the less-predictable, one-off patronage of theaters-goers. This pressure to decrease reliance on box office revenues was then massively compounded by the global shuttering of movie theaters due to the public health risks presented by COVID-19. Entire film slates were converted from traditional windowed releases to instead be piped directly into viewers’ homes from the get-go.

The foregoing development, while undoubtedly a boon to the studios’ fledgling streaming services, provoked outrage from Hollywood talent, whose contracts had been drafted in reliance on windowing remaining the industry’s standard operating procedure. Many studios quietly renegotiated their agreements behind the scenes to account for this new lived reality, not wishing for talent acrimony to

spill out into the press. Marvel apparently couldn’t or wouldn’t do so for Johansson.

To hear Johansson tell it, when Marvel contractually promised her that “Black Widow” would be given a theatrical release, it was understood by the parties that the release would be windowed pursuant to industry custom and practice, thereby maximizing the box office revenue upon which much of Johansson’s compensation is based. However, Disney collapsed the film’s windowing by giving it a concurrent theatrical and streaming release, prioritizing the growth of its Disney+ service (for which Johansson lacked significant profit-sharing rights) to the detriment of its box office performance. (The industry term of art for this is “day and date.”)

Disney’s decision is arguably emblematic of not simply the new reality of COVID-19, but the new reality of media consolidation as

well. While the historical relationship between studios and talent has always been fraught, the studios nevertheless made efforts to present themselves as purveyors of art rather than commodities and retain something of a human touch. As studios have grown more reliant upon the technology industry to maintain their bottom lines, with many ultimately being acquired by technology companies (such as Amazon’s recent purchase of MGM), their ultimate decision-makers seem to increasingly lack understanding of how to navigate the entertainment industry’s delicate frameworks.

Given the foregoing, Johansson can expect a hard-nosed interpretation from Disney of her 2017 agreement with Marvel. While her lawsuit claims that “it was well understood by the parties and Disney that a ‘theatrical release’ referred to an exclusive release in theaters for an extended period of time that was roughly 90-120

days,” Disney will undoubtedly belabor that this understanding is not expressly reflected in Johansson’s agreement, which only required “Black Widow” to be distributed across at least 1,500 screens. It will also argue that Johansson, undoubtedly represented by sophisticated transactional counsel, could have included the word “exclusive” in her agreement to guarantee a windowed release. After all, it has long been held “courts cannot make better agreements for parties than they themselves have been satisfied to enter into or rewrite contracts because they operate harshly or inequitably.” *Walnut Creek Pipe Distribs., Inc. v. Gates Rubber Co. Sales Div.*, 228 Cal. App. 2d 810, 815 (1964).

This argument should prove too clever by half. When Johansson’s agreement was brokered in 2017, the notion of a nonexclusive theatrical release for a Marvel film — which regularly gross 10 figures at the international box office — was simply inconceivable. Talent contracts were frequently silent on windowing specifically because the fact and details thereof were relegated to the studio’s distribution agreements with theater chains. Indeed, “Black Widow” is Johansson’s sixth film in the Marvel Cinematic Universe, the previous five of which all received traditional windowed releases. Under California law, the terms of a contract may be explained or supplemented by custom and practice within a relevant industry, as well as the contracting parties’ prior dealings. See Cal. Civ. Proc. Code Section 1856(c);

*Howard Entm’t, Inc. v. Kudrow*, 208 Cal. App. 4th 1102, 1114 (2012). Given that Marvel’s chief counsel allegedly represented to Johansson’s team that “Black Widow” “would be widely theatrically released like our other pictures,” it would have been eminently reasonable to expect a sixth exclusive theatrical windowing. Why would Johansson assume otherwise before Disney+ was even a twinkle in Bob Iger’s eye?

Regardless of who prevails in Johansson’s litigation, its mere institution constitutes a significant black eye to the Disney brand. Financial disputes between studios and talent are a dime a dozen, but the overwhelming majority of such disputes are resolved behind closed doors in order to preserve the parties’ working rela-

tionships and avoid unnecessary media scrutiny. It is incongruous that Disney could not have headed this case off at the pass through a simple renegotiation of Johansson’s contract, one of the kind that so many other studios have undertaken over the past 18 months. Its apparently unwillingness to do so merely adds to the intrigue of this rare litigation sighting.

It remains possible that Johansson’s lawsuit will prove more pragmatic than persuasive, intended primarily as a cudgel to force Disney back to the negotiating table — particularly given that Disney is not even a signatory to Johansson’s deal and was likely targeted to complicate Marvel’s ability to force the dispute into arbitration, a gambit with uncertain

prospects. Disney, for its part, has yet to blink, lambasting Johansson’s “callous disregard for the horrific and prolonged global effects of the COVID-19 pandemic” and unwillingness to be satisfied with whatever bonuses for “Black Widow” accrue “on top of the \$20M she has received to date.” Perhaps “Black Widow” being a prequel film for a character killed off in 2019’s “Avengers: Endgame” means Disney is now less invested in maintaining an ongoing relationship with Johansson. Whatever the animating reasons are, we are witnessing an unprecedented Hollywood falling-out story in real time, and lawyers across the entertainment industry will no doubt be paying close attention to what it may portend for the industry’s next chapter. ■

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