LAW AND BUSINESS OF THE ENTERTAINMENT INDUSTRIES

Second Edition

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LAW AND BUSINESS OF THE ENTERTAINMENT INDUSTRIES

FOREWORD

The entertainment industry today generates in excess of forty billion dollars a year and is growing rapidly. The motion picture business is responsible for approximately five billion dollars, videos account for seventeen billion, records exceed seven billion and television revenues rise above eleven billion dollars. This remarkable size and growth makes it incumbent upon today's entertainment lawyer to be aware of not only the law, but also of the law as it is affected by the ever changing business world of entertainment.

As an example, the audio and visual aspects of the entertainment business are, as they have been for some time now, on a collision course. The record companies not only want the audio rights from their artists but are equally insistent on the video rights and all that the video rights encompass. The record companies began in the video area, somewhat reluctantly, by producing short form promotional videos of somewhere between three to six minutes in length. Ever so gradually, they began producing "long forms"—videos of thirty minutes to an hour or more—some as mere compilations of the short videos and others being compilations with the addition of a "wrap around" (the adding of special introductory and closing footage, voice overs, and so on). Now, more aggressively, the record companies are producing videos taken from footage of the artists' concerts and still other videos made directly for the video market with a beginning, a middle, and an end. The record companies are thus demanding the right to exclusively exploit the artists' audio-visual performance in video cassettes, video discs, motion pictures, and television. Motion picture and television companies, however, merely spilled over into the video area as a further exploitation of the visual rights that they claimed they already controlled. They, of course, demand the absolute and unencumbered right to exploit the artists' audio-visual performance.

As a result, if a new artist of the genre of Cher, Barbra Streisand, Sting, or Madonna signs with a record company early in his or her career, and that company, as a matter of course, demands a certain exclusivity in the audio-visual area, the potential legal problems for that future star who might subsequently have an equally important career in the motion picture arena can become formidable.

Contracts that were entered into since the 1920s are constantly being re-examined today for a determination of the rights of the respective parties in light of the new and ever expanding methods of exhibition of the product, a product that was essentially made for one medium but today and in the future may be exploited by methods and in media and at prices never even remotely contemplated at the time.

These, as well as a myriad of other problems make it vitally important to remember that an entertainment contract lives as long as the entertainment product itself and that change is the rule rather than the exception in the entertainment business. Consequently, thorough and insightful preparation still remains the ultimate key to successful negotiation.

An indispensable tool in that preparation is *Law and Business of the Entertainment Industries*. When I wrote the foreword to the first edition, I stated that the book would "bring the user up to date on the problems the practioner faces every day and the vital cases that affect every aspect of contract negotiations in the entertainment industry." This, of course, remains as true as ever; however, this new edition is even more thorough in those respects. In addition, this book is meant to alert the reader to the problems to be faced in the future while arming the reader with a concise and thorough knowledge of the current state of contracts and of the law.

The authors, with whom I have dealt over a period of many years, are uniquely qualified for the task at hand by reason of their broad range of experience, their dedication to the law and their precision in performing their work, whether that be in negotiation, research, or writing. They have approached this undertaking with a singular thoroughness that can only have been achieved with knowledge acquired from the distinctive historical perspective that their experience has given them.

This book is a significant and essential work that will not only teach aspiring lawyers and future practitioners the essence of the entertainment industry from a legal and business aspect, but will also continue to be a vital tool in the every day practice of the entertainment lawyer.

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The Authors

INTRODUCTION

During the four years since publication of the first edition of this book, the entertainment industries have undergone tremendous changes. These changes have occurred—and may be expected to continue to occur—in five principal areas having to do with *business*: (1) innovation, (2) consolidation, (3) internationalization, (4) inflation, and (5) censorship. All of these phenomena are interrelated.

Innovation

Since 1987 we have seen the onset of the DAT era—digital audio tape. DAT allows virtually unlimited generational duplication without loss of fidelity, a bit of technological wizardry which understandably has caused great concern in the recording and music publishing industries, which have fought bitterly against the introduction of DAT into the United States. ASCAP (American Society of Composers, Authors and Publishers), the largest U.S. performing rights society, has commenced litigation seeking to prevent the importation of consumer DAT equipment. In addition, a coalition of various record and music constituencies has succeeded in bottling up legislation introduced in Congress which would have permitted the importation of DAT equipment with an anti-duplication device.

Meanwhile, the DAT era may be over before it truly begins, due to the impending availability of digital compact cassettes (DCC) and home equipment that will play both DCCs and conventional tape cassettes as well as re-recordable compact discs (CD). The CD has already revolutionized and, after a long down period, revitalized the record industry, as millions of consumers "recycled" their record collections into this new technology. The prospect of re-recordable CDs may dissuade prospective purchasers from investing in DAT equipment (which is still, as of this writing, quite expensive and at the present time essentially limited to the professional audio market).

Two further technological developments warrant mention: high definition television (HDTV) and digital audio broadcasting (DAB). HDTV promises picture quality vastly superior to anything presently available on film or on television, but it would render existing U.S. broadcasting and receiving equipment obsolete. DAB would similarly revolutionize radio broadcasting.

And let us not forget two previous developments which are seeing something of a renaissance: Pay-per-view television (PPV) and the evolution of the home satellite TV dish from an ungainly backyard eyesore monster to a trim, rooftop item the size of a tabloid newspaper sheet. PPV had a brief, unsuccessful run in the late 1970s, then pretty much faded out. Now, however, the number of "addressable" homes (*i.e.*, those homes capable of receiving PPV transmissions and being billed for them) is rapidly approaching 50 percent of cable TV homes, and PPV may have a far bigger future than was foreseen a decade ago. The miniaturization (and reduction in cost) of the home satellite dish presents interesting possibilities for programming services whose products are now largely limited to a cable audience.

Technological innovations require software as well as distribution outlets, which, in turn, motivates knowledgeable participants in the entertainment industry to control programming and distribution. Much of what follows in this book reflects this trend.

Consolidation

The trend toward expansion through consolidation that characterized the takeover binge of the 1980s was felt throughout the entertainment industries as well. For example, three major bookstore chains (in order of size, Waldenbooks, B. Dalton/Pickwick, and Crown Books) now account for one-third of all U.S. bookstore sales, and will probably reach 50 percent in a few years. The six major record companies—Sony (formerly CBS), WEA, BMG, PolyGram, Capitol/EMI, and MCA now account for more than 90 percent of U.S. sales. Perhaps the only area in which the "majors" saw a shrinkage of their market share was in television, where the audience share of the three principal networks (CBS, NBC, ABC) shrank from 76 percent in 1983 to approximately 63 percent in 1990.

Japanese electronics heavyweight Sony purchased CBS Records for a reported $2.2 billion, then turned around and purchased Columbia Pictures for a reported $3.4 billion. It *then* acquired the Guber-Peters company for some $200 million in order to acquire the services of producers Jon Peters and Peter Guber which, in turn, provoked a lawsuit from Warner Communications, Inc., to whom Messrs. Peters and Guber were then under contract, resulting in a settlement costing Sony anywhere from $500 million to $1.5 billion more. PolyGram Records, itself a subsidiary of the Netherlands multinational manufacturing giant Philips NV, acquired both Island Records and A&M Records and has now expanded into the concert promotion field through a venture with prominent East Coast promoter John Scher, while English multinational Thorn EMI acquired independent music publishers SBK (then the second largest American music company) as well as Chrysalis Records (then a leading independent English record company).

In December 1990, Matsushita Electric Industrial Co., which is twice the size of Sony, purchased MCA, parent of Universal Pictures and MCA Records, as well as a vast—but, at press time, glitch-plagued—Florida theme park, for a reported price of $6.3 billion. And MCA Records itself recently purchased a share of Motown Records, which had been the largest Black-owned U.S. record company for many years.

Time/Life's 1990 merger with Warner Communications, Inc., created an $18 billion communications behemoth (including the Time/Life magazine group, Time/Life Books and Records, Warner Bros. Records, Elektra/Asylum Records, Atlantic Records, Warner Books, and Licensing Corporation of America, as well as HBO, Cinemax, and extensive cable television interests), the only American

enterprise of that magnitude in a world dominated by multinational communications conglomerates such as Bertelsmann (Germany), Hachette (France), Maxwell (UK), and News Group (Australia, although News Group's chairman, Rupert Murdoch, became an American citizen within the past few years).

Internationalization

As we have indicated, ownership of major entertainment enterprises has become increasingly internationalized, reflecting the economic interdependence among nations which has been observed in almost every phase of modern life. In the entertainment industries, howevever, it goes beyond internationalization of ownership.

American film, television, record, and music publishing companies now derive 50 to 60 percent of their revenues from foreign markets, and must therefore consider the tastes of consumers in other countries as much as those of U.S. consumers. One of the reasons why film producers pay seven- and eight-figure fees to stars such as Arnold Schwarzenegger, Sylvester Stallone, Tom Cruise, Meryl Streep, and Mel Gibson is their knowledge that in the right sort of film (lots of action, little dialogue), enormous box-office returns can be derived outside of the United States. Since the average cost of a U.S. studio-produced film, plus the cost of prints, promotion and advertising, is in the neighborhood of $25–30 million, an eye toward the foreign market is crucial.

Moreover, the predominance of American-made films, television, records, and music has led to a marked increase in a tide of intellectual protectionism throughout Europe and elsewhere. Recently, for example, the European Economic Community (EEC) recommended limiting the prime time exhibition of U.S.-made television shows to 50 percent of available airtime. While this does not yet have the force of law, it does reflect a tendency in Europe to establish barriers to the entry of U.S. entertainment programming. The U.S. entertainment industries nervously await 1992, when the EEC expects to become truly a single market.

This factor, plus the escalating costs alluded to above, plus the explosive growth in entertainment outlets in Europe (most notably in television, both in conventional broadcasting and in the development of satellite transmission services such as Sky Channel and B Sky B—the product of a merger between Sky Channel and British Satellite Broadcasting) has led to an increase in multinational co-productions (which often enjoy favorable tax treatment in local territories). Organizations such as WIN (World International Network) have put together multinational packages of sponsors to provide funding and/or services such as locations, crews, and post-production facilities in return for local exclusivity. In the end, however, it all boils down to economics.

Inflation

Years ago, when what some observers described as the "leisure time revolution" was getting under way, prognosticators predicted a tremendous expansion in the types of activities which would be available to fill the time made available by changes in work schedules, labor-saving devices, and education. If we would not become a nation of scholars, we would nonetheless become a nation of discerning consumers, able to select from a dizzying menu of alternatives.

While this has become true to some extent—witness the tremendous range of materials available from the typical multiple-service cable operator—it seems to have become increasingly more difficult to capture the attention of the public. This difficulty, in turn, has led to heightened expenditures for

talent known to command public attention and for the promotion and advertising of their creative efforts. For example, noted author Ken Follett (*The Eye of the Needle*, *The Key to Rebecca*, *Triple*, *The Man from Saint Petersburg*, to name a few of his novels) recently signed a $12 million contract for his next three, as-yet-unwritten novels, and James Clavell (*Shogun*, *Noble House*, *Tai Pan*) regularly receives multimillion dollar advances for his works. This trend is even more extremely pronounced in films and records.

The average Hollywood studio film costs about $25 million to produce and promote. This is because, in the era of the blockbuster, it is not unknown for three or four films to occupy about two-thirds of the available screens (as was the case in the summer of 1989, with *Batman*, *Lethal Weapon II*, *Honey, I Shrunk the Kids*, and *Indiana Jones and the Last Crusade*). It has become increasingly difficult for the smaller film, less dependent on star power and special effects, to find exposure.

By the same token, the record industry has found that its average investment in a phonograph recording by a new or as-yet-unestablished artist (including general advances to the artist, recording costs, pressing and distribution costs, and costs for advertising and promotion) can approach $500,000, and its investment in a phonograph recording by a major artist can escalate into the millions in an industry in which perhaps two of ten releases generate enough income to cover their costs. Taken together with tight radio playlists (the average "top 40" radio station plays perhaps eighteen records per hour, of which three or four are likely to be "golden oldies"), it is difficult to convince the typical record executive that it is better to invest $500,000 in a new and untried band than in an established star who may cost the company several multiples of that figure.

Censorship

While not directly a business trend, the growth in censorship, both of the official and unofficial kinds, has created additional problems for the entertainment industries and the inside and outside counsel practicing within them. There has probably never been a time when American society was totally devoid of attempts to censor the media. In recent years, organizations such as the American Family Association, Accuracy in Media, and the Reverend Jerry Falwell's Moral Majority have made their views on various material well known to the broadcast media—and to the advertisers who support these media. The Parents' Music Resource Center, led by Tipper Gore, wife of Senator Albert Gore of Tennessee, exerted considerable pressure on record companies to label records containing offensive lyrics. Record labelling bills were introduced into several state legislatures, and Louisiana actually passed such a bill, but it was then vetoed by Governor Buddy Roemer.

The rap group Two Live Crew and a Miami area record retailer were tried on criminal obscenity charges based upon the group's record "As Nasty As They Wanna Be." While the group was acquitted, the dealer was convicted. In another case, the Contemporary Arts Center of Cincinnati and its curator, Dennis Barrie, were acquitted of obscenity charges related to an exhibition of the photographs of the late Robert Mapplethorpe. Following this, in the waning moments of the 101st Congress, the attempt of Senator Jesse Helms of North Carolina (largely inspired by his reaction to the Mapplethorpe exhibition) to impose content criteria upon grants to be made by the National Endowment for the Arts was defeated.

In light of the fact that the U.S. Supreme Court has ruled that obscenity is to be judged by community standards, and that the rele-

vant community is the locality rather than the nation as a whole, the careful practitioner cannot ignore the need to consider the applicability of obscenity laws in any instance in which sexual depictions or "foul language" may be involved. The need for such awareness is probably greater than it has been for many years.

The Future

What is the significance of these trends for the practitioner of entertainment law? First of all, a practitioner representing the "artist" will be dealing with ever larger (for want of a better term) adversaries. It is interesting that although huge entertainment companies will bid high for desirable people and property, they will also demand tough contractual terms in return. While a new coterie of small to medium-size companies will inevitably arise to fill the spaces left by the "majors" in various industries (which all seem to suffer to a greater or lesser degree from gigantism as they grow, losing some of their creative edge and "street smarts" as they become more remote and bureaucratic), these small to medium companies will undoubtedly require distribution through, and perhaps financing from, the "majors." While the smaller companies may tend to bid for artists' services by offering sums in the same or similar magnitude to those offered by the majors, if recent history is any guide they will also demand the same tough contractual terms as the majors. Therefore, it will behoove the entertainment practitioner to learn the playing field in each industry, and to understand what terms can and cannot be negotiated in a given situation.

Second, the practioner will need to know something about the laws of other jurisdictions. For example, now that the United States has joined the Berne Convention, there may be opportunities under the laws of other jurisdictions for the ultimate control of creative elements not now present under U.S. law. In addition, there may be opportunities for tax savings through international co-ventures.

Third, the stakes for the entertainment practitioner will be far higher than they were five or ten years ago. A lot of potential deals will not close because the cost is too great. Whereas, in the early 1970s, it was not uncommon for a record company to sign an act in the almost sure knowledge that it would release at least three LPs before considering dropping the act, today's marketplace makes such forbearance increasingly unlikely. The entertainment practitioner will have to function in part as a critic, evaluating the artist and the material before committing the time required to see the matter through.

House counsel for the company will need to know all of this plus something about the copyright, trademark, antitrust, and tax laws of the United States as well as foreign countries, the European Economic Community, and other regional groupings. The future is exciting—but a bit alarming.

An Overview of the Book

As we stated in the introduction to the first edition, change is the theme of this book. For changes occur all the time in the various industries. All too often, a practitioner who deals exclusively in one industry will be unaware of cases in other industries which may affect what he or she is doing. For example, several cases in this book deal with the question of whether subsequent changes to the work of a creator constitute "mutilation," actionable under Section 43a of the Lanham Trademark Act (see Secs. 4.30, 8.30).

The role of law in the entertainment industries is often one of anticipation. A contract today should cover events well into the future. Antitrust decisions should deal with

current disputes by providing reasonable business guidelines for the future. Copyright revisions by Congress should address current and future states of the arts. Labor relations, communications laws, corporate and tax regulations, and concepts of privacy, publicity, unfair competition, and libel should be similarly directed. The issues of choice of law and forum can have a significant impact upon the outcome of future events.

No one pretends that anticipation in these areas has been perfect. In fact, the analysis of law as applied to the entertainment industries is often one of assessing how incompletely and inadequately its practitioners have anticipated subsequent developments. From that vantage point, the entertainment lawyer must assay the damage and construct a method of dealing with the inadequacies to obtain the best result in an imperfect system.

For example, the generation of film directors working in the 1940s and 1950s struggled with the issue of whether—and if so, the extent to which—their films could be cut for television. George Stevens (*The Diary of Anne Frank, Shane*) fought epic (and essentially unsuccessful) battles in this area. During the past few years, Warren Beatty won an arbitration award that prevented Paramount Pictures from permitting ABC Television to cut *Reds* (a decision which also caused Paramount to lose a fee of $6 million). At the time of the publication of the first edition of this book, colorization was a hot issue. Woody Allen was prominent among a large number of directors who testified at Congressional hearings and lobbied for legislation to prohibit colorization—legislation that failed to pass. The heirs of John Huston fought to prevent the showing of a colorized version of *The Asphalt Jungle* in France, which recognizes *droit morale*–the moral right of an author in civil law countries to prevent the distortion of his work—and won at the trial level, only to lose in the intermediate appeal court (the matter now being pending in the high court as of this writing). When the United States adhered to the Berne Convention, further attempts were made to enact moral rights legislation, which was refused on the grounds that existing antimutilation laws were sufficient protection.

These issues illustrate the dynamic nature of the entertainment industries. Change, or at least the appearance of change, is vital. Consumer interests have limited lifespans. The same old fare offered again and again inevitably suffers declining audiences. The dilemma is that basic entertainment does not change that much. Drama, comedy, sports and games, music, art, and (arguably) news and current events are the basics, probably now and forever. How these are packaged and delivered are the real subjects of change. Thomas A. Edison scoffed at the notion that moving pictures might one day be broadcast over the airwaves; now we have the Astra satellite covering northern Europe with sixteen transponders, each of which can carry audio in four different languages. Back in the 1940s, a record "album" consisted of perhaps four to six 12-inch 78 rpm records, each in its own sleeve, in a thick binder; that same package now consists of a single disc the size of one of the labels in an old album. A record collection which once occupied a five foot shelf in a bookcase now fits in not much more than a shoebox.

Minds struggle to discover new methods of repackaging our entertainment to make it appear novel and unique, although the content remains pretty much the same as it was. This need for change plunges the entertainment industries into high-risk ventures. The potentials for huge payoffs are accompanied by the possibilities of economic disasters. While profits from *Batman* and its accompanying merchandising program exceeded $500 million worldwide, movies such as *Ishtar* (starring Warren Beatty and Dustin Hoff-

man) and *Heaven's Gate* (directed by Academy Award winner Michael Cimino) suffered losses of more than $40 million dollars each. Michael Jackson's "Thriller" album sold some 40 million copies and almost singlehandedly revived lagging sales throughout the record industry. But his followup album, "Bad" (which would have been a "career" album for any other artist), sold only a fraction of the numbers racked up by "Thriller" and therefore threw off far less profit than anticipated by CBS Records, which, like all other record companies, uses the profits from its hits to soften the economic impact of its losers. Most companies suffer losses on about eight out of every ten albums.)

This book attempts to pinpoint the principal areas of controversy in each of the major entertainment industries. A description of what has caused problems in the past will surely warn of what to avoid in the future. As was the case in the first edition, we do not attempt to present a seemingly coherent theory of so-called entertainment law, since we doubt such a concept really exists. Instead, we view transactions in the entertainment industries and invite inspection as to what went right and what went wrong, from both a legal and a business perspective. We hope thereby to encourage speculation on what should (and could) have been done to avoid the debacles that ensued.

The transactions discussed must be placed in an overall context of certain realities that face most, if not all, entertainment industries. First, escalating production costs often outstrip earning potential for all but a handful of fortunates who somehow climb to the top of the heap and exclaim, "Look at me!" Second, in the glamorous and alluring world of entertainment, new forms of delivering entertainment are conceived all the time, and competition for the consumer dollar is fierce and growing. Third, actual opportunities to break into some fields of entertainment are shrinking, due to the consolidation of which we spoke above. As competition intensifies, the weak drop out or are absorbed. Retrenchment occurs. Caution grows. Opportunities shrivel. These realities demand examination in the context of the individual industries. However, such an examination needs to be placed in the context of the realities as to the players and to be illuminated by some general principles which do seem to cut across the boundaries of the various industries—although each industry has its own idiosyncrasies.

We begin, in Chapter 1, by examining the roles of agents, managers, attorneys, and promoters, who figure so very significantly in all areas of the business. Chapter 2 considers rights of privacy and publicity, which are a significant element of value to all types of talent. Chapter 3 is an overall examination of contract dealings and principles in various entertainment contexts.

We then turn to individual industries: Chapter 4 discusses literary publishing, its business background and legal and business developments. Many of these themes are repeated and new issues raised in music publishing (Chapter 5), recording (Chapter 6), motion pictures (Chapter 7), television (Chapter 8), and live theatre (Chapter 9).

We believe this organization makes the most practical and, ultimately, logical sense. It forces the analysis of problems in a factual context. We avoid painting the "big picture" because that picture, we think, would be somewhat vacuous and definitely misleading. However, that is not to say there should be an absence of looking at similar problems across industries. Comparative study of these contractual provisions, or the lack thereof, in different industrial settings is not only helpful, but essential. This should be done, however, only after these provisions are first examined in the context of the precise business situations in which they first arose.

Entertainment is no longer centered only in New York and Los Angeles, with a satellite hub in Nashville. Other localities and business interests have entered the industries vigorously and effectively. For example, in film production, although over 60 percent of all U.S. films are made in California, "runaway" productions, according to one estimate, have cost California residents and businesses some $1.5 billion in revenues per year. Studios abound in New York, Texas, North and South Carolina. Other states have established agencies to attract film and television production. There are now approximately 70 state and local film commissions and bureaus aggressively seeking a share of the action. The recording industry faces similar competition. Recording activity has expanded beyond the traditional centers of Los Angeles, New York, Nashville, and San Francisco to such places as Minneapolis (where Prince emerged) and Muscle Shoals, Alabama.

The business opportunities and the economic risks associated with the entertainment industries make this topic a fascinating one to examine. When placed in a legal-business context, each transaction assumes a life of its own. The average adult, according to U.S. government data, spends 64.5 hours per week, or 9.2 hours per day, as leisure time. The breakdown is 29 hours per week watching television, 23 listening to radio, 3.8 reading newspapers, 3.7 listening to records and tapes (and now compact discs), 2.3 reading magazines, 1.2 reading books, and only miniscule amounts watching live spectator sports, movies, and other entertainment. Maintaining or increasing their share of the entertainment pie is what the industries examined in Chapters 4 through 9 are seeking.

NOTES

While additional readings and resources are referred to throughout this book, there are a number of works of general, overriding interest (each of which is supplemented on a regular basis), with which every entertainment law practitioner should be familiar, including:

1. The two leading U.S. copyright treatises, *Goldstein on Copyright* (Boston: Little, Brown & Co., 1989) and *Nimmer on Copyright* (New York: Matthew Bender & Co. Inc., 1963).

2. The two leading series of annotated forms, Farber, ed., *Entertainment Industry Contracts* (New York: Matthew Bender & Co., 1986) and *Lindey on Entertainment, Publishing and the Arts, 2d ed.* (New York: Clark, Boardman & Co., Ltd., 1980).

3. A broad-spectrum treatise on the subject, Selz & Simensky, *Entertainment Law* (Colorado Springs: Shepard's/McGraw-Hill, Inc., 1983).

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