

Media & Entertainment Law Wypadki Spring 2011

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Fall 2011

Media & Entertainment Law

Wypadki

Module 1 Sunshine, FOIA, Access Rights

FREEDOM OF INFORMATION ACT (FOIA)

General Premise

Imposes on the executive branch an affirmative obligation to adopt new standards and practices for publication and availability of information. It leaves no doubt that disclosure is a transcendent goal, yielding only to such compelling considerations as those provided for in the exemptions of the act.

FOIA Request

1. **Who can make a FOIA request:** Almost any person can submit a request to a federal agency for any record controlled by the agency and the agency must provide that record subject to several exclusions and exemptions.
 1. **Requests on behalf of a third party:** Requests can also be made on behalf of any person by an attorney or representative.
2. **Need and Purpose**
 1. **Need is irrelevant:** Whether or not an individual making a FOIA request actually needs the documents requested is irrelevant. . But see below.
 2. **Purpose only relevant to fees:** The purpose of obtaining the documents through FOIA are relevant only to fee waivers. See Fee waivers.
3. **Basic Definition**
 1. **Any person--** Under the FOIA statute, “ any person” includes foreign citizens, corporations, governments, illegal aliens, non-resident aliens, prison inmates.
 2. **Agency—**Only an “agency” is subject to the FOIA.
 1. **Included in Agency Definition**
 1. **Government corporations--**includes government corporations with some combination of federal chartering and federal funding and federal control such as— military department, Government corporation, Government controlled corporation
 1. BUT DOES NOT include the Smithsonian, Freddie Mac, American Red Cross
 2. **Not Included in Agency Definition**
 1. Congress
 2. Courts
 1. The first amendment, however, access to court documents.
 3. President, his immediate staff, entities whose only function is to advise the President
 4. Does include the Office Management & Budget, Office of Science & Technology, Council on Environmental Quality which have statutory duties in addition advising President
4. **Basic Requirements**
 1. Each agencies published rules of FOIA procedure govern the request. The request must be made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed,

2. A request must be made in writing and
3. Reasonably describe the records to be sought
 1. Means that a professional employee of the agency who was familiar with the subject of the request would be able to locate the record with a reasonable amount of effort

FOIA Fees

1. **Recoverable Fees:** FOIA allows agencies to charge fees for
 1. *Duplication costs*
 2. *Costs of Searching for documents*
 3. *Document review costs*
 1. However, an agency cannot charge for the effort to determine whether or not to withhold the document
2. **Fee Waiver:**
 1. **Public Interest fee waivers:**
 1. If "disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations of activities of the government and is not primarily in the commercial interest of the requester, than fee waiver may be granted.
 2. First 2 hours of search time & first 100 pages of copying are free for non-commercial requests

FOIA Time Limits

1. **An agency has 20 working days to decide** whether to comply with the FOIA request:
 1. The agency could just comply with the request
 2. If the agency denies the request
 1. It must give an explanation for the basis of the denial
 2. Inform the FOIA requester of their opportunity to file an internal appeal
 3. If the FOIA requester makes an internal appeal, the agency has 10 days to respond to the appeal.
 1. **Under unusual circumstances**, both deadlines can be extended up to ten days.
2. **Judicial Enforcement**
 1. If the agency fails to meet these deadlines, or the FOIA requester receives an adverse response on appeal, the FOIA requester can litigate the issue in court
 2. Remedies: Attorneys fees, award of court costs, and a court order for the FOIA request to be answered
 3. **Will lose in litigation**
 1. If the FOIA requester failed to exhaust the internal appeals
 2. If the court finds that the agency was acting with diligence
 3. If the delay was within variable processing time of requests

FOIA Exemptions

Exemptions do not require that the federal agency withhold records, only that they provide a justification for the non-release.

Exemptions:

1. Records that need to be kept secret to protect national security
2. Matters related only to internal personnel rules and practices of an agency
 1. Low 2 Exemptions: no need to disclose the information because it is trivial matters "in which the public could not reasonably be expected to have an interest"
 2. High 2 Exemptions: Item is of public interest but disclosure would interfere with proper agency functioning
3. Matters exempt from disclosure by statute
4. Confidential Business information
 1. Trade Secret
 1. Commercially valuable

2. Used in one's own business
3. Maintained by the company in secrecy
4. Relates directly to the production (added by DC Cir.)
2. Commercial or financial
 1. Obtained from a person and is
 2. Either privileged or confidential
5. Inter-agency communications regarding policy
6. Files that would be a clear invasion of someone's privacy (e.g. medical files)
 1. Detailed government records on an **individual** which can be identified as applying to that individual's privacy interest
 2. When disclosure would be "clearly unwarranted invasion of privacy"
 1. Must balance the public interest in the record vs. individual's privacy interest
7. Investigatory files for law enforcement purpose, if disclosure would reasonably be expected to
 1. Interfere with enforcement proceeding
 2. Deprive person of a fair trial
 3. Constitute an unwarranted invasion of privacy
 4. Disclose the identity of a confidential source [broadly defined]
 5. Disclose confidential investigative techniques, practices or guidelines
 6. Endanger the life or safety of a person
8. Reports prepared by an agency responsible for supervision of financial institutions
9. Geological Information concerning wells

Judicial Review under FOIA

1. Agency bears the BOP of proving it has not
 1. Improperly withheld
 2. Agency Records
2. De novo; no deference to agency decision
3. Potential disciplinary action if denial was arbitrary or capricious
4. Reverse Foia--A company whose confidential information will be released by an agency has a reverse foia action for failure to disclose the information, if the disclosure causes the company to suffer a legal wrong because of agency action, or the company is adversely affected or aggrieved by the agency action.

ELECTRONIC FREEDOM OF INFORMATION ACT

1. Definition of a record now includes information stored electronically
2. Documents created on after 11-1-96 must be made available for inspection or copying online as well as in hard copy form
3. Requesters can specify the format and form they want to receive the record in, provided the information can readily produced in that format

THE GOVERNMENT IN THE SUNSHINE ACT

1. Purpose: Is supposed to put government in the "sunshine." The Sunshine Act is founded on the proposition that government conduct the public's business in public. "By requiring important decisions to be made openly, the law will create a better understanding of agency decisions.
2. Basic Definitions:
 1. *Agency*
 1. Any agency as defined in FOIA,
 1. that is headed by a collegial body
 1. composed of two or more individual members, a majority of whom are appointed by the President with the advice and consent of the Senate,

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- *In order to close a criminal trial, three things must be done by the Ct:*
- *Must make detailed findings*
- *must find a substantial probability of prejudice to a compelling interest of the D, gov't, or third party, which closure would prevent*
- *must have considered alternatives and choose the least restrictive means to protect the compelling interests identified.*

ACCESS AND THE CONSTITUTION

1975 SC opinion sated that there is no constitutional right to have access to particular government information. -There is also not an unlimited right to travel

- *The Constitution does not require gov't to accord the press special access to information not shared by members of the public generally.*

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Module 2 Incitement

History of Incitement

1. **Clear and Present Danger Test (Schenck v. United States)**
 1. "The words used are in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree."
2. **Direct Urging of Action: (Masses Publishing v. Patten)**
 1. "If one stops short of urging upon others that is their duty or their interest to resist the law, it seems to me one should not be held to have attempted to cause its violation. If that be not the test, I can see no escape from the conclusion that under this section every political agitation which can be shown to be apt to create a seditious temper is illegal."

Current Test for Incitement

1. **In Brandenburg v. Ohio**, the S Ct. dispensed with the clear and present danger test and established the current test for incitement:
 1. "The constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use force or of law violation except where such advocacy is direct to inciting or producing imminent lawless action and is likely to incite or produce such action."

Cases for Module 2

Schenck v. U.S.

Facts: During wartime, P was sending flyers to draftees. The flyers stated that the conscription was a monstrous evil. The flyers further urged the draftees to not "submit to intimidation," and instructed draftees to peacefully protest the conscription by arguing for the repeal of the Conscription Act. P was charged with violating the Espionage Act by attempting to cause insubordinate and obstruct the draft.

Rule: "The question in every case is whether the words used are used in such circumstances and are of such nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree."

Reasoning: The S Ct. upheld the Act. The S Ct. said that while the first amendment protects speech, it doesn't protect it in every circumstance. For example, the 1st Amendment would not protect a man who falsely shouted "fire" in a crowded movie theater, causing a panic. Likewise, these comments made during peace time would be protected. But when the country is at war, many things that would be ok to say during peace time can be such a hindrance to the war effort that it may be punished. The character of act, therefore, depends on the circumstances.

Masses Publishing v. Patten (N.Y. Dist. Ct.)

Facts: P was a publishing company that distributed a monthly magazine called "The Masses" which contained political cartoons, commentary, and poetry. D's boss thought the August issue violated the Espionage Act and instructed D to not mail the issue. P filed for a preliminary injunction against D to forbid D from refusing to accept its magazines in the mail.

Rule: A publication that does not directly urge a violation of the law does not violate the Espionage Act.

Reasoning: Judge Hand held that the publication did not violate the espionage act because the contents did not "directly counsel or advise insubordination or mutiny." Instead, Judge Hand reasoned that the Masses fell within the proper range of criticizing the government.

Brandenburg v. Ohio

Facts: A tv station was invited to video tape a Ku Klux Klan rally by D. The videotape footage included KKK members carrying firearms and burning cross, and D made a speech which indicated that "if the government continues to suppress the White, Caucasian Race, it's possible that there might be some revenge taken." D was convicted under Ohio's Syndicalism Statute, which prohibits advocacy of the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing reform, and the assembling with any group formed to reach or advocate the doctrine of criminal syndicalism.

Rule: "The constitutional guarantees of freedom of speech and freedom of press do not permit a state to forbid or proscribe advocacy of the use of force or law violation where such advocacy is directed to inciting or producing imminent lawless action and is likely to produce or incite such action."

Reasoning: The S Ct. reasoned that the "mere abstract teaching of moral propriety or even moral necessity to resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action. A statute which fails to draw this distinction impermissibly intrudes upon freedoms guaranteed by the First and Fourteenth Amendments. It sweeps within its condemnation to speech which our Constitution has immunized from governmental control." Basically, the only time you might have a case for incitement is if the an individual is outside the white house telling a group of people with AK-47s to kill the president.

Module 3 Obscenity

Miller Test

1. Each part of the test must be satisfied for the material to be found obscene. The three elements are:
 1. Whether the "average person applying community standards" would find that the work, take as a whole, appeals to prurient interest?
 1. Depends on the community. Vegas would be more lenient with materials than small town in Iowa.
 2. Whether the work depicts or describes, in a patently offensive way, **sexual conduct** defined by applicable law.
 1. Up to state law to define what that means.
 3. Whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.
 1. Does the most to protect entertainment distributors from anti-obscenity law
2. **Meeting the Prongs:**
 1. The first two prongs, prurient interest and patent offensiveness, are issues of fact for the jury to determine applying contemporary standards
 2. For the third prong, experts could testify at this stage
 1. The proper inquiry is not whether an ordinary member of any given community would find serious literary, artistic, political scientific value in allegedly obscene material, but whether a reasonable person would find such value in the material, taken as a whole

2. In *Pope v. Illinois*, The Court clarified that whether a work possesses serious value was not a question to be decided by contemporary community standards. The Court reasoned that the fundamental principles of the First Amendment prevent the value of a work from being judged solely by the amount of acceptance it has won within a given community: "Just as the ideas of a work need not obtain majority approval to merit protection, neither, insofar as the 1st Amendment is concerned, does the value of work vary from community to community based on the degree of local acceptance it has won."

Cases for Module 3

Luke v. Navarro Records

Facts: Broward County Sheriff was discouraging record stores from selling 2 Live Crew's "As Nasty As They Wanna Be". In response, the Navarro records filed for an injunction to prevent the Sheriff from interfering with the record sales. In addition, Navarro records sought declaratory judgement that the record was not obscene.

Rule: Just listening to music is not enough to determine its literary or artistic value.

Reasoning: This was the first time that a ct. applied the Miller test to music. The Ct. first concluded that music by itself, due to its inherent artistic value, cannot be obscene, but the lyrics might be. As to the BOP, the Ct. didn't conclude whether it should be clear and convincing or preponderance of evidence, because the Sheriff would lose under both. The Sheriff had the burden to put in evidence and all he put in to the evidence was the cassette tape. In contrast Navarro put up expert testimony that the song had artistic value. While the judge as the trier of fact could make decisions about the first two prongs, he couldn't make the judgement on third prong with evidence and witnesses. If the Sheriff would have put up more evidence, he would have had a better case.

Module 4 Injunctions and Prior Restraint

Difference Between Sub. Punishment and Prior Restraint

1. **Subsequent Punishment:** the punishment is imposed after the material has been communicated, the punishment is for having made the communication at all, this system allows the information to be communicated
2. **Prior Restraint:** penalty or injunction that is imposed in advance of publication, it prevents the communication for occurring at all

Basic Law

1. "The exceptional nature of its limitations place in a strong light the general conception that liberty of the press, historically considered and taken up by the Federal Constitution, has meant, principally although not exclusively, immunity from previous restraints or censorship."
2. **There is a general presumption that a prior restraint on free speech is unconstitutional**
3. Prior restraint might pass constitutional muster in exceptional circumstances:
 1. Government seeks to prevent actual obstruction to recruiting service
 2. Government seeks to prevent publication of sailing dates of transports and the location of troops
 3. Obscene publications and incitements to acts of violence or violent overthrow by force of orderly government
4. Just because an entity is cut off from making a prior restraint on publication, doesn't mean they cannot use subsequent punishment to obtain redress from the person publishing the material

Cases for Module 4

Near v. Minnesota

Facts: The Saturday Press had published several articles that stated that a Jewish gangster controlled gambling, bootlegging, and racketeering in Minneapolis. The articles claimed that law enforcement was turning a blind eye. Under a new Minnesota law, the trial court banned further publication of the paper because it was a public nuisance. The state supreme court affirmed.

Rule: Main purpose of the the free speech clause is to prevent the imposition of prior restraints on the press.

Reasoning: The S Ct. reversed the lower courts. Tracing the history of prior restraints in first amendment law, the S Ct. pointed out that the government can censor a papder only under exceptional circumstances. But this is not one of those cases. People harmed by material under these circumstances have remedies in libel law, which have better remedies than censoring free speech before its communicate.

Pentagon Papers

Facts: Someone in the defense department photocopied portions of a secrete Dept. of Defense study, and gave it the NY Times and Wa Post. The started publishing portions of the study, which became known as the Pentagon Papers. The Gov't tried to get the publications enjoined, arguing that they were a national security threat.

Rule: Gov't has a heavy burden to meet to justify a prior restraint on the press.

Reasoning: The S Ct. found the prior restraint unconstitutional. In concurrence, Justice Black and Douglas argued that prior restraints the gov't should never be permissible. Brennan said the gov't failed to meet is BOP.Stewart and Burger said that the newspaper could face criminal prosecution for revealing secret documents. Harlan and Blackmun in dissent would have upheld the prior restraint. Moral of the story is that prior restraints, are unlikely, if ever, to be upheld

First Amendment Flow Chart

1. Does the First Amendment even apply?
 1. Who is the actor?
 1. Was the action taken by the gov't or an agent of the gov't?
 1. Yes. Determine what type of speech it is.
 2. No. No 1st Amendment Issue.
2. What type of speech is it?
 1. Obscenity
 1. Appeals to prurient interest by community standards
 2. Depicts patently offensive sexual material as defined by state law
 3. Material as a whole has no artistic, literary, scientific, or political value
 1. Yes. Unprotected speech,
 2. No. Go to fighting words.
 2. Fighting words--words likely to provoke the listener into an immediate fight
 1. Yes. Unprotected speech,
 2. No. Go to incitement
 3. Incitement--advocacy for violence or violation of the law directed to inciting or producing imminent lawful action and is likely to produce such action
 1. Yes. Unprotected speech,
 2. No. Might be protected speech. Go to determine scrutiny.
3. Determine Scrutiny
 1. Unprotected speech--> little to no scrutiny, gov't likely can regulate
 2. Protected speech
 1. If Content based regulation (regulation that regulates speech based on its content)
 1. Apply Strict Scrutiny (law is upheld if it is proven necessary to achieve a compelling government purpose)
 2. If content neutral (regulates all speech the same regardless of content)
 1. Apply Intermediate Scrutiny (law is upheld if it is substantially related to an important government purpose.)

Module 6 Press Freedom and Government Investigation

1. **Reporter's Privilege**
 1. Pre-Branzburg
 1. The common law traditionally did not recognize journalists as among people who could invoke privilege

2. Maryland adopted a shield law (a statutory law shielding a reporter from the duty to reveal sources of information) in 1986. 30 years later, only 17 states had shield laws
2. **First Amendment Protection for Reporter's After Branzburg**
 1. The S Ct. declined find to a reporters privilege under the 1st Amendment
 2. But the holding was very narrow:
 1. **Concurrence:** Newsman, subpoenaed to testify before a grand jury, are without constitutional rights with respect to the gather of news or safeguarding their sources. However, if a newsmen is called to give information bearing only a remote and tenuous relationship to the investigation, he will have opportunity to seek a protective order.
 1. Such claims to privilege should be judged on the facts by the striking of a balance between the freedom of the press and obligation of citizens to provide testimony with respect to criminal conduct. Such balancing should be done on a case by case basis.
3. **State Common Law and Constitution**
 1. Some states recognize reporter's privilege under common law or under the state constitution.
 2. **Reporter's Privileges Constants**
 1. The privilege does not belong to the source
 2. The privilege belongs to the reporter
 3. Applies to information in the course of newsgathering duties
 4. Professional journalists employed by newspapers or broadcast networks or stations are covered by the privilege
 3. **Reporter's Privilege variables**
 1. Confidential vs. nonconfidential materials
 1. Some jurisdictions only protect confidential information, such as when the reporter promises to the source he'll keep the source of his info anonymous, and the reporter keeps that person anonymous when they publish the story
 2. Other jurisdictions extend the privilege to nonconfidential info
 1. When the new source, and perhaps, a portion of the withheld writing are not confidential, unpublished materials, outtake footage
 2. Third party record regarding the media
 1. Hotel phone records can be used to identify confidential sources, even without gathering information directly from the press
 2. Some courts have analyzed motions to quash in such cases under the same 1st Amendment standards as those directly applied to subpoenas of the press
 3. Who qualifies?
 1. Employee-journalists for newspapers or broadcast news operations always do.
 2. Maybes
 1. Freelancers
 2. Scholars and book authors
 3. Bloggers
2. **Privacy Protection Act**
 1. Congress passed a comprehensive federal law limiting newsroom searches, which effectively overruled Zurcher, outlawing most newsroom searches by federal, state, and local law enforcement
 2. Under the PPA, law enforcement officials are prohibited from conducting searches and seizures involving documentary materials held by newsgatheers
 1. **Exceptions**
 1. **Work Product (notes and rough drafts)**
 1. The person is holding information is suspected of a crime: "There is probable cause to believe that the person possessing such materials has committed or is committing the criminal offense which the materials relate"
 1. Newspaper materials not protected if they relate to national security or child pornography
 2. There is reason to believe that the materials must be seized immediate to prevent someone's death or serious injury
 2. **Documentary Materials (photos, tapes, films, materials) other than work product**
 1. The person holding the information is suspected of a crime

2. There is reason to believe the materials must be seized immediately to prevent someone's death or serious injury
 3. There is reason to believe giving notice and seeking subpoena would result in the materials being destroyed, changed or hidden
 4. The materials were not produced as a result of a court order that has been affirmed on appeal
 1. All appellate remedies have been exhausted OR
 2. There is reason to believe that the delay in an investigation or trial occasioned by further proceedings relating to the subpoena would threaten interests of justice
3. **Remedies under the PPA**
1. Sue Civilly for damages
 2. Minimum of 1,000 liquidated damages
 3. Attorney's fees and costs in court discretion for prevailing plaintiff
3. **Additional Sources of Protection**
1. **Fifth Amendment:** If the reporter is implicated in a crime through communication with the source, the reporter can "plead the fifth" and refuse to identify the source or otherwise testify or answer investigator's questions
 2. **Sixth Amendment:** If the information is sought by a criminal defendant based on 6th Amendment guarantee of a fair trial, the information must be both:
 1. Material
 2. Favorable to the defense
 1. If not the reporter can move to quash subpoena under 6th Amendment law
 3. **Federal Rule of Criminal 17(c):** All subpoenas seeking documents and objects directed towards anyone (including the press) in a federal criminal matter can seek only materials that are admissible as evidence at trial
 1. This is much more limited than in civil discovery
 2. Even if admissible as evidence, the party must show:
 1. Materials must be not otherwise reasonably procurable
 2. Party cannot adequately prepare for trial without it
 3. Failure to obtain the material may unreasonably delay trial
 4. Not a fishing expedition
 4. **U.S. Attorney General Guidelines**
 1. Guidelines issued in 19
 2. Require U.S. Attorneys to balance First Amendment with the need for effective law enforcement before issuing a subpoena
 3. Require all reasonable attempts to obtain the information from alternative sources
 4. Require that the information sought from the press is essential
 5. Generally require approval of the Attorney General.
 6. Generally require negotiations with the press before issuing a subpoena to the press or for press's telephone records
 5. **Federal Rule of Civil Procedure 26:**
 1. Court's issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense
 2. Courts can quash or limit subpoenas if the discovery is unreasonably cumulative or duplicative, or is obtainable from some other sources that is more convenient, less burdensome, or less expensive

Cases for Module 6

Branzburg v. Hayes

Facts: Three consolidated cases involving reporters who had refused to answer questions about criminal activities they had witnessed while obtaining their information from confidential sources. Two of the cases involved the black panthers. The Branzburg case involved a story published by a reporter which showed a pair of hands making hashish. After Branzburg published the story he was subpoenaed by a grand jury to testify about who the drug users were. He refused.

Rule: No reporter's privilege for reporters when testifying to a grand jury about confidential sources.

Reasoning: Reporter's are no different from ordinary people who are called before a grand jury. There is no evidence that the flow of news would be obstructed or that confidential sources would not come forward if the S Ct. failed to find a privilege. Even if this was true, public interest in stopping or prosecuting crimes outweighs the press's concern that confidential sources will dry up. Might still be able to quash the subpoena. **Concurrence:** If information is collateral to proceeding, he can seek protective order, which requires a case by case analysis balancing the freedom of the press against the interest in prosecuting criminal conduct.

Zurcher v. Stanford Daily

Facts: There was a demonstration where some officers got hurt after it turned violent. The officers got a search warrant for the Daily's office who had pictures of the event, in hopes of figuring out who the perpetrators were. No staff members were suspected of criminal activity.

Rule: 1A does not protect newspapers against an unannounced search executed by search warrant, even when no member of the staff is suspected of a crime, so long as the warrant satisfies fourth amendment requirements

Reasoning: S Ct. held that 1A did not protect newsrooms from searches executed based on a search warrant. The S Ct. felt that the fourth amendment requirements for a search warrant would be enough to protect a newsroom from a general and intrusive search: Properly administered, the preconditions of a warrant--probable cause, specificity with respect to the place to be searched and things to be seized, and overall reasonableness should protect a newsroom from the harms threatened by searching newspapers office. They left it up to states and Congress to come with their own measures for dealing with newsroom searches.

Module 7 Regulation, Advertising, and Broadcasting

Radio Logistics

- *Spectrum – FCC keeps people from talking over one another with the spectrum. The spectrum tells you what channel can be on what wave.*
 - *You can't tell where a radio transmission is coming from, unless they tell you. This is why we have call signs: N – is Navy's call sign.*
 - *One of the big movements to digital broadcasting is to free up spectrum space. Analogue TV takes up an enormous amount of bandwidth compared with digital.*
- *Broadcast commercial call signs can start with a K or a W. Every radio station is required to recognize themselves every hour at the top of the hour and their city of license. It's important for people to know where the station is coming from.*
 - *You used to be able to pick, but now...*
 - *West of Mississippi take a K – East of Mississippi take a W (WDAZ is an exception).*
- *Everything below 91.9 is reserved for non-commercial stations*
- *Everything above 92.1 is for everything else. Non-commercial can take this space, but commercial operations cannot take below 92*

FM v. AM

- *FM and TV are the same frequency. AM is different.*
- *FM and TV work on line of sight – you have to see where you are going. Their rays need to be on top of mountains, etc.*
 - *AM rays bounce off the atmosphere and thus, can be lower on the ground.*

FCC Payola

1. **Payola** is the practice of record labels, promoters, and others secretly paying DJs to put certain materials on the air
 1. **Ex.** In the 1950s, Alan Freed had a radio show in WBAC. He managed to get bogus writing credits for the song Maybelline, so he would get royalties every time he played the song. Ultimately, WBAC fired Freed and Freed pled guilty to federal charges.
2. **Regulation of Payola**
 1. **Section 317 of Comm. Act: (Station needs to say someone paid to have the material played on the air)**
 1. Broadcasters who receive air a material in exchange for money, services, or other valuable consideration
 2. Must disclose that fact and identify who paid for or promised to pay for the subject to be aired.
 3. The disclosure must be made when the subject matter is broadcast
 4. Broadcasters responsibilities in making sponsorship identification is an FCC rule, w or hich may require a statement such as "the following suppliers of products or services have paid for their use and promotion."
 1. Applies to both radio and television broadcasts
 2. Disclosure must be made even if payment was to an employee, announcer etc.
 3. Licensee of the radio station must act with reasonable diligence to find out if such a disclosure needs to be made and make it
 4. May waive the requirement if in public interest, convenience or necessity doesn't require the broadcasting of such an announcement
 2. **Section 507 of Comm. Act (DJ needs to tell station he is getting paid to play)**
 1. When anyone provides or promises to provide money, services or other consideration to someone to include program matter in a broadcast,
 2. that fact must be disclosed in advance of the broadcast, ultimately to the station over which the matter is to be aired
 3. **BOTH**
 1. the person providing or promising to provide the money services or other consideration **AND**
 2. the recipient
 1. Are obligated to make this disclosure so that the station may broadcast the sponsorship identification announcement required by 317 of the Communications Act.
 3. **Common Factual Scenarios**
 1. Being Paid by the record company for playing records
 2. Free pizza for the DJ
 3. Product placement in scripted television
 4. Game show prizes,
 4. **DISCLOSURE IS THE KEY TO AVOIDING LIABILITY**

FCC Obscenity, Indecency. & Profanity

1. **FCC is motivated by two things:**
 1. License renewal. A lot of their rules are enforced when a station keeps a log of their activities and then presents that log for the purpose of being licensed again.
 2. Complaints. FCC enforcement is largely complaint driven
2. **FCC monitors three categories:**
 1. **Obscenity:** Something is obscene if an average person applying contemporary community standards finds it (1)appeals to the prurient interest, (2)depicts or describes patently offensive sexual conduct-- defined by applicable law-- and (3) as a whole lacks serious literary, artistic, political, or scientific value.
 1. Obscene material is not protected by the 1st Amendment and
 2. Is prohibited from being broadcast at any time
 3. Note: must be sexual, as opposed to violent, etc
 2. **Indecency:** Something is indecent if it contains sexual or excretory material but doesn't rise to the level of obscenity, "language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory organs or activities"

1. **What counts as Indecency? Three Factor analysis**
 1. The explicitness of the description of the sexual or excretory activity
 2. Whether the material dwells on or repeats these descriptions
 3. Whether the material appears to pander or is presented for shock value
 1. The analysis is meant to take into account context i.e., the manner and purpose of the material
 2. Material primarily used to educate or inform the audience is meant to be treated differently from material that panders, titillates or shocks(i.e. Nat'l Geographic showing monkeys slinging poo would be ok)
2. It is protected by the 1st Amendment
3. Cannot be broadcast between the hours of 6am to 10pm because children maybe watching doing those hours
 1. Indecent material receives 1A protection, but time of day restrictions for broadcast survive scrutiny
4. Note: Indecency as opposed to obscenity, includes excretory subject matter
3. **Profane:** Profane language includes those words that are so highly offensive that their mere utterance in the context presented may amount to nuisance.
 1. Doesn't require an element of sacrilege, racial epithets seem not to count, recent decisions require some relation to excretory function or something sexual
 2. **Preemptively profane:** f**k, s**t, bulls**t, dick not in the context of NYPD Blue episode
 3. The use of the F*word is highly offensive and is almost always considered to be profane, if audio tape from an investigation of a mob boss on NPR uses the F*word in passing - it is probably ok - but the F*word accidentally said during an awards show by a famous person NOT ok.

Safe Harbor: refers to the period between 10pm and 6am. A station may air indecent and/or profane material. There is no safe harbor for obscene material

- *FCC factors*
- *The explicitness or graphic nature of the material*
- *To what extent does it dwell on or repeat the material*
- *Does it pander to, titillate, or is it used for shock value*

FCC Closed Captioning

1. **General Scope**
 1. Subtitles can be used in lieu of closed captioning
 2. Programming in languages other than English or Spanish is (generally) exempt
2. **Requirements**
 1. As of **2006**, all new English-language programming must be captioned
 2. As of **2008**, 75% of pre-rule English programming must be captioned
 3. From **2005**, 30% of Spanish-language programming must be captioned - per channel, per quarter
 4. Beginning **January 1, 2012**, 75% of programming in Spanish must be captioned - per channel, per quarter
3. **Automatic Exemptions**
 1. PSAs, promos, etc. shorter than 10 min
 2. 2 am to 6 am programming
 3. Locally produced non-news programming with no repeat value
 4. New networks, for first four years
 5. <\$3M revenue channels
 6. Plus a few other random exceptions
4. **Waiver Exemptions**
 1. Can petition the FCC for a waiver based on "undue burden"
 2. Automatic exemption while petition is pending

FCC Broadcast of False Facts

1. Rules

1. Licensees cannot broadcast false information concerning a crime or catastrophe if:
 1. The licensee knows the information is false and
 2. The licensee knows beforehand that broadcasting the information will cause substantial public harm which
 1. will begin immediately and cause direct and actual damage to the property, health, or safety of general public
 2. or divert law enforcement or public health and safety authorities from their duties
2. **Effect of disclaimers:** If a disclaimer is presented in such a way that is reasonable under the circumstances, and which clearly characterizes the program as fiction, the program will not be presumed to pose foreseeable public harm.

FTC Advertising Regulation

1. FTC Act Section 5

1. (a)(1) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful
2. (2)The commission is hereby empowered [to enforce this.]

2. Endorsement Guides

1. Endorsements must be truthful and not misleading
2. If the advertiser doesn't have proof that the endorser's experience represents what consumers will achieve by using the product the ad must clearly and conspicuously disclose generally expected results in the depicted circumstances; and
3. If there's a connection between the endorser and the marketer of the product that would affect how people evaluate the endorsement, it should be disclosed

3. FTC Q & A

1. I've heard that every time I mention a product on my blog, I have to say whether I got it for free or paid for it myself. Is that true?
 1. No. If you mention a product you paid for yourself, the Guides aren't an issue. Nor is it an issue if you get the product for free because a store is giving out free samples to all its customers
2. What if all I get from the company is a \$1-off coupon, or if the product is only worth a few \$\$? DO I have to disclose?
 1. Here's another way to think of it: While getting one item that's not very valuable for free may not affect the credibility of what you say, sometimes continually getting free stuff from an advertiser or multiple advertisers is enough to suggest an expectation of future benefits from positive reviews. If you have a relationship with a marketer who's sending you freebies in the hope you'll give a positive review, it's best if your readers know you got the product for free.

Cases for Module 7

Red Lion Broadcasting v. FCC

Facts: On Red Lion's station had a 15 minute show that broadcast by James Hargis. During the show, Hargis discussed Fred Cook's book criticizing about Barry Goldwater. He attacked Cook, including saying that Cook had been fired by previous newspaper for false charges against city officials, and that he worked for a Communist paper. Cook asked for reply time based on the personal, and the FCC told Cook to pound sand. Cook complained to the FCC, and the FCC told Red Lion's it had to give Cook airtime.

Rule: There is nothing in the First Amendment which prevents the Gov't from requiring a licensee to share his frequency with others to conduct himself as a proxy or fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves.

Reasoning: S Ct. said that, unlike newspapers, the limited nature of airwaves authorizes the government to decide who gets on the air and to regulate it. In addition, the public has constitutional right to have the medium function properly and for it to be in accord with the end purpose of the First Amendment. The public has a right to access "social, political, aesthetic, moral and other ideas and experiences. The right of the viewers is tantamount. Therefore, radio shows that do get license are kind of a fiduciary whose obligations are to allow the public access to views that otherwise would not be available on the air.

FCC v. Pacifica

Facts: At 2 pm, WBAI aired a 12 minute monologue by George Carlin in which he craftily used filthy words you can't say on the radio. The show was preceded by a warning that the content may not be suitable for some people. A man turned to the station while his son was in the car, and complained to the FCC. The FCC didn't file sanctions against the station but gave the a warning notice in their file. The FCC found that Carlin's speech to be indecent.

Rule: FCC can regulate indecent words broadcast during the daytime where children can here.

Reasoning: The S Ct. concluded that, while Carlin's speech was not obscene because it lacked prurient appeal, it was indecent. Due to the context of where the speech was given, on the radio during the daytime where children could hear, the court ruled that the government could regulate indecent words, even if they would have 1A protection in other contexts. The S Ct. analogized indecent words on the airwaves to a "nuisance [that] may be merely a right thing in a wrong place-- like a pig in the parlor instead of the barnyard."

FCC v. Fox Television Stations

Facts: Originally FCC didn't go after fleeting expletives that occurred during broadcast, but that changed its policy. This case involved two instances at on Award shows where Nicole Richie and Cher cursed on stage and were not bleeped. FCC said the words were indecent and that from now on even fleeting isolated uses of indecent language was actionable.

Rule: S Ct' found that the change in policy was in accordance with APA and remanded to 2nd Cir. on constitutional issues.

Module 8 Tort Liability for Audience Actions

General Rule from Cases: 1st Amendment rules unless there is incitement.

1. *Hold your wee for a wii (hasn't been decided yet)*
2. *DeFilippo v. NBC*
 1. *Johnny Carson stuntman suicide case*
 2. *First Amendment was controlling*
 3. *Right of television producers to produce content and right of viewers to see it*
3. *Wierrum v. RKO General - Get to the studio as fast as possible/Incitement*
 1. *The Real Don Steele*
 2. *Court did not discuss First Amendment*
 3. *Radio station found liable because they owed a duty and they violated their standard of care because it was foreseeable that in the summer teenagers would chase money.*
4. *McCollum v. CBS - Ozzy Osbourne Case*
 1. *Claim was barred by the First Amendment*
 2. *To find incitement, Ps must show:*
 1. *Osbourne's music was directed and intended toward the goal of bringing about the imminent suicide of listeners*
 2. *Osbourne's music was likely to produce such a result*
 3. *Court said there was no duty*

Module 9 Copyright Basics

Copyright - General Premise

1. If you have an idea, you can't copyright that – once it's an expression, it's copyrightable.
2. As soon as you put something in tangible form, you have a copyright. You need to wait for an official patent to be issued if you want a patent.

Idea v.s Expression

1. Copyright does not protect ideas, whether they are fact, opinion or fantasy.
2. It only protects the expression of those ideas. Compilations of facts, such as encyclopedias, dictionaries and even telephone directories, can receive copyright protection.
3. But the facts themselves cannot be copyrighted—only the expression of those facts can be copyrighted.

Sources of Copyright Law

1. Exclusively federal for new works, Title 17, U.S.C.
2. State law for sound recordings pre-1972
3. With few exceptions, there has never been a common law copyright

Categories of copyrightable works

1. Literary works, includes software--compiled machine code and source code
2. Musical works, including any accompanying words
3. Dramatic works, including any accompanying music
4. Pantomimes and choreographic works
5. Motion pictures and other audio visual works
6. Architectural works (new in 1990)

Criteria for Copyright Protection

(all four criteria must be met, doesn't need to be sent into Copyright office or require a copyright notice, work is copyrighted as soon as it is created)

1. **Original**
 1. Must have some minimal degree of creativity
 2. Mere compilations of data are not copyrightable
 3. Seat of brow theory rejected--can't get copyright by showing that author expended alot of \$\$ on the project of time
2. **Expression of an author (not ideas)**
 1. Ideas, themes, and titles are not copyrightable
3. **Non-utilitarian nature**
 1. Conceptual separability
 2. A pen or a planner wouldn't be copyrightable because its the only way to express it, therefore utilitarian
 3. Something utilitarian but of ingenious design might be able to patent it
 4. Scene-a-faire (scene you have to do in a movie of that genre, like a bank robber movie having guns and getaway cars, those elements would not be copyrightable)
4. **Must be fixed in a tangible medium of expression.(fixation)**
 1. It must be relative stable and permanent, such as in a paper, video, phonorecord, etc.
 2. For example, if a drummer improvised a drum beat at an unrecorded jazz concert, that beat would be uncopyrightable because it is not in a fixed form of expression

Exclusive Rights of a Copyright Holder

1. To reproduce in copies or phonorecords
2. To make derivative works--a work that incorporates elements of a preexisting work, such as a screenplay based off of a book, music sampling, etc, violate CO's rights, and therefore can only make with permission of CO or if the derivative work is based of material the public domain
3. To distribute copies
 1. First Sale Doctrine--allows someone who purchases copyrighted material to resell it (but not copy and sell the new copy) without permission of the copyright owner
4. To perform the work publicly-->but only for literary, musical, dramatic, choreographic works, pantomime, pictorial works (including individual images of a motion picture) graphical works, sculptural works

5. Sound recording: to perform the work publicly by means of digital audio transmission.

Duration of Copyright

1. Roughly about 100 years
2. 95 years after publication or 120 years after creation, whichever is earlier for corporate, anonymous, or pseudoanonymous works
3. Life + 70 years after the death of the last co-author
4. Congress has continuously extended terms, and may do so again

When works go into the public domain

1. Works first published in the US in 1922 or before
2. Works first published in US 1963 or before, if copyright is not renewed
3. Works first published in the US Feb. 1989 or before, if published without proper copyright, and if deficiency in notice was not cured in the time allotted
4. Works of the US government
5. Public domain status of foreign works is complex

Notice and formalities

1. Since March 1, 1989, US implementation for the Berne Treaty took effect, proper notice is not required although it is helpful in some ways
 1. Provides prima facie case of copyright (but rebuttable)
 2. Get stat. damages and atty's fees
 3. Right to sue
2. Registration is not required to accrue a cause of action
3. Registration before accrual of cause of action, or w/in 3 mos. of publication, is required for statutory damages and atty's fees
4. Registration is required before filing suit
5. **Requirements of copyright notice**
 1. Either the word copyright, or (C).
 2. Name of copyright owner
 3. Date of first publication
 1. For example "(C) 2011 Jim Bob"

Infringement

1. **Elements**
 1. **Copying:** The individual had to have *actually* copied the work
 1. Can be proven through **direct evidence** (for example, D admits that he copied)
 2. Or **Indirect evidence**
 1. Access: Show that D had access to the copyrighted work before making the alleged infringing work, the more access, more likely she copied
 2. Substantial similarity: the more similar the works are, the more likely D copied
 2. **Substantial appropriation:** did the defendant copy so much of the work that it would be considered infringement (aka they are SUPER similar in expression and likeness), i.e. a photographer copies the exact pose in a copyrighted photo with only two minor differences in the photo

Criminal Infringement

1. Infringement
2. Willful

3. and one of 3 aggravating circumstances
 1. for purposes of commercial advantage or private financial gain
 2. reproduction (or distribution) of \$1,000 (retail value) worth of work in an 180 day period
 3. distribution a work over the internet before release (bootleg copy of The Dark Knight Rises before release, bad idea)

Defenses

1. Fair Use
 1. **The purpose and character of the use:** educational use not for profit more likely to be considered FU than commercial use (for profit, plus would likely have an effect on the market)
 2. The nature of the copyrighted work: more likely FU if for scientific, biographical, or historical purposes
 3. The amount and substantiality of the portion used in relation to the copyrighted work as a whole: copying one sentence from 500 pg book more likely FU than copying a sentence from a 5 line haiku
 4. The effect on the market for the copyrighted work:
 1. P's sales would go down from D selling infringing work, would likely not be FU
 2. Taking a sentence from a book and putting it in a completely different kind of work, like an essay, would not effect sales, could constitute FU
 3. Or book that is no longer being published or sold, borrowing from that book could constitute FU
2. License express or implied
3. Statute of limitations : 3 yrs

Ownership and Authorship

1. Joint Work: A work prepared by two or more authors, with intent that the contribution be joined into a unseverable whole,
 1. Doesn't matter if one party only did a little bit of work, so long as they both intended to create joint work
 2. Problem with this you can't argue copyright infringement against your co-author for joint work
2. Collective Works: "a work, such as a periodical issue, anthology, or encyclopedia, in which a number of contributions, constituting separate and independent works in themselves, are assembled into a collective whole." 17 USC 101
 1. Initially each independent contributor has copyright on the material they put into the collective work
 2. Absent express transfer, the owner of the entire collective work only has the ability to distribute copies of the collective work, make revisions and distribute them (like a 2nd edition of a encyclopedia)
3. Work for hire: the employer, not the employee owns the copyright to the work. Must qualify under two circumstances:
 1. **Employment:** Presumed to be work for hire, unless otherwise stated in express agreement, if the work is created by an employee in the regular course of employment, i
 1. .e. a staff writer for a newspaper writing news article for the newspaper
 2. **Commission:** if person is specially commissioned from an independent contractors (aka getting someone who is not employed with you to do the work, a photographer of a wedding for example)
 1. Under these circumstances only work for hire if 2 conditions are met
 1. **Express agreement in signed writing:** The parties enter into an express "work fire hire" agreement in writing, signed by both parties **AND**
 2. **Work falls within these 9 categories of work:**
 1. Collective work
 2. Motion picture or other audiovisual work
 3. Translation
 4. Supplementary work
 5. Compilation
 6. Instructional text
 7. Test
 8. Answers to a test

Civil Remedies

1. Damages
 1. Lost profits + additional D's profits
 2. Statutory damages
 1. Neither willful nor innocent: \$750-\$30,000
 2. Willful: up to \$150,000
 3. Innocent: down to \$200
 3. Fees and costs
 4. Impoundment or destruction

Criminal Sanctions

1. DMCA, see Module 15
 1. **Safe Harbor:** Provides protection to ISPs who comply with notice and take down requirements
 2. **Anti Circumvention**

Module 10 Copyright and Music

Music Copyright

1. separate copyright interest

a. sound recording is circle p

- i. not protected originally- prior to 1972, sound recordings were protected under state law, not federal law. In 1972, sound recordings were brought under the federal copyright scheme
- ii. no performance right
 - e.g. radio stations can play the records and the owner of the sound recording cannot stop them or get any royalties
- iii. sound-alike recordings do not infringe circle p
- iv. there is a performance right for web-casting and satellite radio
 - subject to compulsory licensing and royalty scheme under 17 U.S.C. section 114

b. musical composition is circle c

- i. Performance right
 - radio stations, satellite radio, web-casters, stadiums, stores, etc. get rights to play through blanket licenses with performance rights societies (ASCAP/BMI /SESAC)
 - ASCAP and BMI are subject to consent decrees for licensing rates (deals made with the US department of justice)
 - Blanket licenses (based off of anti-trust laws)
 - do not cover movies or movie theatres
 - if a tv station wants to show a movie, they will need the blanket license.
 - performing rights societies divvy up the money
- ii. sound-alike recordings would infringe
 - but 17 U.S.C. section 115 gives you the right to get a compulsory license for non-dramatic musical works

2. Licenses

i. Blanket performing-rights-society license

- a license of the circle c
- grants the right to play music to the public
- given to restaurants, sports arenas, tv stations, radio stations
- but not movie theatres in U.S.
 - ASCAP v. ALDEN-ROCHELLE (anti trust laws prohibit requiring blanket licenses of theatres)
 - ASCAP and BMI represent singers and songwriters.

ii. Mechanical license

- a license of the circle c
 - license of circle c that lets you make your own circle p work
- grants the right to record a composition on to a phonorecord and distribute it
- compulsory mechanical license available under 17 U.S.C. section 115
 - applies to published, non-dramatic musical compositions
 - the Harry Fox Agency cuts deals on the same terms as section 115, but without the hassle (they deal with all the government paper so you don't have to.)
- 17 U.S.C. section 115
 - right to make cover versions
 - has contributed a lot of recorded music to the corpus of works
 - must be non-dramatic like a song on the radio, not like "phantom of the opera"
 - can do it without the permission of the songwriter
 - language: "A compulsory license includes the privilege of making a musical arrangement of the work to the extent necessary to conform it to the style or manner of interpretation of the performance involved, but the arrangement shall not change the basic melody or fundamental character of the work..."
 - if you want a complex license like this, you must go through copyright
 - there is no public performance right, except if it is live on television or live on the radio
 - issue with 115 is that you can make a cover version, but it has to be pretty close to the original work

iii. Synchronization license

- a license of the circle c
- negotiate with publisher
 - must be negotiated because you cant get a blanket license
- grants the right to use a music composition circle c in synchronization with moving pictures in an audiovisual work (motion picture, television)
 - need synchronization license if trying to synchronize it with the music
 - purchased in combination with public performance rights, if needed (e.g. for motion pictures, because no blanket licenses)
- no compulsory sync license available
 - always say you are needing the public performance rights

iv. Master use license

- a license of the circle p
- grants the right to use a sound recording circle p
- negotiate with record company
- no compulsory license available
- wording comes from the master recording
- with analogue copying, it would be less than the master
- in digital, multiple copies are the same as the master
- allows you to record on that on compilation album

Copyright Reversions and Terminations

1.Ways to recapture transferred copyrights:

- a) 17 U.S.C. section 304(c)**
 - i. for pre-1978 transfers

- Copyright extension legislation tacks years on to the end of existing copyrights
- The idea of section 304(c) is to give the benefit of those extension to the authors, rather than give a windfall to assignees.
- For pre-1978 works (1909 Act), under extension legislation, there are automatic renewals.
- Pre-1978 transfers
 - There are termination windows beginning at the 56th year (section 304(c)) and 75th year of the copyright (if not exercised at 56th) (section 304(d)).
 - Derivative works can continue on.
 - but after termination, there is no right to make further derivative works

b) 17 U.S.C. section 203

i. for post-1977 transfers

- The idea of section 203 is to give the artists who signed away copyrights back when they had no bargaining leverage a second chance to get a better deal.
- The first transfer window is opening up on January 1, 2013.
- section 203 may impact, many contemporary work.
- The grant must have been executed by the author to be terminable. (section 203(a))
 - Note: that this is in accord with the policy premise - to benefit authors who originally sold copyrights with little bargaining leverage.
- Must server notice between 10 and 2 years in advance of the effective date of the termination.
 - Note: the complicated arithmetic, need for complex docketing, and possible malpractice trap.
- Derivative works may continue to be utilized under the terms of their original grants after termination. But this does not apply to the making of new derivative works.
 - So a transferee can sell DVDs, e.g.
 - But the transferee can't make sequels after termination.

Module 11 Trademark

Trademark overview

1. **Trademark-** marked used to identify the source of the product (R)
 1. **Source--**Meant to protect the source of the product so that when someone goes to buy a diet coke, they know that it came from coca-cola, and not some knock-off company that sells bad diet coke
 2. **Reputation--**when someone goes to buy a pair of shoes, they may purchase a pair of nikes instead of a generic brand because nike is known for making good shoes, therefore their reputation only serves them if the source of their product is identifiable to the public
 3. **Does not have to be registered,** can use a TM or SM for service marks
2. **Protectible trademark**
 1. Distinctive
 2. Fanciful--madeup word like Kodak
 3. Arbitrary: Apple for computers, have nothing to do with apples
 4. Suggestive: Coppertone, doesn't describe product, but suggests you'll get coppertone skin
 5. Generic: Apple for apple, can't trade mark, same with things that have now become generic, like cola, or q-tips
 6. Functional: like color orange of safety cone, shape of cup, while it might be unique, you can't get trademark because the mark is not related to your reputation, but to the functional quality of the product, which could essentially give you a monopoly on all cups and safety cones, irregardless of reputation
3. **Ownership**
 1. Not the first person to think of product, but the first person to use it in commerce
 2. Reserve with intent to use application with Patent office, must use in commerce w/in 6 months unless extension applies
4. **Trademark Infringement**

1. **Use in commerce:** making a coffee table book of labels not trademark infringement because not trying sell book based on the reputation of those logos, ur not using the logos "in commerce"
 2. **Likelihood of confusion:** consumer surveys persuasive
5. **Losing Trademark**
1. **Licensing in gross:** trademark owner allows another to use trademark, and owner does not retain right control over quality licensees product, kiss that trademark goodbye
 2. **Assignment in gross:** trademark owner assigns trademark to another without the underlying goodwill that mark represents (the quality and name recog), can avoid loss of trademark by transferring with the mark underlying business operations and tangible assets
 3. **Abandonment:** trademark owner stops doing business with no intention of starting up again
 4. **Product becomes too generic:** escalator, thermos, or aspirin
 5. **Failing to police** others from using the trademark can result in abandonment

Trademark issues in entertainment

1. Key trademark issues in the entertainment context

i. ownership of band names

-standard trademark doctrine and concepts apply

-source

-reputation

-not who is first to think of or coin

-agreements to the contrary may or may not be enforceable/valid

-Bell v. Streetwise record

-Bell, Bivins, Brown, DeVoe, and Tresvant seek exclusive rights to the mark "New Edition" for performing and recording.

-Streetwise produced, recorded, and marketed the first New Edition LP, and claims that the mark "New Edition" belongs to them.

-Streetwise says it employed the four artists to serve as a public front for a concept which it developed, and to promote recording embodying that concept: "black bubblegum music of the 80's"

-Four of the five current members of New Edition started at a talent show, where they performed as "New Edition." Defendants discovered them there.

- "Priority is established not by conception by bona fide usage."

-But that doesn't resolve this case.

-The five say the goods are entertainment services of themselves.

-Streetwise claims the goods are the recordings, which they own, and which embody the Streetwise concept.

- "Public association... is crucial in establishing just what the mark has come to identify, i.e., what the 'goods' are."

- "In order to determine ownership in a case of this kind, a court must first identify that quality or characteristic for which the group is known by the public."

- "The second step is to determine who controls that quality or characteristic."

- "The 'magic' that sold New Edition, and which 'New Edition' has come to signify is these five young men."

- "I conclude that the quality which the mark New Edition identified was first and foremost the five plaintiffs... The 'goods' therefore are the entertainment services they provide. They and no one else controlled the quality of those services. They own the mark."

ii. clearance of footage

-apply standard trademark doctrine to logos and trade names caught on film.

-the test for infringement is likelihood of confusion

-risk averse climate encourages getting unnecessary licenses.

-practice of needless licensing can affect consumer perceptions.

-feedback effect.

- plausible likelihood-of-confusion after feedback.
- product placement may affect consumer perceptions as well.

iii. titles as trademarks

- standard trademark doctrine and concepts apply.
 - source
 - reputation
- USPTO will only register titles for series

iv. trademarks and merchandising

- standard trademark doctrine and concepts may be left behind
 - source
 - reputation
- courts sometimes depart from sound trademark concepts to hold for entertainment industry litigants trying to get exclusive rights to fictional elements of a story

v. putative use of trademark to exclude others from expressive works

- standard trademark doctrine and concepts apply.
 - source
 - reputation
- that hasn't stopped plaintiffs from trying.
- Supreme Court refused this tack.

Module 12,13 Right of Publicity and Privacy Torts

RIGHT OF PRIVACY –V- PRIVACY TORTS

- Right to privacy is represented by interests protected in the Constitution's Bill of Rights
- Tort law of Privacy – deals with invasions of personal privacy by individuals or businesses making possible civil lawsuits for monetary damages.

Defamation –v- Privacy

- Privacy law deals with freedom from emotional distress, while defamation's primary concern is reputation.
 - Some publications may be both defamatory and an invasion of privacy
 - BUT courts do not usually allow a plaintiff to collect for both actions
 - Similar to defamation suits, the right to sue in a privacy suit only belongs to the P!

2 Important Things to Remember about Invasion of Privacy:

1. There is GREAT conflict of laws from states to state
2. Balancing the scales is important – gotta weigh the public interests in an open society with the freedom of expression and the right to publish

4 Kinds of torts under “invasion of privacy:”

1. **Intrusion on plaintiff's solitude or “newsgathering tort”**
 1. **Peeping, unlawful surveillance**
 2. **Truthfulness does not apply**
 3. **Not intrusion to take someone's picture in a public place**

1. **Photographers stand in for the public, capturing images anyone could see if they were there**
2. **False Light.**
 1. Statement doesn't have to be bad, just false and highly offensive
3. **Appropriation (a.k.a misappropriation, right of publicity)**
 1. Using someone's likeness or name
 2. Could be true or false
 3. Can't use for a commercial purpose
 4. **notes**
 1. the right exists purely as a matter of state law.
 2. only individual natural persons can bring suit under the right of publicity- corporations and business associations have no such protectible interest.
 1. among natural persons, the right of publicity is most typically invoked by celebrities.
 3. although often still regarded as a tort, the right of publicity is sometimes considered a property right, and in some states, the right can persist post-mortem, devisable by will.
 4. Because of the largely unbounded nature of the right of publicity in its blackletter formulation, defenses to right-of-publicity suits are extremely important in defining the true scope of the right.
 5. The First Amendment does much of the heavy lifting in defining the outer contours of the right.
 6. Because the right of publicity is a creature of state law, federal copyright preemption has also been used to stop many asserted cases.
 7. Additionally, uses of personal identity which are "fleeting and incidental" or "de minimus" are often excluded from the scope of exclusive entitlements under the right of publicity.
 8. The defense of implied license also restricts the scope of the doctrine in important ways.
4. **Publication of Private Matters**
 1. Often goes with Intrusion

False Light

Components of a False Light lawsuit:

1. Publication and Identification. Must actually be published and identifiable (like defamation claims)
2. Falsity must be substantial and must be proven by the P
3. The false light (as stated in the restatement of torts) must be "highly offensive to a reasonable person"
4. D must have had "knowledge of or acted in reckless disregard as to the truth or falsity of the publicized matter and the false light in which the other would be placed"

Dempsey v. National Enquirer – pilot that fell out of plane...paper published an article that they made seem was written by the pilot that actually landed the plane.

1. The interest protected is the interest of the individual in not being made to appear before the public otherwise than he is.
 2. It is not, however, necessary to the action that the P be defamed.
 3. It is enough that he is given unreasonable and highly objectionable publicity that attributes to him characteristics, conduct or beliefs that are false, and so is placed before the public in a false position.
- Unlike defamation which requires that a person's reputation be damaged, the false light tort requires only that the published statement be false, substantial and objectionable.
 - Everything depends on context. If a picture's caption shows someone in a false light, don't use it!
 - EX:...picture of couple taken in the public. It was ok when it had a caption about Love, but not about Sex.
 - Duncan v. WJLA-TV
 - News story video footage implied that innocent female bystander had herpes

- P survived summary judgment, then won small award

Defenses to False Light Privacy Lawsuits

1. Plaintiff must prove falsity. (Instead of the D proving truth - ??)
2. **Where public interest is involved – actual malice must be shown**
 1. Case where woman's HORRIFYING neighbor sent in pics of her naked...because she was a private actor, she only had to prove negligent behavior by Hustler
 2. If persons caught up in the news are to recover damages for falsity, they must prove "Actual malice"
3. **Consent**
 1. must be provable and
 2. must be broad enough to cover the situation complained of (consent to one thing is not necessarily consent to another)
4. **Remember that Consent:**
 1. Must be pleaded and proved by the D
 2. Consent to one thing is not consent to another
5. Signing a release does not necessarily mean consent if what you consented to is taken out of context.

Appropriation of P's Name or Likeness

- *The appropriation or "taking" of some element of a person's personality for commercial or other advantage.*
- *Re-Publication of a news media's work is ok (case where newspaper made t-shirts of the front page of one of its papers that featured Joe Montana)*
- *Usually these suits are limited to advertising and now news reports.*

The Right of Publicity

- *Courts have found property rights in performer's likenesses or personalities.*
- *Recording a performer's act is actionable.*

EXAMPLES:

- *Case where GM had a trivia question about Karim Abdul-Jabar in their advertisement.*
- *Cases where impersonators used people who resemble or sound like the celebrities in a context that would make the public think it was the celebrity.*

Whether or not a dead person can sue for their publicity rights depends on what state you are in. 28 states provide protection for the names, likenesses, voices and images of celebrities after their death.

Republication of Private Matters

- Truth is not a defense to an invasion of privacy suit.
- Lawsuits for defamation will not stand where the media have accurately reported the truth, but the media nevertheless could lose an action for invasion of privacy based on similar fact situations.
- Defense: publication accurately based on open records has been protected by qualified privilege and escaped successful lawsuits.

Privacy Right of Intrusion

- *Invading a person's solitude...hidden cameras or microphones.*

Dietman v. Time – media has no right to break the laws to get a story even if it is legitimate news.

- *Press can go to far even in public places (Stalking Jaqueline Kennedy Onasis)*

Nonconsensual Entry/Refusal to Leave

Trespassing is not ok. Doesn't matter if officials give you the ok – the tenants or owners must say ok. Landlord's permission is not enough.

- *Trespass is both a crime and a tort.*

Access to disaster scenes – press has no right to go where the general public cannot.

Fraud Claims and Undercover Reporting

ABC v. Food Lion

1. *ABC reporters came up with fake identities and applied for jobs*
2. *Dist. Ct granted a HUGE award (5.5 M) and the Ct. of App reversed saying they could not collect for fraud because their only damages were training the employees*
3. *Ct. of App used Cowen's argument and stated that "generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news."*
4. *However, there remains a public stake in clean food.*
5. *ABC got into trouble because it did not first exhaust traditional open reporting methods. After that, some reporters believe that you should do whatever because the ends justify the means.*

Dateline Trucker case:

1. *where Dateline told the trucker's it would not include an organization that opposed the trucker's habits in it's story and then did it anyway*
2. *Ct of App upheld the fraudulent and negligent misrepresentation because Dateline had already conducted the interviews with the organization when it lied to the truckers and therefore, it was a specific misrepresentation.*
3. *However, the Ct was less responsive in the trucker's argument that Dateline promised to portray them in a positive light, saying this was merely "puffery"*

Tortious Interference With a Valid Contract

A third party's intentional inducement of a contracting party to break a contract, causing damage to the relationship between the contracting parties

- *Elements:*
 - *A valid contract*
 - *Defendant's knowledge of the contract*
 - *Intent to interfere with the contract*
 - *Causation*
 - *Interference with the Contract*

- *The causation issue is very tricky, the accusation of intentional interference is easy-- but to prove by preponderance of the evidence there was an intentional interference is difficult*

Case:

1. *CBS was going to publish statement from an executive of a tobacco company and feared being sued for tortious interference with a K.*
2. *New York Times criticized CBS saying they gave into fear rather than the public good of reporting it and that this would cause other employers to get secrecy agreements from their employees.*
3. *CBS had paid the employee, which would mean it paid the employee to get him to violate his secrecy K.*

Module 14 Defamation

Overview of Defamation

- **Defamation- is the communication of a statement that makes a false claim, expressively stated or implied to be factual, that may harm the reputation of an individual, business, product, group, government or nation.**
- **Defamation Elements:**
 - **Publication (includes telling a third party) of a**
 - **False statement which is**
 - **Harmful to one's reputation, and is**
 - **Unprivileged (no consent, no lawful justification)**
- **Opinion: There can be no libel predicated on an opinion. The publication must contain a false statement of fact. However, where the alleged defamatory remarks could be determined either as fact or opinion, and the court cannot say as a matter of law that the statements were not understood as fact, there is a triable issue of fact for the jury.**
- **Preponderance of the evidence burden shifts to the P to prove a statement is not true.**
- **Defamation must actually damage a person's reputation: if one's reputation is terrible, defamation may not be possible.**

2 Sides of Defamation

• 2 sides of deformation:

1. Constitutional

o First Amendment Based:

- Absolute privilege to fairly and accurately report, newsworthy charges made by one public figure against another.
- Not applicable when used to incite personal attack.
- Moot if reporter lacks malice.

2. Common Law

- o Fair reporting privilege.
- o The media is privileged to provide a fair and accurate report of defamatory statements made in the course of legislative, judicial, administrative and other official proceedings/record, if:
 - The proceedings or records are open to the public.
 - Relates to a matter of public concern.

•&vβσπ;Limitation of the fair reporting privilege:

- o Common law malice.
- o Must be fair.

Facts v. Opinion:

- Opinion is protected.
 - Fact is not protected , unless grossly distorted.

Slander v. Libel

- Slander
 - o Slander Per Se:
 - When you falsely accuse someone of...
 - a criminal offense
 - a loathsome disease
 - A matter incomparable with the proper exercise of the P's business, trade, profession or office or
 - Sexual misconduct.
 - o Plead and prove special damages
- Libel: Defamation by written or printed words.
 - o Libel has been considered the more damaging form of defamation because printed defamation generally has greater permanency and reaches more people than oral defamation.
- Jurisdictions are split on whether television and radio are libel or slander

REPUBLICATION

- If you report a defamatory statement that someone else said, then you are liable
 - o Unless you're reporting what police or prosecutors are doing or saying, that's an exception

WHAT CAUSES A JURY TO FIND FAULT

- Failure to contact obvious and available source
- Reliance on a single biased source, or one with a grudge against P

DISCOVERY IN DEFAMATION SUITS

- The 1st Amendment does not prohibit plaintiffs from directly inquiring into the editorial processes of whom they accuse of defamation.
 - REASONING: Because it must be false for a defamation claim to hold water, the thoughts and editorial processes of the alleged defamer should be open to examination.
- The discovery process is very intrusive...journalists should conduct themselves carefully.
 - Publishers need to develop clear policies about how their news is gathered.

DIFFERENT STANDARD FOR PUBLIC OFFICIALS AND FIGURES

- New York Times Co. v. Sullivan – News media are not liable for defamatory words about the public acts of public officials unless the words are published with “actual malice.”
 - Even factual errors will not make a publication liable
 - REASONING: If you stop publishers from printing stories about public officials that they had printed in good faith, then you are limiting the democratic process and shutting down all publications
 - Erroneous statements are inevitable in free debate.
 - Doesn’t matter if it is a criminal or case.
 - Remember: If you are dealing with a situation and you figure out that the person who is claiming to be defamed is a public figure or public official, move for Summary Judgment on the grounds that they failed to prove actual malice.

Actual Malice: Reckless Disregard or Knowing Falsity

- Actual Malice that the P must prove consists of the publisher’s knowledge that what he printed was false, or else disregard on the part of the publisher as to its probable falsity (Knowledge or High Degree of Awareness)
 - Hatred, ill-will, etc does not count, even though this is how the word “malice” is normally used
 - It is more common for courts to find reckless disregard for the truth instead of knowledge of falsity.
 - Must demonstrate actual malice by CLEAR and CONVINCING evidence
 - Reckless Disregard – “high degree of awareness of falsity”...Garrison v. Louisiana. For reckless disregard to be found, “there must be sufficient evidence to permit the conclusion that the D in fact entertained serious doubts as to the truth of his publication.” Persons who are not believable or who are relied on despite their known biases
 - Publishing an inherently improbable story
 - Failing to contact a necessary and proper source
 - Recognizing that the publisher has doubts about the truthfulness of the story and still publishes it.
- Assigning a young reporter does not constitute actual malice
 - Knowing Falsity
 - It is a type of malice
 - Like, reckless disregard for the truth

Libel per se

- damages do not need to be proved because they are assumed
- This is the standard...
- Of Course, Truth is a complete privilege!

- Deliberate misquotation of a public figure cannot be libelous unless the wording changes the meaning of what really was said
 - A deliberate alteration of the words uttered by a plaintiff does not equate with knowledge of falsity unless the alteration materially changes the substance of the statement.

Who constitutes “public official” or “public figure”

- Stories published subsequent to the initial defamatory story will not make a private person a public figure – the analysis takes place when the defamatory story is published.

Public Official

- Rosenblatt v. Baer – the “public official” designation applies to, at the very least, those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of gov’t affairs.
 - The Sullivan rule may apply to a person who has left public office where public interest in the matter at issue is still substantial.
 - Public official does not mean public employee!
- A Charge of criminal conduct against a present official, no matter how remote in time or place the conduct was, is always “relevant to his fitness for office.”
- Courts vary significantly regarding who they will and won’t include as a public official.
- Doesn’t matter if the person is not employed as a public official...if that person is in a position to make policy and has access to the press (presumably for self-defense), that can add up to classification as a public official

Public Figure

- People who throw themselves into public controversies in an attempt to influence their outcomes are more than just anonymous residents and constitute public figures and are subject to Sullivan
- Rosenblum v. Metromedia – Publisher of nude magazines sues...May be extended to private citizens involved in libel whenever the news is a “matter of public interest”
- Policy:
 - Private citizens are at a disadvantage because they do not enjoy greater access to channels of communication like public figures do. They are more vulnerable and need more governmental protection
 - Media is entitled to act on the presumption that public figures have exposed themselves to an increased risk of injury
- Gertz decision analyzed
 - A public figure is created in two ways:
 - An individual may achieve fame or notoriety that he becomes a public figure for all purposes and contexts (“all purpose”)
 - you need clear evidence of general fame or notoriety in the community and pervasive involvement in the affairs of society
 - An individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues. (“vortex”)
 - to determine this, you need to look into the nature and extent of an individual’s participation in the particular controversy giving rise to defamation.
 - EX: Firestone divorce case – woman was not a public figure simply because she allowed her private affairs to be aired in the public eye. She did not have “special prominence in the resolution of public questions” or “pervasive power or influence.”

- Thus, you do not use Rosenblum, which required the courts to examine the TOPIC of the news – instead you must now examine the INDIVIDUAL and his role in public life.
- The Sullivan rule applies to candidates as well – candidates are treated the same as occupants of the office. It does not matter if the public candidate/official’s public or private reputation is ruined. Anything that might touch on an official’s fitness for office is relevant.
- Public figures don’t have to just be people – they can be organizations (Ithaca college ex)

Limited Purpose Public Figures

- Someone can be a public figure for a limited purpose.
- Bootstrapping – when a D will try to take a private person P and turn him into a public figure in order to require the P to pass the actual malice hurdle.
- NOTE: Average libel suit costs \$175,000.

Cases

- Prozeralik v. Capital Cities, Inc.
 - TV station reported about beating connected to Mafia
 - Speculated about the identity of the victim, contacted FBI with Prozeralik's name
 - Agent said she didn't confirm Prozeralik's name, didn't give another name, didn't approve story
 - Prozeralik sued
 - Station erroneously blamed FBI for putting forth Prozeralik's name
- Masson v. The New Yorker
 - Altered quotes case
 - Masson was projects director of the Sigmund Freud archives
 - Reporter altered quotes
 - Deliberate misquotation of a public figure cannot be libelous unless the wording changes the meaning of what really was said
- Walker v. Associated Press
 - Justice Harlan's dissent
 - A public figure who is not a public official may recover damages for a defamatory falsehood whose substance makes substantial danger to reputation apparent on a showing of highly unreasonable conduct constituting an extreme departure from the standard of investigation and reporting ordinarily adhered to by responsible publishers
 - Test has too many qualifiers

DEFENSES AGAINST DEFAMATION

- Neutral Reportage – A useful, but not-to-be-trusted defense against libel lawsuits goes under the name “neutral reportage.”
 - - Constitution protects accurate, unbiased news reporting of accusations made against public figures regardless of the reporter’s view of their truth
 - What is newsworthy is that the accusations were made...the press is not required to suppress newsworthy accusations merely because the reporter has serious doubts at to the truth of the accusations.

- BUT this only applies where the press is not taking sides or deliberately distorting statements in order to launch a personal attack.
- Some states have accepted this doctrine while others have rejected it.
- HOW DOES THIS SQUARE WITH THE REPUBLICATION RULE?

Three Main Defenses:

1. Qualified Privilege,
2. Truth,
3. Fair Comment and Criticism

Qualified Privilege

- Three branches of Gov't have an Absolute Privilege
 - There is no defamation liability for what these people say in the performance of their official duties.
 - Policy – the three branches of government work better when judges and politicians are able to speak their minds.
- Absolute Privilege for Citizens...
 - Absolute privilege to criticize the gov't
 - Exceptions
 - You can't reveal nat'l security secrets
 - Could be sued for defamation by an individual gov't actor
 - Can't discuss grand jury proceedings
 - Can't commit trademark infringement
 - Ex) using public college sports teams' mascots on t-shirts
 - Ex) NYPD t-shirts
 - Statutory limitations on using gov't seals and insignia
- Media has a Qualified Privilege in Public or Official proceedings
 - News media may publish defamations from legislative, judicial or other public and official proceedings without fear of successful libel or slander action
 - The Absolute privilege that these people enjoy would be of little use if the media was unable to report it. People need to know what is going on in these proceedings...thus, media is given a "qualified immunity" (limited immunity).
 - The privilege is "qualified" in that it must be FAIR AND ACCURATE.
 - An accurate quote published out of context may not be privileged if defamatory. However, a wrong fact taken accurately from records is protected.
 - Adding opinion or extraneous material may also destroy immunity.
- The qualified privilege for the press comes into play when a hearing is either official or public:
 - Official
 - In some states, a document filed with the clerk of court is part of an official proceeding, can be reported on with no danger of defamation
 - In some states, it's not and you have to wait until something comes before the judge before you can report on it, or else you could be subject to a defamation suit
 - Policy: The classic justification for being able to report on court proceedings is because the public must be aware of what is going on with the court system
 - In all jurisdictions matrimonial proceedings are secret

- How does this square with Justice Holmes’ assertion that “it is of the highest moment that those who administer justice should always act under the sense of public responsibility”
 - The counterargument would be that it is of public concern how the judiciary deals with private matters
 - Also, one of the main arguments against same-sex marriage is that marriage is of public concern
 - Judicial Branch
 - Reports of official activity outside of the meeting may not be protected.
 - In many states, the pleadings do not get protection.
 - Campbell Rule (20 states follow this) – pleadings may be reported on fairly and accurately as soon as they are filed.
 - Some states have rejected this saying the press does not have a legal or moral duty to report on accusations.
 - Even jurisdictions where the pleadings are protected, 2 basic rules of reporting should be followed:
 - It should be clear where the document is from
 - Play fair – state when you have not gotten both sides of the story and why, for ex.
 - Executive Branch
 - Formal hearings are protected.
 - Informal hearings USUALLY are protected
 - informal investigations carried out by executive officers, for ex
 - Police reporters BEWARE! A preliminary police investigation may not be protected.
 - Legislative Branch
 - Can be even more difficult to determine which hearings are official or public.
 - Hearings often operate under loose rules.
 - Beware if:
 - No quorum
 - if the committee publishes material that its clerks have collected without itself first investigating charges in the material.
 - The committee has not authorized the work of its subcommittees
 - if reports are issued without the committees approval.
- - Public
 - To determine what meetings are “public” – KNOW THE LAW OF YOUR STATE.
 - The immunity is clearest when a hearing is both official and public. However, there does seem to be an emerging standard that even if a meeting is not public or official, it is important for the community to know what is happening where matters of public welfare and concern are involved...**If the media publishes non-public or secret materials containing defamatory information, the public interest in those materials needs to be compelling to afford the media protection from liability.

Truth

- Most states say that truth is a complete defense – SCOTUS hasn’t decided.
 - Also, true statements when taken out of context may also be libel.
- Policy – why should an individual be awarded damages from harm to his reputation when the truth of the matter is that his record does not merit a good reputation?
- Burden of proving truth = largely on the Plaintiff.

- Presumption - The media should not be punished for statement that MAY be true.
 - If it MAY be true, no punishment
- Truth will not be destroyed by a story's minor inaccuracies (saying Aug 15th instead of Aug 16th)
- Republication Rule - Not a defense that media reported accurately and truthfully someone else's false and defamatory statements. ** (HOW DOES THIS SQUARE WITH THE NEUTRAL REPORTAGE RULE??)
 - "according to a reliable source" or "according to police reports" does not remove liability. Liability under the republication rule exists.
- Difference between this and Neutral Reportage:
 - However, even though every fact in a story may be true – an act of omission may result in libel (Mr. Thompson and Mrs. Fredrickson were found at the home without saying that Mr. Fredrickson was also there)
- Some states take ill-will into consideration when analyzing the defense of truth:
 - Public - Doesn't matter if ill-will or intent to harm is shown. If it is truthful, must show knowing or reckless falsehood.
 - Private – Truth is only a good defense if made with good intentions and for justifiable ends.
- Accuracy v. Truth
 - Quoting something exactly is ACCURATE, but it is not always truthful.

Opinion and Fair Comment

Non-Actionable Opinion- Courts weigh several factors including

- the content of the alleged defamatory statement,
- whether the statement is provable as false,
- the precision and specificity of the language used,
- the use of cautionary language or words of apparency,
- the verifiability of the statement,
- the context in which the statement is made,
- its intended audience and
- the medium in which it is communicated.
- Demand for Retraction- This is an imperfect defense, but in some states a P's permissible recovery in a defamation action may be limited if the P fails to demand a retraction in a timely manner or if a D does make a retraction upon the demand of the P.

Fair comment and criticism- This privilege applies to communications about a newsworthy person or event. Conditional privileges may be lost through bad faith or abuse.

Mixed opinion – an opinion expressed in such a way to appear to be based on fact, and where the opinion is expressed so as to imply there are undisclosed facts justifying the defamatory statement. -Not protected.

Pure opinion – based on provable facts which are explicitly stated as support for the opinion.

Sometimes, courts use a four part test to distinguish between fact and opinion (365):

1. inquiry must analyze the common usage or meaning of the words
2. Statement must be verifiable
3. What is the linguistic context in which the statement occurs?

Steps to Protect from Charges of Defamation:

1. Change the names and circumstances so that the people depicted are not identifiable
2. Obtaining a depiction release from those persons portrayed
3. Exercising any potentially defamatory material.

Defamation Flow Chart

First Amendment Applicability: Is P a public official, public figure, or does the statement involve a matter of public concern?

No → the First Amendment does not come into play, go to common law analysis

Yes → First Amendment does come into play, go to constitutional analysis

Constitutional Analysis—

Public Official Public Figure (someone who has put themselves in public light)

Was the statement false AND . . .

Did D act with malice, that is, D acted with knowledge that the statement was false or reckless with regard as to the truth or falsity of the statement?

Private Person RE Matter of Public Concern

Was the statement false AND . . .

Did D act with malice, that is, D acted with knowledge that the statement was false or reckless with regard as to the truth or falsity of the statement OR

Did D act negligently and P was actually injured?

NOW GO TO CL ANALYSIS

Common Law Analysis—

Is there a defamatory statement (defamatory = tends to injure the reputation in the view of any substantial or morally respectable group)? If no, no liability

Is the statement of or concerning P (identification of person can be implicit, can be by group identification if group is small)? If no, no liability

Was the statement published (intentionally or negligently actually communicated to at least one person)? If no, no liability. If yes to all of these go to libel or slander analysis

Is it libel (oral) or Slander (written)?

Slander → Slander Per Se

Does the Statement's defamatory information come from . . . ?

Adverse to one's profession or business loathsome disease

Guilt of crime involving moral turpitude

Lack of chastity

If yes special damages no special damages need to be proven go to defenses

If no, then need to be proven, go to if special damages not proven, no liability, if proven go to defenses

Libel

Is it libel per se (no external information is needed to understand defamatory import) go to defenses

Is it libel per quod (innuendo, etc, some external information is need for defamatory meaning)

Defenses—

Is the statement substantially true? if yes, no liability

Is the statement protected by absolute privilege (court proceedings, legislative business, high-level government executive communications, spouse-to-spouse) ?if yes, no liability

Is the statement protected by qualified privilege (fair and accurate reporting, employment reference, other) ?if yes, no liability

Is the qualified privilege exceeded (lack of subjective belief in its truth, lack of objectively reasonable belief in truth, excessive publication? If yes no liability

Module 15 Online Safe Harbors

Two safe harbors for third-party content

1. 230
 1. Defamation and other state law claims
 2. Applies automatically
2. DMCA
 1. Copyright infringement
 2. Requires special set-up to use

47 USC 230

1. Protection for Good Samaritan blocking and screening of offensive material
 1. No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider
 2. No cause of action may be brought and no liability shall be imposed under any State or local law that is inconsistent with this section
2. Who is protected?
 1. Any interactive computer service is protected
 2. Interactive computer service means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server
 3. This includes blogs, forums, listservs, etc.

4. The original author of the defamatory statement or otherwise actionable content is not protected
3. What claims are barred
 1. Barred:
 1. Defamation
 2. Privacy torts
 3. Other state law civil claims
 2. Not barred
 1. Copyright
 2. Trademark
 3. Criminal Law
 3. Unclear
 1. Right of publicity
4. Bounds of immunity
 1. Ok:
 1. Passively hosting 3rd content
 2. Screening posts/comments prior to publication
 3. Selectively removing posts
 4. Selectively publishing posts
 5. Encouraging 3rd parties to submit
 6. Edits that don't materially alter the meaning

DMCA

1. Section 512
 1. Administrative requirements
 1. Designate an agent to receive take down notices
 2. Adopt and communicate to users a copyright infringement policy
 3. Properly comply with take down when received
 2. Substantive requirements
 1. You don't have actual knowledge that there is infringing content on your servers or know surrounding facts making the infringement apparent
 2. You don't receive any financial benefit directly attributable to the infringing activity, if you have the ability to control the activity
 3. You act expeditiously to remove or disable access to the infringing material upon obtaining actual knowledge or awareness of infringement or after getting a proper takedown notice

Module 16 Anti-Slapp

SLAPP

- “strategic lawsuit against public participation”
- Goal is not to win

• Goal is to silence critics

SLAPP--frequent claims

- Defamations
- Invasion of Privacy
- Intentional Interference with Contract

- Intentional Interference with Prospective Economic Advantage
- Intentional Infliction of Emotional Distress
- Intellectual property (copyright, trademark)

—Procedural law

—Designed to prevent the civil litigation system from being used to effectively silence critics, regardless of underlying merits

Anti-S LAPP statutes

California	Indiana	Ohio
Colorado	Massachusetts	Pennsylvania
District of Columbia	Michigan	Texas
Florida	New Jersey	Virginia
Georgia	New York	Washington
Illinois	North Carolina	

California Anti-SLAPP

425.16. (a) The Legislature finds and declares that there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and person for the redress of grievances. The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process. To this end, this section shall be construed broadly.

425.16 [b][1] A cause of action against a person arising from any act of that person arising from any act of that person in furtherance of the person’s right of petition or free speech under the U.S. Constitution or the California if. Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.

--Def. must show that the plaintiff is suing because of an “act in furtherance of [Def’s] right of petition or the free speech under the U.S. or California constitution in connection with a public issue”

---“any act in furtherance” covers any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest”.

Applicability OnLine

-A publicly accessible website qualifies as a public forum--see Barrett v. Rosentahl

-The website need not allow comments or have other interactivity with the public, so long as it is available to the public

--see Wilbanks v. Wolk, 121 Cal app. 4th 883, 897 [Cal Ct apt 2001

Getting fees and costs

-With a few exceptions 'a prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney's fees and costs. If the court finds that a special motion to strike is frivolous or is solely intended to cause unnecessary delay, the court shall award costs and reasonable attorney's fees to a plaintiff prevailing on the motion".

LICENSE v. WAIVER v. CONTRACT

A license is NOT a contract. A license is an affirmative defense. A contract may include a license. A contract is a bargained for exchange between two parties with mutual consideration. No consideration is necessary for a license. So if you sign something when you go into a bar – that can be a license (same thing as a waiver) *So with copyright infringement, license is always a defense (express or implied). I have an implied license to wear D&G – by selling something with their logo on it, they have given me an implied license.

CONTRACTS

Building Blocks of Contracts

1. Introductory Matter
2. Definitions
 1. In line OR you can have a separate definitions section (do not put operative provisions in the definitions. It is bad drafting)
3. Representations, Warranties and Covenants
 1. Representations – statement of fact intended to be relied upon
 1. Kinds:
 1. about the enforceability of the k
 2. subject matter representations,
 3. representations about the parties
 2. Exceptions: "except for...."
 1. Bring Downs: A rep that was made at one point in time is being re-made at a later point in time
 2. EX: "all of the goods are described in Section F..."
 3. Survival of Reps: "Representations may survive the closing"< /li>
 2. Warranties– assurance of a fact coupled with an implicit indemnification obligation if false
 1. Reps and warranties are functionally the same thing, they are both snapshots in time, they are both used to smoke out facts (Depositions), and to allocate risks
 3. Covenant – ongoing promise to act or refrain from acting, to maintain a certain factual condition
 1. Kinds:
 1. Affirmative (something you have to do),
 2. Negative, or
 3. Financial (ex: need to keep a certain amount of money in the bank)
 2. Exceptions:

1. CarveOuts – ex: the operator shall not make repairs or modification to the vessel, except for those that are required for safe operation.
2. Baskets – ex: ???
3. Conditions Precedent: Things that have to be satisfied before performance is required.
4. Remedial Provisions -??
5. Operative Provisions - ??

Form of K

1. Normal: Always want date, parties, what the agreement is
2. Letter Agreement
3. Old Fashioned / Fancy; EX:Purchase Agreement (bold all caps)
 - This asset purchase agreement is dated march 12, 2009, and is between Hexetron Nuclear Systems, inc., a Delaware corporation (“ Hexetron”), and Vayatom Undersea Ventures Corp., a New York corporation
 - Letter agreement In-line, or definitions section

Types of Contracts:

1. Implied in Law
2. Implied in Fact

PROTECTING IP

Big five ways to protect IP:

1. Patent
 1. Doesn't come up often in media and entertainment
2. Copyright
 1. Lasts longer than patent
 1. Life of the author plus 70 years
 2. Protects expression
 1. Doesn't protect ideas
 2. If you write a book, it's protected
 3. If you have an idea for a book, it's not protected
3. Trademark
 1. Can potentially last forever
 2. Designates the source of products
4. right of publicity
5. trade secret
 1. Can potentially last forever, as long as the secret is kept
 2. Has independent economic value

Promises to Pay (“ hey that was MY idea!”) Rule:

1. have to have an express promise to pay either before or after the conveyance OR
2. circumstances and actions show a promise to pay;

Remember that it is important to take into account who you are dealing with. In the case where the guy blurted out his idea to a secretary, there was no confidence found.

Tort-Like claims:

1. Right of Publicity
2. Trade Secret – can potentially last forever. Idea is that this had independent economic value.
3. Trademark – can potentially last forever. This all comes back to designating the source of goods.

Breach of Confidence

1. arises when an idea is offered in confidence and is voluntarily received in confidence and the understanding that it is not to be disclosed to others.
2. Important: Have to have evidence of the communication of confidence.

What can you do if a client comes to you and says he has an idea he would like to protect his work...

1. Use the magic words when discussing this idea with producers...“ What I am about to tell you is in confidence” and Make saying this phrase a habit.
2. Send a letter to the person you pitched your idea to confirming what was said. (“Record making letter”). At least make a note to yourself so that you know what was said.
3. Could tell the person that “If you use this, you will pay me, right?” Sets up an oral contract... but the terms are not set, so you could get screwed.
4. Write the idea down and copyright it (claim copyright protection over it). You can create a Writers Guild of America Registration – but need to update it every 5 years. You can only sue someone for copyright if they had access to it and looked at it. Johnson says that he would have stuck it on the internet and that way – everyone has access to it!
5. Bring a witness
6. Explain at outset that you expect to get paid
7. Get them to actually sign a K
8. Bring in a tape recorder (careful...not allowed to do this in every state)
9. Write a treatment, so that you have then gone from mere expression which would then take you into the realm of copyright law
10. Keep notes.
11. You can send anything written to the WGA to have it registered, to show when you wrote something

When you buy “the rights” to something what does that really mean?

- Waivers for defamation, right of privacy causes of action, right of publicity causes of action.
 - you are also buying their cooperation
 - It is important that they do not retain any approval rights.

Cases

- Desny v. Wilder
 - Implied in fact contract
 - P telephoned Billy Wilder's office, spoke with secretary
 - Told secretary about an idea for a movie
 - Secretary told him to send in synopsis
 - P told secretary that if they were going to use the story to make a movie, he wanted to be paid for it
 - Secretary told him that he would be paid if his synopsis was used to make a movie
 - Movie was made very similar to P's synopsis
 - P sued and the court held that there was an implied in fact contract
 - Now, studios won't read anything unless it comes from an agent
 - Still doesn't protect them from a Desny-type suit

- Faris v. Enberg
 - Faris approached Dick Enberg with an idea for a sports quiz show with Enberg as the host
 - A similar show was made with Enberg as the host, but Faris got nothing
 - Faris hadn't authorized Enberg to speak with anyone else about the format
 - Faris didn't tell Enberg that what he was saying was in confidence

WHO'S WHO IN ENTERTAINMENT

- TV Writer / Producer Hierarchy
- Staff Writer
- Story Editor
- Executive Story Editor
- Co-Producer
- Producer
- Consulting Producer
- Supervising Producer
- Co-Executive Producer
- Executive Producer

Studio –

- functions like a bank.
- Most have lots and you tend to think of them as physical places.
- A team of E. Producers will think of a film and take it to the studio to see if the studio will fund the film. The Studio will fund the film in return for the copyright and the right to distribute the film.
- The studio cares about the budget, but has no control on how the film is made.
- Executive Producer doesn't necessarily work for one studio.
- Studios are like big dumb banks...there really aren't any rivalries.

Talent Agents

- Primary Role is to Procure employment for clients
- Usually receive 10% of the client's gross income
 - Usually cannot legally take a higher fee
- Many production companies will not accept literary materials unless they are sent through an agency
- Usually need to be licensed and associated with the WGA

Talent Managers

- Anyone can do this...don't need to be licensed.
- Talent Managers Associated have created a code of ethics that its members are expected to uphold.
- Marathon Entertainment, Inc. v. Blasi
 - does the Talent Agencies Act apply to Managers?
 - RULE: Any person who procures employment is a talent agency subject to regulation, regardless of how often they procure employment
 - Doctrine of Severability = When a manager has engaged in unlawful procurement, what is the remedy?...Labor commissioner may void contract, but may also enforce the doctrine of severability, voiding only the illegal portions of the K.

Entertainment Attorneys

- Usually take a 5% fee
- Conflict of issues can arise if an attorney represents both a talent and the production company

Creative Executives

- Dictates which projects will be developed
- Most time spent reading scripts and treatments

Entertainment Unions... the influence of a union comes from a voluntary agreement with the producers (but they really have no choice)

The Guilds

- Screen Actors Guild (SAG)
- Writers Guild of America (WGA)
- Directors Guild of America (DGA)
- Below the Line Talent Unions

Producers-

- Really in charge of the movie.
- Almost anyone can become a producer. "Producer" is used widely because there is no Producer's Guild like there is a Director's Guild.

2 Types of Producers:

1. Executive Producer who is the dealmaker and financier.
2. Line producer who is in charge of logistics for the shoot. He will hire crew, order supplies and equipment and make sure that everything the director needs to make the films available when needed (usually hired by the executive producer).

Director is really only working on stuff going on in the set.

- The director is the person primarily responsible for supervising the creation of a film or television program.
- Charged with keeping the production on budget and on schedule.
- A director is typically hired on an exclusive basis, preventing him from accepting outside employment and working on more than one film at a time.
- Final Cut- Usually the director does not have the right of final cut which is the power to determine the composition of the final edited version of the picture. Studios may insist on reserving this right to protect their investment.
- Miscellaneous- Television show, the director has a more limited role.

If there is a clash between a producer and director, a studio may find it less costly and disruptive to remove a producer than a director. Most producers are not independent and may rely heavily upon studios for financing and distribution of their pictures.

- Level of work for a producer depends on their experience. Producers get many credits because the Producer's Guild is not recognized as a union or a guild by the studios.
- Studios consider producers as part of management and have refused to enter into a collective-bargaining agreement that would restrict the studio's ability to grant credits.
- Studios can even give producing credits away as perks to persons who have not earned them.

SCHEDULE

Development – getting things organized and people hired...when something gets "greenlighted" it goes to pre-production

Pre-Production – Preparing to film.

Principal Photography – When the film actually begins taking motion picture for the film.

Post Production – Actors go home and editors kick in. Director can be as involved as he or she wants to be. Film gets scored. Sounds get added. -Looping – when the actors have to come back in and rerecord their dialogue after the picture has already been shot. -ADR – After dialogue recording. Adding in background noises. -Foley – adding in random noises (door closing)

NEGOTIATING THE DEAL

1. Option – Producers and Studios will often purchase an option on property such as completed screenplays and books they want to turn into movies.
 1. This is the exclusive right to purchase the property at a set price within a prescribed period of time.
 2. Usually the option period is 12-18 months
 3. Negotiable whether the option price is applicable against the purchase price
 2. Pay or Play
 1. Even if your script isn't used, you still get paid.
 2. WGA sets the minimum purchase price for an original screenplay (usually between 30-70,000)
 3. In some cases, the price the owner is paid may be tied to the budget, but the owner will usually at least set a floor
 4. (ex: Owner will receive 2% of the budget upon exercise of the option with a floor of \$150,000)
 3. Credit
 1. Generally determined in accordance with the WGA agreement. This is all negotiated
 1. EX: Based upon a short book by _____.
 2. Producers do not have the unfettered power to award writing credits.
 2. Credit Process- The WGA contract provides that a production company must send each writer a copy of the final shooting script and a “notice of Tentative Credits.” If a writer agrees with the tentative credits, he does nothing. If he disagrees, he must protest within the time specified in the notice.
 3. A writer whose work represents 33% of a screenplay is entitled to a screenplay credit. However, for original screenplays, subsequent writers must contribute 50% to the final screenplay to receive a credit.
 4. Reserved Rights
 1. Writer may retain certain rights
 2. Ex: if the book is already published, the owner must withhold the print publication rights
 5. Right of Negotiation – non-exclusive, has really no affect other than to say the writer has to meet with one studio (it has no real legal affect in court)
 6. Contracts are not merely legal instruments, not merely to allocate duties and responsibilities; they are methods of business communications, they function as ways for business persons to communicate with each other
- This statement may have no legal affect, but business persons may just take it as a cue to sit down and negotiate
1. Right of Last Refusal – (aka – Right to Match)
 1. if you go and talk to someone else, work up a deal, before you go through with it, you must come back to us and see if we want to match that offer
 2. This often just becomes a deal killer – the other party isn't going to want to put a huge effort into negotiations if you are obligated to go back to another party who has this right of last refusal or right to match
 2. Warranties – certain representations about what you are buying
 1. Examples:
 1. The property is wholly original with the writer, and no part thereof is taken or copied from any other source except for public domain material

2. The writer will not take any action that would interfere with the producer's enjoyment of the rights
3. Reversion – Owner will often request the right to reacquire her property in the event that the purchaser does not produce a motion picture, television film, or series based on the property within a certain, negotiated time period.
4. "Increased Marketability" – the mere starring in a film can get an actor new jobs or increased pay for their next film
5. "Negative Pickup": the riskiest way to finance a film and market it
 1. where someone produces the film, films it, cuts it, and then some studio picks it up and distributes it (like independent film)
 2. "negative" because the post-production product of the film is the actual negative of the film itself
 3. it is the studio that picks it up who has to produce the positive and distribute it
6. Turnaround Provision
 1. The purpose of the turnaround provision is to permit a producer to take his project to another studio if the first studio is no longer interested in pursuing it, while at the same time permitting the first studio to recoup its development costs if the project is undertaken by the second studio.
 2. Purpose- To permit the production company to recoup its costs in the event that the project is placed at another studio.
7. Creative Accounting
 1. These are common problems in movies.
 2. Audits cost about 20-30K and usually pay for themselves for top grossing films. You can discover clerical errors. The other error arises out of contract interpretation.
 3. The philosophy of most studios is "When in doubt, resolve it in our favor and we will fight it out later if it is contested."
 4. Other problems arise when improper deductions are made. For example, a studio may try to deduct the cost of an ad used to promote a different movie.
8. Anti-Slap Statute- To stop frivolous lawsuits. You can go beyond the pleadings unlike a 12(b)(6).
9. Contract v. Torts
 1. You can get punitive damages with a tort so lawyers are always trying to turn contract breeches into torts.
 2. Fraud, breach of fiduciary duty, Intentional interference with a contract (you have to sue a 3rd party who is not a party to the contract, Viacom case), breach of the implied covenant of good faith and fair dealing, Intentional interference with prospective economic advantage (can't sell ice because someone unplugged our ice machine).
10. Never offer to share profits in a contract because it will kill you.
11. As the show goes on, the production costs and distribution expenses should be lower and the show should start make money. At the same time you hope that the revenue stream will go up as the show gets more popular. At some point the show stops production but goes on in syndication so maybe someday you could make money off of net profits.
12. Literary Acquisition Contract
 1. Is an agreement to acquire all or some rights in a literary property such as a book or a play.
 2. Producers typically use it to buy a screenplay or movie rights to a book.
 3. Just like real property, the owners will disclose their copyright registration number so that buyers can check the copyright records and review the chain of title to be sure that they are getting all the rights they want.
13. Seller's Rights- A writer who allows adaptation of his work into film might want to retain book rights, stage rights, radio rights and the right to use his characters in a new plot.
 1. Buyers may usually obtain a Right of First Negotiation to these remaining rights.
 2. Writer also usually retains the right to use characters in a new plot.
14. Buyer's Rights- Right to Change- No buyer is going to invest large sums of money to develop a screenplay only to find itself in a vulnerable position, unable to change a line of dialogue without the author's permission. Buyer's will also want sellers to make certain warranties, or promises.
 1. The writer will often warrant that the work does not defame or invade anyone's privacy, or infringe on another's copyright. Buyer's also want writers to stand behind their warranties and indemnify buyers in the event a warranty is breached (or insurance when the writer is poor).
 2. Another provision is an agreement that the seller not let the property fall into the public domain. The buyer will want the right not to make the production as well. Also the rights to assign his rights to another without the writer's consent.

3. Right of Last Refusal would discourage third-party offers because why should Universal pictures spend time negotiating the terms of a sale with the writer, only to have the deal supplanted at the last moment by WB?
15. Deal Memo- Has incomplete sentences, mostly bullet points. Often they are signed. (Did in class...Seth Rogen)

FINES AND FEES

Net profits – refers to a contractually defined formula which can vary

- Lawyers can stipulate about what this is, but that doesn't mean a ct will go for it.

MAG (modified adjusted gross) – a net participation with negotiated distribution fees.

COMPENSATION AND SERVICES FOR WRITERS

1. WGA sets a floor...\$90,000 for an original screenplay (for a film with a budget of 5 M or more), \$24,000 for a re-write, and \$12,000 for a polish.
 1. IS MEMBERSHIP IN THE WGA MANDATORY??
 2. Usually what the writer has been paid in the past will be crucial to determining their pay today
2. Treatment – an adaptation of a story, book, play or other literary material for motion picture use in a form suitable as the basis for a screenplay
3. First Draft Screenplay, Rewrite, Polish: A studio will normally contract a writer an amount that includes the first draft, and one or more re-writes or polishes.
4. Pay or Play – Studio must pay the writer for each guaranteed step whether or not the particular step is actually ordered.
 - In other words, the studio can fire the writer whenever, but is still obligated to pay.
1. Standard Reading and Writing Periods are as follows:
 1. First Draft: 8-10 weeks for writing / 4-6 weeks for reading
 2. Rewrite: 6-8 writing / 4-6 for reading
 3. Polish: 4-week writing / 2-4 for reading.
 1. Studio will often try for shorter writing periods and longer reading periods and vice versa. Writer wants to opposite because then he or she gets paid sooner.
2. Turnaround – a contractual right of an individual to take partial control of a project or script on a temporary basis.
3. Reversion – a permanent transfer of rights in and to the writers work.
4. Writer's Bungalo – Little house for writers to write in.

DIRECTORS

1. DGA (Director's Guild of America) – regulates many elements of a directors engagement on motion picture projects and in other media
 1. The agreement acknowledges that the director contributes to all creative elements (and be consulted of them) in the making of a motion picture.
 2. With few exceptions, a producer may assign only one director to a film. The director must be provided a private office at the studio.
 3. A studio cannot replace a director who directs 100% of the principal photography except for gross willful misconduct.

4. The director is entitled to post-production creative rights. These creative rights include the right to be present at all times and to be consulted throughout the entire post-production period. Directors have a right to make a “director’s cut.”
 2. When negotiating a director deal on a feature film, the following key issues should be addressed:
 1. Development services – such as attending story meetings, supervising the writer, etc
 2. Pre-Production Services – director is normally needed on an exclusive basis about 8 weeks before the scheduled date of principal photography. Casting and budgets are finalized, set designs are completed, etc.
 3. Principal Photography Services – Director is obviously needed exclusively.
 3. Production Requirements that the director must often comply with often include:
 1. Length
 2. Budget
 3. Screenplay conformity (this will not vary widely from the original screenplay)
 4. Rating (need to receive a low rating)...MPAA ratings
 5. Cover Shots...alternate scene and dialogue used to cover scene (such as those containing nudity or profanity) initially shot for the film’s theatrical release in case the venue requires a more conservative version.
 4. Post-Production Services – Director must supervise the editing of the film
 1. Sometimes directors get a development fee (usually about \$25,000) for this time, but it is usually as an advance against the directing fee
 2. Usually payable one-half upon commencement of services and one-half upon the earlier of
 1. the studio abandoning the project, or
 2. the studio formally electing to proceed to production.
 5. Directors get paid WAY more than writers
 6. Studios and Producers usually impose a payment schedule for the director’s fixed compensation:
 1. 20% of guaranteed fee payable in weekly installments during the 8 week period immediately preceding principal photography
 2. 60% in weekly installments over the period of the principal photo
 3. 10% upon completion of the director’s last cut of the film
 4. 10% upon delivery to the studio/producer of the answer print
 7. Directors may also negotiate for a participation in the studio’s net proceeds. Directors who also write or act will obviously have more bargaining power.
 8. Pay or Play – when a director gets this, her directing fee is guaranteed regardless of whether she actually directs the film. However, even if a director gets this, exceptions can be made if:
 1. the director’s death or a disability preventing her from rendering services
 2. breach of K by director
 3. acts of force that affect the picture’s production
 9. Possessory credits (“A film by”) are usually given to directors
 10. Most directors will request a right of first negotiation to be engaged with any subsequent production (sequel).
- Directors will also sometimes be asked to remain attached to a project in a turnaround.

TV WRITERS

1. Writer is king in TV because of continuing series
2. Writers often take on expanded role of "show runner" (serves as executives of production and report only to studio and network)
3. Usually credited as executive producers which is the highest credit given in TV

RECORDING INDUSTRY CONTRACTS

- Employment contracts
- Record company owns copyright to sound recordings

- Composer owns copyright to the composition
 - Get royalties if it's in a movie, Muzak, etc.
 - No royalties from radio airplay
- Artist is required to perform, do promotions
- Record company is required to give the advance, but not required to record or release
 - Artist can't record with another company, unless released by the company holding the contract
- Extendable at the sole discretion of the company
- In California, duration is subject to a 7 year limit
 - Record companies like to choose New York law
- California has minimum payments
 - Year 1 \$9000
 - Year 2 \$12,000
 - Year 3 \$15,000
 - Years 4 & 5 \$15,000 + \$15,000 from another source (e.g., royalties)
 - Years 6 & 7 \$15,000 + \$30,000 from another source
 - The record company can make up for not having paid you by making the back payments
- The record company promotes the band's songs, and the band makes money by touring