

Entertainment Law and Practice

SECOND EDITION

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*For my family
Avery, Alec Sasha (z"l), Noah,
and Stacy Blumberg Garon.*

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Preface to the Second Edition

Although I have endeavored to update the first edition of *Entertainment Law and Practice* every other year with a supplement, technological change and court decisions required that I publish a new edition of the casebook itself. In industries such as publishing, the central debates challenging the industry a decade ago have been entirely replaced as new economic realities reshape the relationships within the industry. The casebook also has a great many more Supreme Court decisions than the prior edition because the concerns of the entertainment industries have become profound enough to warrant the time of the Court.

From a substantive law perspective, copyright has undergone the greatest transformation in the past decade. Once a primarily commercial body of law involving disputes between creators and distributors of content, or on rare occasion a dispute between copyright industries and commercial industries which utilized copyrighted works, most of the new cases reproduced in the second edition focus on consumers and the public rather than commercial defendants. This change in the role of the law may explain a good deal about how the entertainment industries have been transformed in the past decade.

The transformation is well underway, but still has miles to go. As these changes affect the lives of more and more individuals, the concerns covered in the casebook will increasingly become the focus of public debate. I hope the second edition provides a helpful tool to facilitate that debate in a thoughtful, well-informed manner. Entertainment has always been fun. Today it is more important than ever.

All questions, comments, and inquiries should be directed to me, Jon M. Garon, Dean and Professor of Law, Nova Southeastern University Shepard Broad Law Center, at phone number 954-262-6101 or garon@nova.edu.

Jon M. Garon, editor
Ft. Lauderdale, FL

Preface to the First Edition

In choosing to write, publish, adopt, or study a casebook, the threshold question to be answered is Why this book? The editorial structure of this casebook is an extension of my work attempting to demonstrate that entertainment law is more than a series of generally applicable laws that can be applied to the fun and exciting world of entertainers. Entertainment law has evolved into a discrete body of law whereby other legal doctrines take on unique interpretations. (See Jon M. Garon, *Entertainment Law*, 76 *TULANE L. REV.* 559 (2002).) Broad areas of law such as copyright, privacy, and free speech have been transformed by or translated through the entertainment industries. This casebook reflects more of the unified or thematic approach to entertainment law than others previously published.

The unified approach to entertainment, however, does not tell the complete story. There are other areas of entertainment practice that are governed by laws specifically written to regulate these industries. There are also historical practices—some centuries old—that dictate the relationships between parties and the structure of the industry. In many situations, these practices bear no relation to entertainment as a whole, but instead focus on practices highly concentrated on one particular industry, such as professional theatre, music publishing, or commercial film. As a result, the practice of entertainment is an equally important aspect of study for any serious student of entertainment law.

The law and practice sections of the book reflect the broad dichotomy between those areas where entertainment has reshaped general law and those areas where the entertainment practice is specific to a particular industry or industries. Admittedly, this dichotomy may sometimes be subtle or artificial. The organization is my preferred structure, but each subchapter stands as a complete module, so that each instructor may design the course to fit his or her pedagogy and objectives.

The thematic structure of the casebook may help to explain why the topics covered are sometimes quite different than other books on the topic. One example may help illustrate the approach. Every entertainment law casebook has some discussion of trademark principles and how these concepts apply to film titles and professional credits. This book also includes a specific review of trademark analysis and partnership law as it applies to the ownership of a band's name. Although this topic is central to practitioners' texts and arguably the most valuable asset owned by a musical performer, the unique intersection of trademark, publicity, free speech and partnership law has not previously been addressed in any of the commercially available casebooks.

Useful teaching materials are more likely to come from those developed in the classroom than those created in isolation, and I have been very fortunate to have built this casebook over time as my students worked through the materials selected and provided me with feedback and insight. When teaching Entertainment Law or either of my break-out courses, Law of Motion Pictures and the Performing Arts and Music Management &

Licensing, my teaching objectives are to develop the students' problem-solving skills using issues related to the entertainment industry and business planning; to familiarize students with the intellectual property rights and contractual relationships between the media producers, distributors and authors in these industries and to introduce the deal-making aspects of practice in the entertainment industry; and to track the legal and business structure of the entertainment industries.

The included notes, questions, and problems help focus the reading on the problem solving skills of the students. To this end, some materials are included to illustrate tensions in the law and limitations imposed by legal rules, collective bargaining restrictions, or practical consequences. Other materials simply illustrate industry practice. In addition, the range of cases promotes traditional critical reading and reasoning skills.

Depending on the course hours available, many professors may elect to assign less than the entire text. Part I can be considered sufficient to teach an entire survey course. Alternatively, selected sections of Part II can be integrated with Part I to focus on music, film, television, or theatre, depending on the interests of the course and the instructor.

The entertainment industries rely heavily on copyright, trademark, First Amendment, antitrust, labor law, and telecommunications law. The casebook provides introductions to explain the relevant principles in the context of entertainment law. Questions, hypotheticals, notes, statutes, and historical materials provide a robust context in which to explore the entertainment industries and develop a sophisticated understanding of these critically important and highly complex materials.

Each subchapter provides sufficient context that it can be read without regard to the chapter as a whole. Helpful historical cases and materials are typically left to the notes so that the student can identify the current law or practice instead of tracking the growth of a doctrine or custom through voluminous reading.

Each chapter has a bibliography focused on the general themes of the chapter. Most sections have notes and questions that help focus and refine the topics under consideration. In addition, most sections have a problem—always focused on Bryce, the client who comes to students for advice throughout the book. As Bryce's career moves through the various entertainment fields and chapters of the book, Bryce's concerns become more sophisticated, creating an opportunity to integrate the topics being explored. These problems move beyond the materials of the section, often highlighting the intersection of various themes in the book and serving as potential research topics or areas for further study.

To make the student assignments manageable in length, it is necessary to heavily shorten most of the materials. Deletions of textual material are generally noted with ellipses (...), except for footnotes and citations, which are not noted. In addition, some central footnotes have been moved directly into the text where the note would otherwise have been placed. The remaining footnotes are renumbered. Insertions and any editorial changes are placed in brackets ([]). Where necessary, paragraph breaks have also been added or deleted without notation.

Finally, I have endeavored to edit the cases in a manner that allows the students to see the interrelation between multiple causes of action. Many cases involve a copyright, trademark, unfair competition, and publicity rights cause of action for the same alleged misconduct. The First Amendment is sometimes invoked as a defense to all of these. As a result, fewer but longer cases may better inform students regarding the relationship between the doctrinal legal boxes taught elsewhere. I have attempted to keep the book capable of longer or shorter reading assignments to provide flexibility for instructors who seek to emphasize some topics, but not others.

Like any casebook, particularly one where the area of law and practice is in such a state of transformation, the book is constantly evolving. I appreciate all feedback and suggestions.

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I must also acknowledge the reliance I have made on the casebooks I have used throughout my teaching as models and guides for this book. Robert Gorman and Jane Ginsburg, *Copyright Cases and Materials*, and Eugene Volokh, *The First Amendment—Law, Cases, Problems, and Policy Arguments*, both served as models for me in determining what should be included and omitted from this book.

From the first edition, I would like to recognize the assistance provided by Ed Kroening, my old friend and editor at that time; by Carol Swanson, my Associate Dean for Academic Affairs at Hamline; and to Hamline Law Students Shelley Ryan, Corinna Venters, Amanda Leonhardt, Kristin Luckenbill, Chris Vilorio, and Chris Rogers, for their assistance with editing, proofing, and adjusting the text. Of course, all responsibility for the content is solely my own.

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Jon Garon is the dean of Nova Southeastern University Shepard Broad Law Center, serving as chief academic officer for the law school, providing strategic leadership on programming, curriculum, enrollment management, marketing, and finance. He is a nationally recognized authority on technology law and intellectual property, particularly copyright law, entertainment and information privacy. A Minnesota native, he received his bachelor's degree from the University of Minnesota in 1985 and his juris doctor degree from Columbia University School of Law in 1988.

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Among his publications on intellectual property, Dean Garon has written the following books, book chapters and law review articles:

Books

Author, *ENTERTAINMENT LAW & PRACTICE* (Carolina Academic Press Second Edition 2014).

Author, *THE INDEPENDENT FILMMAKER'S LAW & BUSINESS GUIDE — FINANCING, SHOOTING, AND DISTRIBUTING INDEPENDENT AND DIGITAL FILMS* (Second Edition, A Capella Books/Chicago Review Press, June 2009) (First Edition 2002).

Author, *OWN IT — THE LAW & BUSINESS GUIDE TO LAUNCHING A NEW BUSINESS THROUGH INNOVATION, EXCLUSIVITY AND RELEVANCE* (Carolina Academic Press, September 2007).

Book Chapters

Author, *Copyright at the Crossroads of Commerce, Culture and Creativity*, in *ESTUDOS AVANÇADOS EM DIREITO DE AUTOR (COPYRIGHT ADVANCED STUDIES)* (Leonardo Machado Pontes, ed., Elsevier 2014).

Author, *The Band — Artistic, legal and financial structures which shape modern music*, in *MUSIC AND LAW* (Mathieu Deflem ed., Emerald Group Publishing 2013).

Author, *Legal Issues for Database Protection in the US and Abroad*, in *BIOINFORMATICS LAW: LEGAL ISSUES FOR COMPUTATIONAL BIOLOGY IN THE POST-GENOME ERA* (Jorge Contreras ed., American Bar Association 2013).

Author, *Copyright, Trademark, Trade Secret and Publicity Rights Concerns*, in *EMERGING LEGAL ISSUES IN RFID AND OTHER CONTACTLESS DATA EXCHANGE SYSTEMS: WHAT LAWYERS SHOULD KNOW* (Sarah Jane Hughes ed., American Bar Association 2012).

Author, *Localism as a Production Imperative: An Alternative Framework for Promoting, Intangible Cultural Heritage*, in *TRANSNATIONAL CULTURE IN THE INTERNET AGE* (Sean A. Pager & Adam Candeub eds., Elgar Publishing 2012).

Author, *Google, Fairness and the Battle of the Books*, in *THE 2010 IP BOOK* (Midwest Intellectual Property Institute 2010).

Contributor, *ANNUAL REVIEW OF INTELLECTUAL PROPERTY LAW DEVELOPMENTS 2006–2008* (George Jordan ed., ABA Section of Intellectual Property Law 2009).

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