

Entertainment Law and Practice

Entertainment Law and Practice

THIRD EDITION

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CAROLINA ACADEMIC PRESS
Durham, North Carolina

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ISBN 978-1-5310-1843-6
eISBN 978-1-5310-1844-3
LCCN 2020930523

Carolina Academic Press
700 Kent Street
Durham, North Carolina 27701
Telephone (919) 489-7486
Fax (919) 493-5668
www.cap-press.com

Printed in the United States of America

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

Summary of Contents

Part I · Legal Issues in the Entertainment Industries

Chapter 1 · The Nature of Entertainment Law	3
Chapter 2 · Copyright for Entertainment Law	45
Chapter 3 · Ethical and Equitable Issues: Agents, Lawyers, and Treatment of Minors, Women, and Minorities	97
Chapter 4 · First Amendment Aspects of the Entertainment Industry	151
Chapter 5 · Attention to Non-Literary Rights	215
Chapter 6 · Trademarks	267
Chapter 7 · Rights of Publicity and Identity	323
Chapter 8 · Contracts: Credit and Control	381

Part II · Industry Practice in Entertainment

Chapter 9 · Professional Live Theatre	437
Chapter 10 · Music Publishing	479
Chapter 11 · Music Distribution and the Sound Recording Industry	543
Chapter 12 · Film Production Rights, Financing and Distribution	603
Chapter 13 · Television and Cable Production Agreements	659
Chapter 14 · Television and Cable Regulation	727
Chapter 15 · Video Games, eSports, and Social Media	803
Chapter 16 · Digital Distribution, Piracy, and Technology	877
Chapter 17 · Publishing	949
Chapter 18 · Visual Arts and Cultural Artifacts	1035
Index	1113

Contents

Table of Principal Cases	xxiii
Preface to the Third Edition	xxvii
Preface to the Second Edition	xxix
Preface to the First Edition	xxxi
Acknowledgments	xxxv
About the Author	xxxvii

Part I • Legal Issues in the Entertainment Industries

Chapter 1 • The Nature of Entertainment Law	3
A. Overview	3
1. First Amendment History	3
<i>Kalem Company v. Harper Brothers</i>	4
<i>Joseph Burstyn, Inc. v. Wilson</i>	5
<i>Zacchini v. Scripps-Howard Broadcasting Co.</i>	9
<i>Brown v. Entertainment Merchants Ass’n</i>	13
Notes and Questions	14
Problem 1-A	16
2. Sources of Regulation and Management	16
B. Transactions in Ideas	18
1. Overview	18
2. Source of Ideas	19
<i>Blaustein v. Burton</i>	20
<i>Faris v. Enberg</i>	25
<i>Baer v. Chase</i>	27
Notes and Questions	30
Problem 1-B	31
C. Written Submission Agreements	31
<i>Nadel v. Play-By-Play Toys</i>	31
<i>FASA Corp. v. Playmates Toys Inc.</i>	38
Notes and Questions	40
Problem 1-C	42
D. Bibliography and Links	43
Treatises to Be Used throughout the Course	43
Law Review Articles for Chapter I	43
Websites	44

Chapter 2 · Copyright for Entertainment Law	45
A. Overview	45
Copyright Protection	45
Notes and Questions	55
Problem 2-A	57
B. Comparison between Works—Ideas & Abstractions	58
<i>Nichols v. Universal Pictures Co.</i>	58
<i>Sheldon v. Metro-Goldwyn Pictures Corp.</i>	62
<i>Twentieth Century-Fox Film Corp. v. MCA, Inc.</i>	64
<i>Gaiman v. McFarlane</i>	66
Notes and Questions	70
Problem 2-B	72
C. Other Uses of Copyrighted Works	73
<i>Ringgold v. Black Entertainment Television, Inc.</i>	73
<i>Leigh v. Warner Bros., Inc.</i>	82
Notes and Questions	85
Problem 2-C	88
D. Scope of Contractually Acquired Rights	88
<i>Welles v. Turner Entm't Co.</i>	88
Notes and Questions	92
Problem 2-D	95
E. Bibliography and Links	96
Chapter 3 · Ethical and Equitable Issues: Agents, Lawyers, and Treatment of Minors, Women, and Minorities	97
A. Agent Regulation	97
Statutory Regulations	97
<i>Yoo v. Robi</i>	97
<i>Marathon Entertainment, Inc. v. Blasi</i>	100
Notes and Questions	107
Problem 3-A	108
B. Regulation of Attorneys	108
<i>Blanks v. Seyfarth Shaw L.L.P.</i>	108
<i>Todd W. Musburger, Ltd. v. Meier</i>	113
<i>Solis v. Blancarte</i>	117
Notes and Questions	121
Problem 3-B	121
C. Enforcement of Contracts for Minors	121
Expansion of Coogan Laws	121
<i>Scott Eden Management v. Kavovit</i>	124
<i>Berg v. Traylor</i>	128
Notes and Questions	133
Problem 3-C	134
D. Racial and Gender Disparity Issues	134

1. Introduction	134
2. Riders	140
3. Representation	142
<i>Wil-Helm Agency v. Lynn</i>	142
Notes and Questions	147
Problem 3-D	148
E. Bibliography and Links	148
Chapter 4 · First Amendment Aspects of the Entertainment Industry	151
A. First Amendment Recognition of the Entertainment Industries	151
<i>Mutual Film Corp. v. Ohio Industrial Comm.</i>	151
<i>Joseph Burstyn, Inc. v. Wilson</i>	154
<i>Interstate Circuit v. City of Dallas</i>	154
<i>Southeastern Promotions, Ltd. v. Conrad</i>	160
<i>Ward v. Rock Against Racism</i>	166
<i>United States v. Stevens</i>	173
<i>Brown v. Entertainment Merchants Association</i>	179
Notes and Questions	179
Problem 4-A	181
B. Claims for Injuries Caused by Media Content	182
<i>James v. Meow Media, Inc.</i>	182
<i>Waller v. Osbourne</i>	190
<i>Winter v. G.P. Putnam's Sons</i>	194
<i>Anthony v. Buena Vista Home Entertainment Inc.</i>	197
Notes and Questions	203
Problem 4-B	203
C. Limits on First Amendment Deference	204
<i>National Endowment for the Arts v. Finley</i>	204
Notes and Questions	210
Problem 4-C	212
D. Bibliography and Links	212
Chapter 5 · Attention to Non-Literary Rights	215
A. Defamation	215
1. Introduction	215
2. Expansion of the <i>N.Y. Times</i> Standard	218
<i>Excerpt from Gertz v. Robert Welch, Inc.</i>	218
<i>Huckabee v. Time Warner Entertainment Co., L.P.</i>	219
<i>Virginia Citizens Defense League v. Couric</i>	227
<i>Davis v. Costa-Gavras</i>	230
<i>Pippen v. NBCUniversal Media L.L.C.</i>	236
Notes and Questions	239
Problem 5-A	241
B. Parody and Satire	242
<i>Hustler Magazine v. Falwell</i>	242

<i>Farah v. Esquire Magazine</i>	243
Notes and Questions	248
Problem 5-B	249
C. Privacy	249
<i>Time, Inc. v. Hill</i>	249
<i>Polydoros v. Twentieth Century Fox Film Corp.</i>	255
Notes and Questions	258
Problem 5-C	261
D. Communications Decency Act Changes to Common Law	
Privacy and Defamation	261
Notes and Questions	264
Problem 5-D	265
E. Bibliography and Links	266
Websites	266
Chapter 6 · Trademarks	267
A. Overview	267
1. Subject Matter of Trademark Law	267
2. Sources of Legal Protection from Both State and Federal Law	268
3. Benefits of Federal Trademark Registration	269
4. A Trademark Must Be Distinctive	269
5. Secondary Meaning and Acquired Distinctiveness	270
6. A Trademark Owner Must Be First in Priority	271
7. Junior Users and Other Limitations	272
8. Use of Surnames	273
9. Unfair Competition as a Broader Alternative	274
10. Service Marks, Collective Marks, and Certification Marks	274
B. Dilution and Disparagement	275
1. Dilution	276
2. Disparagement or Tarnishment	277
C. Acquiring, Licensing, and Maintaining Trademarks	278
1. Use in Commerce	278
2. Intent to Use	279
3. Elements of an Application—Specimens and Drawings	279
4. Acquisition through Purchase or Licensing	280
5. Benefits of Co-Branding and Licensing	281
6. Maintaining Trademarks	282
D. Enforcement of Trademark Rights	282
1. Enforcing Trademark Rights before Litigation	282
2. Elements of the Trademark Infringement Claim	283
3. Likelihood of Confusion	284
4. Nominative Fair Use and Collateral Use	286
5. Other Defenses to Trademark Infringement	287
E. Intersection with Copyright	287

<i>Dastar Corp. v. Twentieth Century Fox Film Corp.</i>	287
Notes and Questions	294
Problem 6-E	295
E. Constitutionality	295
<i>Matal v. Tam</i>	295
<i>Iancu v. Brunetti</i>	302
Notes and Questions	308
Problem 6-F	309
G. Exploitation of Fictional Marks	309
<i>Viacom Int’l, Inc. v. IJR Capital Invs., L.L.C.</i>	309
Notes and Questions	320
Problem 6-G	321
H. Bibliography	321
Chapter 7 • Rights of Publicity and Identity	323
A. Introduction	323
1. Subject Matter of Publicity Rights	323
2. Unfair Competition under the Lanham Act for Rights of Publicity	324
3. Matters Not Protected by Publicity Rights	325
4. Relationship between Publicity and Copyright	325
5. Other Limitations on Publicity Rights—First Amendment and Quasi Fair Use	326
6. Relation of Protection for State-Law Right	327
7. Term of Publicity Rights	327
8. Taxonomy of Publicity Rights Usage	328
B. Publicity	328
<i>Zacchini v. Scripps-Howard Broadcasting Co.</i>	328
[New York] Civil Rights Law	328
California Civil Code	329
<i>Downing v. Abercrombie & Fitch</i>	331
Notes and Questions	338
Problem 7-B	343
C. Sound Alikes	343
<i>Midler v. Ford Motor Co.</i>	343
<i>Waits v. Frito-Lay, Inc.</i>	346
Notes and Questions	351
Problem 7-C	352
D. Tension between Publicity and Free Speech	353
<i>Comedy III Prods., Inc. v. Gary Saderup, Inc.</i>	353
<i>Winter v. DC Comics</i>	361
<i>Parks v. Laface Records</i>	364
<i>Tyne v. Time Warner Entm’t Co. L.P.</i>	371
Notes and Questions	375

Problem 7-D	378
E. Bibliography	379
Chapter 8 · Contracts: Credit and Control	381
A. The Negotiated Areas for Talent Contracts—Credit, Compensation, & Control	381
1. Credit	382
2. Compensation	382
3. Control	383
Sample Associate Producer Agreement	384
<i>Lee v. Marvel Enterprises, Inc.</i>	389
Notes and Questions	393
Problem 8-A	394
B. Performer's Rights to Credit	394
<i>Williams v. UMG Recordings, Inc.</i>	394
Notes and Questions	399
Problem 8-B	400
C. Loss of Credit Despite Express Contract	400
<i>Fleet v. CBS, Inc.</i>	400
<i>Tamarind Lithography Workshop, Inc. v. Sanders</i>	406
Notes and Questions	410
Problem 8-C	411
D. Limiting Credit Exploitation	411
<i>King v. Innovation Books</i>	411
Notes and Questions	415
Problem 8-D	415
E. Post-Partnership Ownership: Band Names	416
<i>Commodores Entertainment Corp. v. McClary</i>	416
<i>Brother Records, Inc. v. Jardine</i>	422
<i>Kassbaum v. Steppenwolf Productions, Inc.</i>	426
Notes and Questions	431
Problem 8-E	433
F. Bibliography and Links	434
Websites	434

Part II · Industry Practice in Entertainment

Chapter 9 · Professional Live Theatre	437
A. Overview	437
1. Broadway Theatre	437
2. Touring Companies	438
3. Nonprofit Professional Theatre	438
4. The Participants	439
Problem 9-A	440
B. Employment in the Theatre	440

<i>This Is Me v. Taylor</i>	440
<i>H.A. Artists & Associates, Inc. v. Actors' Equity Ass'n</i>	446
<i>Makarova v. United States</i>	452
<i>Gennaro v. Rosenfield</i>	455
Notes and Questions	461
Problem 9-B	463
C. Playwrights	464
1. The Approved Production Contract	464
<i>Childress v. Taylor</i>	464
<i>Thomson v. Larson</i>	469
Notes and Questions	473
Problem 9-C	476
D. Bibliography and Links	477
Websites	478
Chapter 10 · Music Publishing	479
A. Overview of the Music Industries	479
1. The Industry at a Glance	479
2. Limited Rights of the Composer	480
3. Ownership of a Record	481
4. Monetization of a Song	483
5. Exclusive Writing Agreements	484
6. Relations between Publishers and Record Companies	485
B. Publisher Agreements	485
<i>Folkways Music Publishers, Inc. v. Weiss</i>	485
<i>In re Isbell Records, Inc.</i>	488
Notes and Questions	490
Problem 10-B	495
C. Performing Rights Societies & Copyright Enforcement	495
Introduction	495
<i>Broadcast Music, Inc. v. Weigel Broadcasting Co.</i>	496
<i>MOB Music Pub. v. Zanzibar on the Waterfront, L.L.C.</i>	501
Notes and Questions	506
Problem 10-C	512
D. Antitrust Regulation of the Performing Rights Societies	513
<i>United States v. ASCAP</i>	513
Notes and Questions	525
Problem 10-D	529
E. Grand Performing Rights v. Small Performing Rights	529
Introduction	529
<i>Frank Music Corp. v. Metro-Goldwyn-Mayer, Inc.</i>	530
<i>Robert Stigwood Group, Ltd. v. Sperber</i>	533
Notes and Questions	537
Problem 10-E	539

F. Bibliography and Links	540
Websites	541
Chapter 11 · Music Distribution and the Sound Recording Industry	543
A. Finances in the Recording Industry	543
1. Mechanical Rights Licensing under the 2018 Orrin G. Hatch-Bob Goodlatte Music Modernization Act and the Mechanical Licensing Collective	543
2. Performance Rights Organizations for the Sound Recording Industry	544
3. Production Agreements: General Structures	545
a. Producer Agreement	545
b. Pressing and Distribution Agreement	546
c. Master Purchase Agreement	546
d. Recording Artist Agreement	546
4. Recording Artist Contracts: Budgets and Income to the Recording Artist	547
5. Deal Structures and the Rise of the 360 Deal	548
Notes and Questions	550
Problem 11-A	551
B. Producers and Copyright Ownership	552
<i>Systems XIX, Inc. v. Parker</i>	552
<i>Forward v. Thorogood</i>	557
Notes and Questions	559
Problem 11-B	560
C. Scope of Prior Licenses	561
<i>Thomas v. Gusto Records, Inc.</i>	561
<i>Greenfield v. Philles Records</i>	562
<i>Malmsteen v. Universal Music Group, Inc.</i>	566
<i>F.B.T. Productions, L.L.C. v. Aftermath Records</i>	570
<i>F.B.T. Productions, L.L.C. v. Aftermath Records</i>	575
Notes and Questions	577
Problem 11-C	578
D. Promotion and Exploitation of the Recording Artist	578
<i>Contemporary Mission, Inc. v. Famous Music Corp.</i>	578
Notes and Questions	582
Problem 11-D	583
E. Term, Renewals, and Extensions of Recording Contracts	583
<i>MCA Records, Inc. v. Newton-John</i>	583
Notes and Questions	586
Problem 11-E	590
F. Accountability under Recording Contracts	590
<i>Peterson v. Highland Music, Inc.</i>	590
<i>Cabot v. Jamie Record Co.</i>	592

Notes and Questions	597
Problem 11-F	600
G. Bibliography and Links	600
Websites	601
Chapter 12 · Film Production Rights, Financing and Distribution	603
A. Overview	603
1. Production at a Glance	604
a. The Studio Production	604
b. The Location Production	605
c. The Various Media	605
i. Feature Motion Pictures	606
ii. Industrial Films	606
iii. Television Production	607
iv. Commercials	607
2. The Film Industry: Key Participants	607
3. The Antitrust Experience in Hollywood	611
Notes and Questions	612
B. Production Agreements and Budgets	613
1. Film Finance and Control	613
2. Final Cut	614
3. Motion Picture Budgets	614
<i>Filmline (Cross-Country) Productions, Inc. v. United Artists Corp.</i>	615
<i>Buchwald v. Paramount Pictures, Corp.</i>	621
Notes and Questions	626
Problem 12-B	628
C. Derivative Interests and Bundling of Motion Picture Interests	629
<i>Russell v. Price</i>	629
<i>Stewart v. Abend</i>	632
Notes and Questions	638
Problem 12-C	639
D. Character Licensing	639
<i>New Line Cinema Corp. v. Easter Unlimited, Inc.</i>	639
<i>Conan Properties International L.L.C. v. Sanchez</i>	642
Notes and Questions	647
Problem 12-D	648
E. Ratings	649
<i>Maljack Prods. v. Motion Picture Ass'n of America</i>	649
Notes and Questions	652
Problem 12-E	655
F. Bibliography and Links	656
Websites	656
Chapter 13 · Television and Cable Production Agreements	659
A. Structure of the Television and Cable Market	659

1. Introduction	659
2. Television Networks, Stations, and Studios	662
The Walt Disney Company Form 10-K Description of Business Operations	663
CBS Corporation Form 10-K Description of Business Operations	666
Comcast Corporation Form 10-K Description of Business Operations	668
Twenty-First Century Fox, Inc., Form 10-K Description of Business Operations	670
3. Production	672
Notes and Questions	674
Problem 13-A	676
B. Television Writer Agreements	676
Writers Guild of America West Residuals for High-Budget Subscription Video on Demand (HBSVOD) Programs	676
Writers Guild of America Standard Writing Services Contract	677
<i>Sandy Veith & Vuelta International, Inc. v. MCA Inc.</i>	678
<i>Jacobs v. CBS Broadcasting, Inc.</i>	689
Notes and Questions	693
Problem 13-B	694
C. TV Substantial Similarity	695
<i>Willis v. HBO</i>	695
<i>Warner Bros., Inc. v. ABC</i>	696
<i>Robinson v. Viacom Int'l</i>	703
Notes and Questions	707
Problem 13-C	709
D. Editing for Television	709
<i>Preminger v. Columbia Pictures Corp.</i>	709
<i>Gilliam v. ABC</i>	714
<i>Tristar Pictures v. Director's Guild of America</i>	720
Notes and Questions	723
Problem 13-D	724
E. Bibliography and Links	725
Websites	726
Chapter 14 · Television and Cable Regulation	727
A. Overview	728
Communications Marketplace Report, Excerpts	728
FCC, The Public and Broadcasting	735
FCC, Cable Television	745
Notes and Questions	756
B. Content Regulation	758
<i>Red Lion Broadcasting Co. v. FCC</i>	758

<i>FCC v. Pacifica Foundation</i>	764
<i>Reno v. American Civil Liberties Union</i>	768
Notes and Questions	773
C. Cable Systems	776
<i>Turner Broad. System v. Federal Communications</i> <i>Commission</i>	776
<i>Turner Broadcasting System v. Federal Communications</i> <i>Commission</i>	783
<i>American Broadcasting Companies, Inc. v. Aereo, Inc.</i>	788
<i>Fox Television Stations, Inc v. Aereokiller, L.L.C.</i>	794
Notes and Questions	800
D. Bibliography and Links	801
Websites	802
Chapter 15 · Video Games, eSports, and Social Media	803
A. Overview of the Industry	803
Origins—Video Games, Role Playing Games and Virtual Worlds	803
Wikis, Blogs, Social Media—The Content of the Curatorial Audience	805
Notes and Questions	807
B. Advertising and Endorsements	809
FTC Publishes Final Guides Governing Endorsements, Testimonials	809
Title 16: PART 255—Guides Concerning Use of Endorsements and Testimonials in Advertising	810
Notes and Questions	816
FTC Staff Reminds Influencers and Brands to Clearly Disclose Relationship	816
Problem 15-B	818
C. Scope of First Amendment Protections	818
<i>Brown v. Entertainment Merchants Association</i>	819
<i>Twitch Interactive, Inc., v. John and Jane Does 1 Through 100</i>	826
<i>Mil-Spec Monkey, Inc. v. Activision Blizzard, Inc.</i>	831
Voluntary Regulations—The Entertainment Software Rating Board (ESRB)	837
Notes and Questions	838
Problem 15-C	840
D. Publicity Rights in Video Games	841
<i>Hart v. Electronic Arts, Inc.</i>	841
<i>In re NCAA Student-Athlete Name & Likeness Licensing</i> <i>Litigation</i>	856
Notes and Questions	863
Problem 15-D	864
E. Contract Issues for Consumers	865

Clickwrap, Shrinkwrap, TOS, and EULA	865
<i>Bragg v. Linden Research, Inc.</i>	866
Notes and Questions	872
Problem 15-E	873
F. Bibliography and Links	874
Websites	874
Chapter 16 · Digital Distribution, Piracy, and Technology	877
A. Why Many-to-Many Matters	877
B. Unauthorized Recording & Distribution	881
1. 18 U.S.C.S. § 2319A (2003)	881
2. 17 U.S.C. § 1101. Unauthorized Fixation and Trafficking in Sound Recordings and Music Videos	881
<i>United States v. Moghadam</i>	882
Notes and Questions	883
Problem 16-B	884
C. Traditional Bootlegging of Branded Merchandise	885
<i>Plant v. Does</i>	885
<i>SKS Merch, L.L.C. v. Barry</i>	888
<i>World Wrestling Entertainment, Inc. v. Unidentified Parties</i>	894
Notes and Questions	896
Problem 16-C	897
D. Unauthorized Distribution Using Peer-to-Peer File Sharing	897
Introduction	897
<i>A&M Records v. Napster, Inc.</i>	898
<i>MGM Studios, Inc. v. Grokster Ltd.</i>	906
Notes and Questions	915
Problem 16-D	919
E. Consumer Services & Electronics	919
Introduction	919
<i>Recording Industry Association of America v. Diamond Multimedia Systems, Inc.</i>	920
<i>UMG Recordings, Inc. v. MP3.com, Inc.</i>	921
<i>Viacom International, Inc. v. YouTube, Inc.</i>	921
<i>EMI Christian Music Group, Inc. v. MP3tunes, L.L.C.</i>	930
Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies	936
Notes and Questions	942
Problem 16-E	947
F. Bibliography and Links	947
Websites	948
Chapter 17 · Publishing	949
A. Overview	949
1. Bookstores and Ebooks	950

2. Ebooks	951
3. Print-on-Demand	951
4. The Book Tie-In Market: Inter-Media Integration	952
5. Libraries and Ebooks	952
B. Author Agreements and Delivery Requirements	953
<i>Chodos v. West Publishing Co.</i>	953
<i>Helprin v. Harcourt, Inc.</i>	959
<i>Dunn v. CCH Inc.</i>	965
Notes and Questions	969
Problem 17-B	971
C. Termination and New Technology Issues	972
<i>Random House, Inc. v. Rosetta Books L.L.C.</i>	972
<i>HarperCollins Publishers L.L.C. v. Open Road Integrated Media, L.L.P.</i>	978
Notes and Questions	984
Problem 17-C	986
D. Ownership of Editorial Content	987
<i>N.Y. Times Co. v. Tasini</i>	987
<i>Faulkner v. National Geographic Society</i>	992
Notes and Questions	996
Problem 17-D	1000
E. Fair Use in Publishing	1000
<i>Rosemont Enterprises, Inc. v. Random House, Inc.</i>	1000
<i>Random House, Inc. v. Salinger</i>	1004
<i>Salinger v. Colting</i>	1009
<i>Authors Guild v. Google, Inc.</i>	1015
Notes and Questions	1027
Problem 17-E	1032
F. Bibliography and Links	1032
Websites	1033
Chapter 18 · Visual Arts and Cultural Artifacts	1035
A. Overview of Copyright for Pictorial, Graphic, or Sculptural Arts	1036
<i>Bleistein v. Donaldson Lithographing Company</i>	1036
Notes and Questions	1038
B. Artists' Rights to Attribution and Integrity	1039
Introduction	1039
<i>Carter v. Helmsley-Spear, Inc.</i>	1040
<i>Martin v. City of Indianapolis</i>	1049
<i>Cohen v. G & M Realty L.P.</i>	1054
<i>Cheffins v. Stewart</i>	1061
Report Waiver of Moral Rights in Visual Artworks	1063
<i>Close v. Sotheby's, Inc.</i>	1064
Notes and Questions	1070

Problem 18-B	1072
C. Government Regulation of Content in the Visual Arts	1073
<i>National Endowment for the Arts v. Finley</i>	1073
<i>Brooklyn Institute of Arts & Sciences v. New York & Rudolph W. Giuliani</i>	1081
<i>Trebert v. City of New Orleans</i>	1086
<i>City of New Orleans v. Clark</i>	1090
Notes and Questions	1096
Problem 18-C	1098
D. Art Fraud & Trafficking in Art & Artifacts	1098
<i>United States v. An Antique Platter of Gold</i>	1098
<i>United States v. Austin</i>	1103
Notes and Questions	1106
Problem 18-D	1109
E. Bibliography and Links	1110
Websites	1110
F. Epilogue	1111
Index	1113

Table of Principal Cases

- A&M Records v. Napster, Inc., 898
American Broadcasting Companies, Inc. v. Aereo, Inc., 788
Anthony v Buena v. Vista Home Entertainment Inc., 197
Authors Guild v. Google, Inc., 1015
- Blaustein v. Burton, 20
Bleistein v. Donaldson Lithographing Co., 1036
Bragg v. Linden Research, Inc., 866
Brooklyn Inst. of Arts & Sciences v. New York & Rudolph W. Giuliani, 1081
Brother Records, Inc. v. Jardine, 422
Brown v. Entertainment Merchants Association, 13, 179, 819
Buchwald v. Paramount Pictures, Corp., 621
- Cabot v. Jamie Record Co., 592
Carter v. Helmsley-Spear, Inc., 1040
Cheffins v. Stewart, 1061
Childress v. Taylor, 464
Chodos v. W. Publ. Co., 953
City of New Orleans v. Clark, 1090
Close v. Sotheby's, Inc., 1064
Cohen v. G & M Realty L.P., 1054
Comedy III Prods., Inc. v. Gary Saderup, Inc., 353
Commodores Entertainment Corp. v. McClary, 416
Conan Properties International LLC v. Sanchez, 642
- Contemporary Mission, Inc. v. Famous Music Corp., 578
Dastar Corp. v. Twentieth Century Fox Film Corp., 287
Davis v. Costa-Gavras, 230
Downing v. Abercrombie & Fitch, 331
Dunn v. CCH Inc., 965
- Ellison v. Robertson, 879, 917
EMI Christian Music Group, Inc. v. MP3tunes, L.L.C., 930
EMI Latin v. Bautista, 587
- Faris v. Enberg, 25
FASA Corp. v. Playmates Toys Inc., 38
Faulkner v. Nat'l Geographic Soc'y, 992
F.C.C. v. Pacifica Foundation, 764
F.C.C. v. Fox Television Stations, Inc., 305, 773
Filmline (Cross-Country) Productions, Inc. v. United Artists Corp., 615
Fleet v. CBS, Inc., 400
Folkways Music Publishers, Inc. v. Weiss, 485
Forward v. Thorogood, 557
Frank Music Corp. v. Metro-Goldwyn-Mayer, Inc., 530
- Gaiman v. McFarlane, 66
Gennaro v. Rosenfield, 455
Gilliam v. ABC, 714

- Greenfield v. Philles Records, 562
H. A. Artists & Associates, Inc. v. Actors' Equity Ass'n, 446
HarperCollins Publishers L.L.C. v. Open Road Integrated Media, L.L.P., 978
Hart v. Electronic Arts, Inc., 841
Helprin v. Harcourt, Inc., 959
Huckabee v. Time Warner Entertainment Co., L.P., 219
Hustler Magazine v. Falwell, 242
- In re Aimster Copyright Litig., 898
In re NCAA Student-Athlete Name & Likeness Licensing Litigation, 856
Interstate Circuit v. Dallas, 154
- Jacobs v. CBS Broad., Inc., 689
James v. Meow Media, Inc., 182
Joseph Burstyn, Inc. v. Wilson, 5, 154
- Kalem Company v. Harper Brothers, 4
Kassbaum v. Steppenwolf Productions, Inc., 426
King v. Innovation Books, 411
- Leigh v. Warner Bros., Inc., 82
Leopold v. Levin, 235
Locke v. Warner Bros., Inc., 627, 628
- Makarova v. United States, 452
Maljack Prods. v. Motion Picture Ass'n of Am., 649
Malmsteen v. Universal Music Group, Inc., 566
Martin v. City of Indianapolis, 1049
MCA Records, Inc. v. Newton-John, 583
MGM Studios v. Grokster, Ltd., 906
Midler v. Ford Motor Co., 343
Mil-Spec Monkey, Inc. v. Activision Blizzard, Inc., 831
Mutual Film Corp. v. Ohio Indus'l Comm., 151
- Nadel v. Play-by-Play Toys, 31
National Endowment for the Arts v. Finley, 204
New Line Cinema Corp. v. Easter Unlimited, Inc., 639
Nichols v. Universal Pictures Co., 58
N.Y. Times Co. v. Tasini, 987
- Parks v. Laface Records, 364
Peterson v. Highland Music, Inc., 590
Plant v. Does, 885
Polydoros v. Twentieth Century Fox Film Corp., 255
Preminger v. Columbia Pictures Corp., 709
- Random House, Inc. v. Rosetta Books L.L.C., 972
Random House, Inc. v. Salinger, 1004
Recording Industry Association of America v. Diamond Multimedia System, 920
Red Lion Broadcasting Co. v. FCC, 758
Reno v. Am. Civil Liberties Union, 768
Ringgold v. Black Entertainment Television, Inc., 73
Robert Stigwood Group, Ltd. v. Sperber, 533
Robinson v. Viacom Int'l, 703
Rosemont Enterprises, Inc. v. Random House, Inc., 1000
Russell v. Price, 629
- Salinger v. Colting, 1009
Sandy Veith & Vuelta Int'l, Inc. v. MCA Inc., 678
Scott Eden Management v. Kavovit, 124
Sheldon v. Metro-Goldwyn Pictures Corp., 62
SKS Merch, L.L.C. v. Barry, 888
Southeastern Promotions, Ltd. v. Conrad, 160

- Stewart v. Abend, 632
Systems XIX, Inc. v. Parker, 552
- Tamarind Lithography Workshop, Inc.
v. Sanders, 406
This Is Me v. Taylor, 440
Thomas v. Gusto Records, Inc., 561
Thomson v. Larson, 469
Time Warner Entm't Co., L.P. v. U.S.,
371, 674
Time, Inc. v. Hill, 249
Traditional Bootlegging of Branded
Merchandise, 885
Trebert v. City of New Orleans, 1086
Tristar Pictures v. Director's Guild of
Am., 720
Turner Broadcasting System v. Federal
Communications Commission, 776,
783
Twentieth Century-Fox Film Corp. v.
MCA, Inc., 64
Twitch Interactive, Inc., v. John and
Jane Does 1 Through 100, 826
- UMG Recordings, Inc. v. MP3.com,
Inc., 921
United States v. An Antique Platter of
Gold, 1098
- United States v. ASCAP, 513
United States v. Austin, 1103
United States v. Moghaddam, 882
- Viacom International, Inc. v.
YouTube, Inc., 921
Virginia Citizens Defense League v.
Couric, 227
- Wachs v. Curry, 118
Waits v. Frito-Lay, Inc, 346
Waller v. Osbourne, 190
Ward v. Rock Against Racism, 166
Warner Bros., Inc. v. Am. Broad. Cos.,
696
Welles v. Turner Entm't Co., 88
Wil-Helm Agency v. Lynn, 142
Williams v. UMG Recordings, Inc.,
394
Willis v. HBO, 695
Winter v. G.P. Putnam's Sons, 194
World Wrestling Entertainment, Inc. v.
Unidentified Parties, 894
- Zacchini v. Scripps-Howard Broadcast-
ing Co., 9, 328

Preface to the Third Edition

The third edition to Entertainment Law & Practice illustrates the continuing transformation triggered by the digital revolution to all media formats covered by the book. The music industry had been impacted first, going back to the turn of the twenty-first century. Since then, the publication and distribution of books has been redefined by Amazon.com; the way the public watches television has been upended by Netflix and Amazon Prime; the ability to make and upload films and videos has created a new industry on YouTube; the ubiquity of social media has changed marketing and retail; and the video game industry has entered an entirely new era as a result of the rise of esports and the expansion of the viewer audience on Twitch.

The changes in these industries have resulted in continued expansion of the case law in the areas of trademark and publicity rights. Each of these topics now has its own chapter. The statutory and case law for online digital media have also continued to evolve. The chapters on television and cable have been revised to reflect that “television” is now a metaphor for broadcast, cable, satellite, and over the top video streaming. It is viewed on traditional television sets, but it is also viewed on computers, tablets, phones, watches, and other mobile devices. Instead of separate chapters for television and for cable, the third edition has a chapter focused on television content production and television regulation.

Other important changes are slowly making their way through the entertainment industries, and these are also reflected in the new edition. The chapter on ethics has been expanded to include a focus on the gender and race disparities prevalent in aspects of the entertainment industries. Although there is little case law, these materials highlight the need for continued inclusion in the industry and the role that lawyers can play in fostering these efforts.

The design of the book is fashioned to serve as a capstone for many bar tested subjects, a seminar on sophisticated legal doctrine, or a workshop on practicing law. The third edition includes more introductory material to provide context for each of the entertainment industries. Questions, hypotheticals, notes, statutes, and historical materials continue to 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 chapter retains the bibliography to encourage additional research on the themes of the chapter.

All questions, comments, and inquiries should be directed to me at Nova Southeastern University Shepard Broad College of Law, email: garon@nova.edu; phone: (954) 262-6229.

Jon M. Garon, editor
Ft. Lauderdale, FL

Preface to the Second Edition

Although I have endeavored to update the first edition of Entertainment Law & 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, Director, NKU Chase Law + Informatics Institute and Professor of Law, Northern Kentucky University Chase College of Law.

Jon M. Garon, editor
Highland Heights, KY

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 breakout 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.

Jon M. Garon, editor
St. Paul, MN 2004

Acknowledgments

This book has been a continual outgrowth of my practice and academic work in the area of entertainment law. I have benefited from the assistance of colleagues at each of the five law schools where parts of this work were developed: Western State University College of Law, Franklin Pierce Law Center (now University of New Hampshire School of Law), Hamline University School of Law, Northern Kentucky University Salmon P. Chase College of Law, and Nova Southeastern University Shepard Broad College of Law. Among my colleagues who assisted, I would like to thank Maryann Jones, Susan Richey, Sophie Sparrow, Tom Field, Larry Bakken, Carol Swanson, Dennis Honabach, Kevin Kirby, Susan Stephan, and Debra Moss Vollweiler. I also appreciate the assistance of attorneys with whom I have worked at the firms of Hawes & Fisher and Gallagher, Callahan, & Gartrell.

My thanks go out to Stacy Blumberg Garon for her editing on this book and many of my articles, Lena Abdin, Andrea Pontecorvi, and Cherie Gannet who worked on the third edition of the casebook, Luke (Walter) Bubenzer who has worked on the second edition of the casebook as well as the 2012 Supplement, Matthew Ryan for his work on the second edition, and Jacqueline A. Olson, my research assistant on the 2010 supplement. I also wish to thank Lindsey Jaeger and Laurie Darwish, who have worked extensively with me at the NKU Chase Law + Informatics Institute and who have made it possible for me to complete the second edition.

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.

About the Author

Jon M. Garon is a professor of law and the immediate past dean of Nova Southeastern University Shepard Broad College of Law. He is a nationally recognized authority on technology law and intellectual property, particularly copyright law, entertainment and information privacy. A tenured member of the law faculty, Dean Garon teaches Information Privacy Law, Cyberspace Law, Copyright Law, Entertainment Law, and related courses. He is the author of more than 50 books, book chapters, and articles, and he has presented at more than 200 programs across the U.S. 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.

Prior to joining Nova Southeastern University in 2014, Garon was the inaugural director of the Northern Kentucky University Salmon P. Chase College of Law, Law + Informatics Institute from 2011–2014. The Law + Informatics Institute serves to integrate the specialized programming on technology and information systems as they apply across legal disciplines. He also served as dean and professor of law at Hamline University School of Law in St. Paul, Minnesota and interim dean of the Graduate School of Management from 2005 to 2006. Before Hamline, Dean Garon taught Entertainment Law and Copyright at Franklin Pierce Law Center in Concord, New Hampshire and Western State University College of Law in Orange County, California.

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

Books

Author, ENTERTAINMENT LAW & PRACTICE (Third Edition 2020) (with Teacher's Manual), (Second Edition, Carolina Academic Press, June 2014) (First Edition 2005).

Author, ENTERTAINMENT LAW & PRACTICE SUPPLEMENTS (Carolina Academic Press, 2012, 2010, and 2007).

Author, BURN RATE (Manegiare Publications, 2019) (novel focused on cybersecurity and cyberwar risks).

Author, THE ENTREPRENEUR'S INTELLECTUAL PROPERTY & BUSINESS HANDBOOK (Manegiare Publications, August 2018) (First edition: OWN IT—THE LAW & BUSINESS GUIDE TO LAUNCHING A NEW BUSINESS THROUGH INNOVATION, EXCLUSIVITY AND RELEVANCE (Carolina Academic Press, September 2007)).

Author, POP CULTURE BUSINESS HANDBOOK FOR CONS AND FESTIVALS (Manegiare Publications, 2017).

Author, *THE INDEPENDENT FILMMAKER'S LAW & BUSINESS GUIDE—FINANCING, SHOOTING, AND DISTRIBUTING INDEPENDENT AND DIGITAL FILMS* (Second Edition, A Cappella 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).

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- Author, *Chapter 6: White v. Samsung Elecs. Am., Inc., 971 F.2d 1395 (9th Cir. 1992)*, *FEMINIST JUDGMENTS: REWRITTEN PROPERTY OPINIONS* (Eloisa C. Rodriguez-Dod and Elena Maria Marty-Nelson, eds., Cambridge University Press 2020 (forthcoming)).
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- Contributor, *ANNUAL REVIEW OF INTELLECTUAL PROPERTY LAW DEVELOPMENTS 2006–2008* (George Jordan ed., ABA Section of Intellectual Property Law 2009).
- Author, *THEATER LAW: CASES AND MATERIALS* (Robert Jarvis, *et al.*, Carolina Academic Press, July 2004) (with Teacher's Manual).

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