

Entertainment

Litigation

Know the Issues
and Avoid the
Courtroom

Editors

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FOREWORD

By Peter Herbert

More than 30 years of entertainment and intellectual property law experience indicated to me that litigated disputes usually involve certain fundamental issues that are central to a creative artist's career, and that a basic, practical guide to these common issues, would help creative artists and their representatives gain some insight as to how to avoid the courtroom. These issues are most easily identified by asking the question, "What does an entertainer or creative artist need for a healthy dispute-free career?" I would suggest the following:

- representatives who are free of conflicting interests;
- agreements that expressly require both parties to perform stated obligations as a condition of maintaining the relationship;
- agreements that clearly recite the terms of service, including the amount and conditions of compensation, the credits to be accorded the artist, the artist's copyright interest in his or her authored works and the circumstances under which the relationship may be terminated;
- protection for the artist's copyrightable works through proper registration and enforcement of rights; protection of the artist's name and likeness that has gained public recognition (commonly referred to as the "right of publicity") through licensing activity, quality controls and the monitoring and prevention of unauthorized uses;
- protection for the artist's trademarks, logos, domain names and other indicia that identify the artist as the source of goods or services;
- protection of the artist's reputation by assuring appropriate "credit" for work performed, including preventing others from taking credit for what the artist has created and from wrongfully trading off the name and reputation of the artist in relation to the work of others;
- effective merchandising of the artist's products and services through traditional and emerging technologies; and

- review of accounting statements provided under the artist’s service and licensing agreements with third parties and collection of all amounts due under the terms of the underlying agreements.

While each industry, be it recording, music publishing, motion picture, television, live theatrical, book publishing, fine art or merchandising, has its own special customs and practices, these areas of protection are common to them all.

Just as the artist’s transactional representative must fully appreciate the legitimate needs of the parties with whom the artist contracts, the litigator must understand and appreciate the legitimate positions of the adversary and educate the client as to its reasonable expectations. The bull-dog litigator who ignores this responsibility, believing that only trial by combat will maximize the client’s advantages, even with the best of intentions, may blindly play a tune that is “tin” to a judge’s ear. In the process, he or she may embroil the client in distracting and all-consuming litigation that can sap the client’s creative energies and resources at the expense of his or her career. In most cases in which injury to reputation or professional integrity is not involved, constructive litigation should produce positive results for both parties by minimizing their respective losses. Other cases that do involve a potential injury to reputation or a compromise of fundamental values are not susceptible of easy practical resolution and must necessarily be pursued to conclusion.

The genesis of this handbook was the outline of a three-hour lecture on entertainment litigation that I delivered twice a year for more than 15 years to the students at Georgetown University Law Center. Salient principles were brought to life through discussions of cases in which I was personally involved over the years. Although some cases were of a more esoteric nature such as the interpretation of aspects of the Copyright Act (e.g., the meaning of a “posthumous work,”¹ the test of “joint authorship”² or the financial effects of the Act’s termination provisions³), most involved the practical issues listed above, which are at the heart of protecting the artist’s career.

Thus, it seemed that it would be useful to the legal and business community to offer a book that addresses, in a simple, accessible way, the

1 *Bartok v. Boosey & Hawkes, Inc.*, 523 F.2d 941 (2d Cir. 1975).

2 *Childress v. Taylor*, 945 F.2d 500 (2d Cir. 1991).

3 *Harry Fox Agency, Inc. v. Mills Music, Inc.*, 543 F. Supp. 844 (S.D.N.Y. 1982), *rev’d*, 720 F.2d 733 (2d Cir. 1983), *rev’d*, 466 U.S. 903 (1984).

basic issues that inspire disputes in the entertainment and intellectual property arenas so that, with this knowledge and awareness, artists and their representatives could minimize the risk of litigation.

I am grateful to Elissa D. Hecker, Past Chair of the Entertainment, Arts and Sports Law Section of the New York State Bar Association, whose energy and insight sparked the interest of the Section in this project. Her enthusiasm and attention to all aspects of the project's development jump-started my own incentive to bring this book to life. I want to extend my gratitude to distinguished attorneys Robert Clarida, Judith Bresler, Peter Glass, Janna Glasser, Joel Hecker, Judith Prowda and Roger Deitz, and to my splendid and talented partners and associates at Hinckley, Allen & Snyder LLP in Boston, Providence and New Hampshire, specifically, intellectual property specialists Deborah Benson, Amy Spagnole and Brent Canning, all of whom responded to my call and generously offered their time and talent to make this book possible. And my thanks to Miriam Tauber and Brendon McKeon, the research assistants who contributed case synopses to the book. Finally, my heartfelt thanks to the New York State Bar Association, specifically, Daniel McMahon, Director of Publications, and Joan Fucillo, Senior Copy Editor, for their enthusiasm, extraordinary competence, meticulousness and unfailing good will throughout the process of transforming a rough manuscript into a finished book.

I hope this book will be seen as a work in progress, to be supplemented periodically as new developments, emerging areas and issues, and cases of practical significance occur, and that the book will bring further understanding to commonly litigated issues in the entertainment and intellectual property arenas, so that disputes may be creatively and promptly resolved.

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Robert Clarida is a partner at the New York firm of Cowan, Liebowitz & Latman in New York. His copyright practice includes both counseling and litigation for clients in a wide variety of industries, including music, fine art, photography, film, and software. He has helped untangle copyright problems in connection with works ranging from the writings of Dr. Martin Luther King, Jr. and the music of John Coltrane to the movie *Spiderman* and the song “Who Let the Dogs Out?” Mr. Clarida speaks and writes frequently on copyright issues, and is co-author of the annual review of copyright decisions published each year by the *Journal of the Copyright Society of the USA*. He teaches a seminar on emerging intellectual property issues at Columbia Law School, is the current co-chair of the Copyright Committee of the New York State Bar Association IP Section, former chair of the Copyright and Literary Property Law Committee of the Association of the Bar of the City of New York, a past Trustee of the Copyright Society of the USA, and former chair of the Copyright Law Committee of the American Intellectual Property Law Association. He is also the author of the forthcoming *Copyright Law Deskbook* (BNA).

Before joining Cowan, Liebowitz, Mr. Clarida taught music history and music theory at Dartmouth College, and wrote music for several dance companies in New York.

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