

Entertainment Law Wypadki

Spring 2008

authored by students of
Entertainment Law
University of North Dakota School of Law
Prof. Eric E. Johnson
Spring 2008

Preliminary Printing

Not Authorized for Exam

This is copy of the Entertainment Law Wypadki is a preliminary version for use in studying.
You may not bring this copy with you to the exam to use as a reference. When you sit for the exam, you will be given a clean printed document, which will be the same as this document, except that this cover sheet will be different, and there may be markings on the interior pages to indicate that such pages are part of the official printing authorized for use in the exam.

Contents

- [1 Introduction](#)
 - [1.1 The Movie Industry, Then and Now](#)
 - [1.2 Negotiating Tactics & Strategies \(Litwak ch. 10\)](#)
 - [1.3 Hollywood History](#)
- [2 Contracts](#)
 - [2.1 Contract Issues - Cases](#)
 - [2.1.1 Interpretation](#)
 - [2.1.1.1 Donahue v. Artisan](#)
 - [2.1.2 Oral Agreements](#)
 - [2.1.2.1 Main Line Pictures v. Basinger](#)
 - [2.2 Contract of Adhesion](#)
 - [2.3 Turnaround Provision](#)
 - [2.4 Creative Accounting](#)
 - [2.5 Exhibitors v. Distributors](#)
 - [2.6 Contract v. Torts](#)
 - [2.7 Accounting Problems](#)
 - [2.7.1 Types of profits](#)
 - [2.7.2 Buchwald v. Paramount Pictures Corp.](#)
 - [2.7.3 Brennan v. Big Ticket](#)
 - [2.7.4 Notes](#)
 - [2.8 Contract Torts](#)
 - [2.8.1 Kinds of Contract Torts](#)
 - [2.8.1.1 Intentional Interference with Contract](#)
 - [2.8.1.2 Intentional Interference with Prospective Economic Advantage](#)
 - [2.8.1.3 Fraud](#)
 - [2.8.1.4 Breach of Fiduciary Duty](#)
 - [2.8.1.4.1 April Enterprises, Inc. v. KTTV](#)
 - [2.8.1.5 Breach of implied covenant of good faith and fair dealing](#)
 - [2.9 The Acquisition/Distribution Agreement](#)
 - [2.9.1 DeHaviland v. Warner Brothers](#)
 - [2.9.2 Radioactive Records v. Manson](#)
- [3 Liability for Audience Actions](#)
 - [3.1 Duty of Care](#)
 - [3.2 Weirum v. RKO General](#)
 - [3.3 McCollum v. CBS, Inc.](#)
 - [3.4 Possible Differences Between Weirum and McCollom](#)
- [4 Labor, Guilds and Pitfalls for Talent](#)
 - [4.1 Entertainment Unions](#)
 - [4.1.1 Types of Unions](#)
 - [4.1.1.1 SAG](#)
 - [4.1.1.2 AFTRA](#)
 - [4.1.1.3 Actors' Equity \(Equity\)](#)
 - [4.1.1.4 DGA - Directors Guild](#)
 - [4.1.1.5 WGA - Writers Guild of America](#)
 - [4.1.1.5.1 Marino v. Writer's Guild of America](#)
 - [4.1.1.6 IATSE - International Alliance of Theatrical Stage Employees](#)
 - [4.1.1.7 Teamsters](#)
 - [4.1.2 Exclusivity](#)
 - [4.1.3 Subversions of Exclusivity](#)
 - [4.1.4 CBA \(Collective Bargaining Agreements\) basics](#)
 - [4.1.5 Unions increase costs](#)
 - [4.1.6 How Unions serve as barriers to entry](#)
 - [4.1.7 Unions Circumscribing Entertainment Content and Distribution](#)

- 5 Agents, Managers, Attorneys and Employment Regulations

- [7 Trademark](#)
 - [7.1 Trademark law is about Source](#)
 - [7.1.1 Reputation](#)
 - [7.2 TEST](#)
 - [7.3 Background](#)
 - [7.4 Defenses](#)
 - [7.4.1 Genericide](#)
 - [7.4.2 Functionality](#)
 - [7.4.3 Abandonment](#)
 - [7.4.4 Non-Trademark Use](#)
 - [7.4.5 Nominative Fair Use Defense](#)
 - [7.5 Remedies](#)
 - [7.6 It Makes a Difference Whom you Pick a Fight With](#)
 - [7.7 Priority Battle](#)
 - [7.8 Grounds for a Claim](#)
 - [7.8.1 Confusion](#)
 - [7.8.1.1 AMF v. Sleekcraft Boats](#)
 - [7.8.2 Dilution](#)
 - [7.8.2.1 Eastman Photographic Materials v. Kodak Cycle=](#)
 - [7.8.2.2 Two ways to Dilute a trademark=](#)
 - [7.8.2.3 What do you have to show for dilution?](#)
 - [7.8.2.3.1 Moseley v. V. Secret Catalogue \(SUPCO 2002\)](#)
 - [7.8.3 Contributory Infringement](#)
 - [7.9 Cases](#)
 - [7.9.1 In re Elvis Presley Enterprises, Inc. \(1999\)](#)
 - [7.9.2 The Star v. 20th Century Fox](#)
 - [7.9.3 Morgan Creek Productions, Inc. v Capital Cities/ABC, Inc. \(1991\)](#)
 - [7.9.4 Bell v. Streetwise Records, Ltd.](#)
 - [7.9.5 The New Kids on the Block v. News America Publishing, Inc.](#)
 - [7.9.6 Mattel, Inc. v. MCA Records, Inc.](#)
 - [7.9.7 GAF Broadcasting Co. v. Caswell-Massey Co.](#)
 - [7.10 Notes](#)
 - [7.10.1 Notes on Trade Dress](#)
 - [7.10.2 Notes](#)
 - [7.10.3 Notes](#)
 - [7.11 Secondary meaning](#)
- [8 Copyright](#)
 - [8.1 Background](#)
 - [8.2 Requirements](#)
 - [8.3 Rights](#)
 - [8.4 Ownership](#)
 - [8.4.1 Morrill v. Smashing Pumpkins](#)
 - [8.5 Duration](#)
 - [8.6 Division and Transfer](#)
 - [8.6.1 Fred Alhert Music v. Warner/Chappell Music](#)
 - [8.7 Offenses](#)
 - [8.7.1 Infringement](#)
 - [8.7.2 Infringement of the Right to Distribute](#)
 - [8.7.3 Contributory and Vicarious Infringement](#)
 - [8.8 Defenses](#)
 - [8.8.1 Fair Use](#)
 - [8.8.1.1 Campbell v. Acuff-Rose Music, Inc.=](#)
 - [8.8.1.2 American Geo Physical Union v. Texaco](#)
 - [8.8.1.3 Saga Enterprises v. Mapia](#)
 - [8.8.1.4 Munster Comm. v. Turner Broadcast Systems](#)
 - [8.8.1.5 Lan v. Starks](#)
 - [8.8.1.6 Sandeval v. New Line Cinema](#)

- [8.8.1.7 Dr. Suess Enterprises v. Bantam Books](#)
 - [8.8.2 License](#)
 - [8.8.2.1 Motola v. EMI America Recordings](#)
 - [8.8.3 Copyright Misuse](#)
 - [8.8.4 Statute of Limitations](#)
 - [8.8.5 de minimus use isn't recoverable](#)
 - [8.9 Copyright in the Music Context](#)
 - [8.10 "Circle P"=](#)
 - [8.10.1 "Circle C"](#)
 - [8.10.1.1 Sampling](#)
 - [8.10.1.1.1 Newton v. Diamond](#)
 - [8.11 Synchronization License](#)
 - [8.12 Duration](#)
 - [8.13 Transfers](#)
 - [8.14 Non-exclusive licenses](#)
 - [8.15 Assign](#)
 - [8.16 Joint Author](#)
 - [8.17 Joint Work](#)
- [9 Copyright Cases](#)
 - [9.1 Subject Matter, Ownership, Acquisition, Rights & Infringement](#)
 - [9.1.1 Maljack Productions, Inc. v. UAV Corp.](#)
 - [9.1.2 Lone Wolf McQuade Associates v. CBS, Inc.](#)
 - [9.1.3 MGM, Inc. v. American Honda Motor Co., Inc.](#)
 - [9.1.3.1 Notes](#)
 - [9.2 Music](#)
 - [9.2.1 Motola v. EMI America Records](#)
 - [9.2.2 Bright Tunes Music Corp. v. Harrisongs Music, Ltd.](#)
 - [9.2.2.1 General public license \(GPU\)](#)
 - [9.3 Infringement \(cont'd\) & Fair Use](#)
 - [9.3.1 Beal v. Paramount](#)
 - [9.3.1.1 Notes on Access](#)
 - [9.3.2 Campbell v. Acuff-Rose](#)
 - [9.4 Copyright Part IV](#)
 - [9.4.1 Newton v. Diamond](#)
 - [9.4.2 Morill v. Smashing Pumpkins](#)
 - [9.4.3 Fred Ahlert Music Corp. v. Warner/Chappell Music, Inc.](#)
- [10 Broadcast Regulation, Obscenity, Telecom Regulations](#)
 - [10.1 Background on FCC](#)
 - [10.2 Obscenity](#)
 - [10.2.1 Luke Records v. Navarro](#)
 - [10.3 Broadcasts](#)
 - [10.4 Indecency](#)
 - [10.5 Profanity](#)
 - [10.6 FCC Payroll Broadcast Rules](#)
 - [10.7 Social Regulation](#)
 - [10.7.1 Luke Records, Inc. v. Navarro](#)
 - [10.7.2 FCC v. Pacifica](#)
 - [10.7.2.1 Regulated by FCC](#)
 - [10.7.2.2 Reasons FCC regulation is required](#)
 - [10.7.2.3 Theories for protecting stories](#)
- [11 Protection for Inchoate Entertainment](#)
 - [11.1 Theft of Ideas, Breach of Confidence, Development Deals, Submissions](#)
 - [11.1.1 Property](#)
 - [11.1.2 Express Contract](#)
 - [11.1.2.1 Buchwald v. Paramount Pictures Corp.](#)
 - [11.1.3 Implied-in-Fact Contract](#)
 - [11.1.3.1 Desny v. Wilder](#)

- [11.1.3.2 Grosso v. Miramax](#)
 - [11.1.4 Implied-in-Law/Unjust Enrichment/Quasi-Contract](#)
 - [11.1.5 Tort](#)
 - [11.1.5.1 Breach of Confidence](#)
 - [11.1.5.1.1 Faris v. Enberg](#)
 - [11.2 Theft of Ideas, Breach of Confidence, Development Deals, Submissions](#)
 - [11.2.1 Land v. Jerry Lewis Productions, Inc.](#)
 - [11.2.1.1 Notes](#)
 - [11.2.2 Grosso v. Miramax Film Corp.](#)
- [12 Legitimate Theatre](#)
 - [12.1 Theatre terms](#)
 - [12.2 Case](#)
 - [12.2.1 Thompson v. Larson](#)
- [13 Ratings](#)
- [14 Record Contracts](#)

Introduction

The Movie Industry, Then and Now

- Moguls
 - founded the industry
 - tough businessmen out to make a buck
 - tyrants who ran their studios with iron hands – changed stars names, told them what their next movie would be and loaned them like chattel
- Studio Executives
 - college-educated men and women with law degrees and MBA's who run studios
 - dealmakers not filmmakers
 - make decisions rationally
 - invest in state-of-art technology to improve picture quality
 - have many types of market research to help them
 - promote through sophisticated ads, merchandising tie-ins, slick music video and websites
- Downfall of the Studios
 - 1948 – Anti-Trust divested studios of their theater chains
 - 1950's – television
 - Studios began producing for television and cable
 - Studios are now conglomerates or are owned by conglomerates

Negotiating Tactics & Strategies (Litwak ch. 10)

- Honor code among “players”
 - Top Hollywood dealmakers: agents, attorneys, studio executives, producers
 - serve an unwritten code of behavior
 - dishonesty is not respected
 - oral agreements are relied upon
 - Ex. an agent may commit his client to a project and the written agreement won't be signed until the project is done
 - Theme – Hollywood Lawyers do a poor job industry pressures keep them from tying things up like a lawyer from the outside world would
- Terminology
 - High-balling: asking for excessive amount of money or positioning oneself favorably for compromise
 - Low-balling: suggesting an unduly low budget amount
 - Eat-in clause: provides that producer's profits and/or fees are eaten into if the film goes over budget

- Unwritten rule: everyone is entitled to modest raise over last deal
 - Substantial raises only if artist has recently won Academy Award or starred in blockbuster film
- Techniques to induce a studio to make a deal
 - Other buyers are interested
 - you do this through the grapevine or trade papers
 - play into an executive's desire to see a project first
 - Bargain: can be prestige film that cost little and have Oscar potential
 - offer the project as a way to build a relationship with an up and coming star
 - Hot topic: subject that everybody is talking about
 - Studios decline if television likely to produce movie first (lower budgets, faster production on TV movies)
 - TV limited subject matter and limited budget prevents exotic locations, sets, etc.

Hollywood History

The original founders were big gamblers and now everyone is trying to avoid risk and there are big board of directors that make large decisions based on trying to find sure hits. But the new studios aren't more profitable than the old studios. Dealing with Studios- Other Buyers are Interested- When studios hear that their counterparts in other studios are interested then they become even more interested. Of course you can't directly inform a Columbia executive of Fox's interest in your project and so they will be suspicious. So the masters of this technique use trade papers and grapevine to spread the word that they have a hot project. See Project First- If your script looks like it has been rejected everywhere, buyers may assume that it can't be any good. So spruce it up and make it different and make it a big deal that they are the first ones to look at it, everyone wants to be first. If you have old projects and sell one to Steven Spielberg, you can re-sell your old projects as a successful writer who just made a deal with a big shot. Building Relationships- Since executives come and go, they are usually looking out for their next job so they want to build relationships with important stars, directors and writers. So one way a smart dealmaker knows that it will be appealing is to present it as an opportunity for the executive to develop a relationship with an up-and-coming star.

Contracts

Contract Issues - Cases

A court can decide whether language in a contract is ambiguous. If reasonable minds can differ than it can be enough to send it to a jury Donahue. You can't back out of a deal in Hollywood that was made orally because so many people follow the honor system and do not use proper documentation Basinger.

Interpretation

Donahue v. Artisan

2002 U.S. Dist. LEXIS 5930 (S.D.N.Y 2002) - District Court District Judge Koeltl

- FACTS: "Blair Witch" The 3 main characters from the original Blair Witch movie signed a contract with Haxan so that Haxan could use their images (which included childhood photos) in the movie. Haxan then sold to Artisan, who proceeded to make a sequel. In promotion of the sequel, Artisan used images of the main characters from the original movie.
- ISSUE: Artisan says that they can use the images because they have a contract that says that they have the rights to use the images, plaintiff's say that was only for the 1st film.
 - the contract was based on a form contract
 - it had a pay or play clause
- REASONING:
- Applying NY law:

- **1) The Court decides whether the contract is ambiguous or unambiguous ***- unambiguous – has a definite and precise meaning unattended by danger of misconception in the purport of the contract itself and concerning which there is no reasonable basis for the difference of opinion**
 - - reasonable minds could not differ
 - - a contract isn't ambiguous because the parties urge different interpretations in litigation
- **2) If the Court finds the contract is unambiguous, it must give effect to the contract as written and may not consider extrinsic evidence to alter or interpret its meaning**
- **3) If the Court finds it ambiguous, it is for the jury to decide**
 - - if the contract is subject to more than one reasonable meaning and where extrinsic evidence of the parties' intent exists Artisan argued that the first sentence of a paragraph was a broad grant of rights but the plaintiff's argued that the limiting language would make the rest of the language superfluous.
- "It is agreed and understood that Haxan retains all rights to the results and proceeds of Heather's services to Haxan. Haxan retains the rights to dub into any language and to hire another actress for this purpose. Haxan retains control of all tie-ins and merchandising rights. It is understood that as long as Haxan pays Heather, Haxan is not obligated to pay Heather."
 - *Canon of Construction of Contracts – give meaning to every sentence (signal a future judge that the next sentences aren't meant to limit the previous by using language such as "including but not limited to OR for emphasis but not by way of limitation", etc.)*
 - *The Legal Work was Amateurish*
 - - think about contingent futures such as a sequel
 - - added complication – using her real name
 - o you can't get all the rights to someone's name = unconscionable
 - o she has a right to publicity
- **HOLDING:** The argument is that "all rights" gave them broad rights, but the next sentence says the same thing - so it would be repetitive and the court won't read something in that would make it repetitive - this is Contract Lesson #1 - the court will interpret to give everything meaning and not to make something superfluous - so use limiting language
 - Johnson said that if the contract had used a false name, there would be no claim, but they used her real name.
 - Summary judgment for Artisan was inappropriate - Proper interpretation of contract is issue for finder of fact and cannot be settled by summary judgment

Entertainment Terms from class discussion:

- **"Pay or Play Clause"** – (if the film does not get made, or if the studio casts a different actor) – what are the expectation damages? Courts tend to not want to entertain increased marketability damages because they are very speculative – "As long as we pay you, we are not obligated to play you." The damages are limited to the money set forth in the contract.

- Courts will, when interpreting breach of contracts, generally award actual damages in the form of unpaid wages, but are hesitant to award speculative damages (for exposure, increased marketability, etc.)
- Courts will not award specific performance to force employee to do work, but will force employer to use employee
- Limits damages to the money awarded in the contract
- Can prevent summary judgment because expert will be required to interpret meaning of clause

- **"Increased Marketability"** – the mere starring in a film can get an actor new jobs or increased pay for their next film

- **"Negative Pickup"** – the riskiest way to finance a film and market it – where someone produces the film, films it, cuts it, and then some studio picks it up and distributes it (like independent film) – "negative" because the post-production product of the film is the actual negative of the film itself – it is the studio that picks it up who has to produce the positive and distribute it

- *This is inferred from this case*

Oral Agreements

Main Line Pictures v. Basinger

Main Line Pictures, Inc. v. Basinger (Cal. App 1994) (Boxing Helena) Judge Grignon

- Basinger enters into an oral agreement (there is an unsigned deal memo) to act in Boxing Helena, things are discussed, documents are passed back and forth; Basinger gets a new agent and they say don't do the film; she pulls out
- Goes to trial for breach of contract
- Basinger and her *loan-out corporation* appealed from an \$8 million jury verdict against them because the verdict form failed to differentiate between Basinger and/or Might Wind
- Need to decide if Might Wind and Basinger can be separated at trial or if they are the same
- The problem is the judgment is against "Basinger and/or Might Wind" which is ambiguous as to liability.
- No alter ego argument was made to pierce the veil of the corporation and show if they are separate or not
- Phillips gets the memo, annotates it, and sends it back to Wyman, she also noted there is substantial nudity "KB ok with it...no frontal nudity – nothing graphic – more subliminal"
- Everyone backdates in Hollywood
- It is not unusual to enter into agreements in Hollywood without ever really obtaining signatures on the contracts
- The Industry Climate is such that everyone really just goes forward with less than desirable documentation – there is no downside to executive producers pushing their lawyers into agreements without proper documentation; even when numerous lawsuits may follow
- **Issues:** mainly, the and/or statement of the jury verdict and the judgment
 - The term and/or is inherently ambiguous
 - *if you use and/or in one place and don't in another, the court will probably think you meant something different*
 - the court refused to just take the Hollywood culture of doing things this way and ignore the law
 - ct. said it doesn't interpret an ambiguous jury verdict when it cannot be determined which party is liable and when it leaves open the possibility of numerous conclusions, the court will not reach its own
 - the result of a jury verdict as to liability is a failure to make a finding on a critical issue with and/or – only if the options are synonymous will it not be ambiguous
 - a corporation is a legal entity which is distinct from its shareholders and officers
 - loan out corporations are not sham entities
 - only if Basinger is the alter ego for Might Wind, will she be liable
 - Main Line didn't rely on this theory and didn't **establish the alter ego factors**
 - **number and identity of the shareholders, directors or officers**
 - **extent of capitalization**
 - **compliance with corporate form and formalities**
 - The appellate court here says, whoa you can't just ignore the law, it actually means something and it needs to be followed
 - There is no power given to the "this is how we do it, don't worry about it" culture

"Loan Out" – many bigger people (directors, actors) may use this because their accountant advises them to do so for tax purposes – the loan out says you hire the corporation and they then loan the actor to the film for production – clearly the production company wants remedies against the actor for non-performance if necessary

"Deal Memo" – short document that contains a lot of bullet points, very choppy outline of the agreement – these are often signed – often contain a clause where the parties agree to enter into the long-form at a later date

- this is a contract though in Hollywood, it is called an agreement

Contract of Adhesion

Is a standardized contract which imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it. Once a contract is deemed to be one of adhesion (small negotiations might not matter) then the court looks at whether it is unconscionable and whether the terms are expected by the weaker party. Look for unconscionable clauses Buchwald

Turnaround Provision

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. Purpose- To permit the production company to recoup its costs in the event that the project is placed at another studio.

Creative Accounting

These are common problems in movies. 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. 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." 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.

Exhibitors v. Distributors

Usually there is a deal between the distributor and the theaters, the distributors usually have a 90/10 profit for the first few weeks and then it starts to alter. The theaters usually cover the overhead expenses in the deal by gaining exclusive profits from the concession stand.

Anti-Slap Statute- To stop frivolous lawsuits. You can go beyond the pleadings unlike a 12(b)(6).

Contract v. Torts

You can get punitive damages with a tort so lawyers are always trying to turn contract breaches into torts. 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).

Never offer to share profits in a contract because it will kill you.

Accounting Problems

General Accounting Principles - deciding how to categorize things will make a huge difference in whether the business looks profitable or not

- Accrual – adding everything up all at once
- Cash Basis – you decide profit on how much cash you have and how much you have spent
 - it isn't revenue until you receive it

Types of profits

- **Net profits:** generally considered earnings minus expenses
 - gross – distribution fees – distribution expenses – production costs = Take
- **Modified adjusted gross receipts:** gross – distribution fees* – distribution expenses – production costs = Take
 - Distribution fees are limited to 10%
 - these are a set percentage at every level
- **Adjusted gross receipts:** gross – distribution expenses – production costs = Take

- Because there are no distribution fees taken out, this is close to actual net profits
- **Gross:** no deductions

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.

Buchwald v. Paramount Pictures Corp.

(Cal. Super. Ct. 1990) J. Schneider

- the court found “Coming to America” was “based upon” Art Buchwald’s screenplay
- the court said using the phrase net profits when that is not really what you mean is unconscionable (so after this case companies stopped calling it net profits)

FACTS: Court determined that defendant’s film “Coming to America” was based upon plaintiff’s screen treatment; second phase of case is determining following issues: whether contract was contract of adhesion; whether contract was unconscionable; whether relationship between parties was of co-venturers; whether defendant owed fiduciary duty to plaintiff; whether defendant’s conduct breached implied covenant of good faith and fair dealing; components of contract are deal memo, turnaround agreement, additional terms and conditions and defendant’s standard net profit participation agreement with two attachments relating to royalties

DISCUSSION: Contract is a contract of adhesion even though some parts were negotiated, which allows court to strike entire contract of any provision thereof when contract is unconscionable; contract contains a number of provisions of percentages to be paid out, and court determines that several of the provisions are unconscionable for various reasons; Consultation clause not important because net profit formula is unconscionable and that third phase of trial necessary to determine appropriate compensation; Parties were not co-venturers and evidence does not show that usual components of joint venture were present

- Third phase of trial necessary to determine damages

Brennan v. Big Ticket

in this case, they were treating income as cash and expenses on accrual (Superior Court, LA County 2002)

- **FACTS:** Brennan is the producer on the Judge Judy show. His contract gives him favored nation status.
 - Favored Nation Status - if another interested in defined proceeds is more favorable, the contracting party with the right to favored nation treatment is entitled to the benefit of the more favorable interest.
 - Brennan was a tabloid news guy who did Current Affair and Real TV
 - before they took Judge Judy to NATPE, they had a deal memo which stated “Plaintiffs would be entitled to be paid, among other things, the following:” included 12 ½ % of 100% of defined proceeds (BTP’s)
 - they are using this phrase because of Buchwald
 - Judge Judy was doing well and wanted to re-negotiate her contract and Brennan said he was entitled to more under the favored nations clause
 - if someone else was going to negotiate a change in a standard definition of net profits, everyone should get that
 - he wanted defined proceeds to be adjusted gross receipts
- **ISSUE:** Judge Judy re-negotiates her contract, now Brennan wants the same deal.
- Brennan is currently getting a part of the defined proceeds.
 - Defined Proceeds is a generic term - usually used for the kind of proceeds that has less worth.

- Judge Judy gets a lawyer and gets Adjusted Gross Receipts instead of Net Profits.
 - Brennan wants the same definition as Judge Judy
 - Brennan gets 12.5% of Net Profits, if they changed to AGR - he would get more than Judge Judy
 - so Big Ticket gives him the same as Judge Judy
- LESSON: Favored Nations will amplify problems - it's a bomb that will go off later
 - If you anyone besides major talent, you want Favored Nations

Notes

- Attorneys will often turn contract disputes into tort actions because punitive damages are available with tort actions and not available with contract actions
- Intentional interference with contract: problem is that one cannot interfere with own contract; available only when suing third parties
 - Party to contract will only be able to be sued for breach of contract
- Intentional interference with prospective economic advantages
- Fraud
- Breach of fiduciary duty
 - Fiduciary duty needed
- Lawyer/Client; Trustee/Beneficiary; Agent/Principal (depends); Officers and Directors/Corporation; Partner/Partner; Joint Venturers
- Breach of the implied covenant of good faith and fair dealing
 - In CA, allowed in insurance matters only

Contract Torts

- turning a breach of contract into a contract tort allows plaintiff to recover punitive damages

Kinds of Contract Torts

Intentional Interference with Contract

- suing someone not a party to the contract
 - Ex. Brennan v. Big Ticket – Viacom was also a party as the parent company of Big Ticket

Intentional Interference with Prospective Economic Advantage

- this is the same sort of thing as the one above
 - Ex. ice sales at competing gas stations

Fraud

- you need some sort of detrimental reliance
 - Ex. Brennan thought he was getting good profits when the company all along knew he was getting bad profits

Breach of Fiduciary Duty

- this one is important and comes up all of the time in business litigation
- Types of Fiduciary Duties
 - lawyer-client
 - trustee-beneficiary
 - agent/principle

- officers & directors/ corporation
- partner to partner (a bit fuzzier and more dangerous)
- joint venturers (a bit fuzzier and more dangerous (April v. KTTV)

April Enterprises, Inc. v. KTTV

(Ct. of Appeals of CA, Second District 1983) Johnson J.

FACTS: Contract dispute based upon contract entered into for production of a television show; appellant was unwilling to make deal for subsequent use of show and then filed suit several years later after discovering that videos of show had been erased.

- Plaintiff is April Enterprises which entered into an agreement to do the Winchell-Mahoney show
- KTTV was to own the tapes and they had the right to erase the tapes within six months of the show
- if the show went into syndication – they split profits 50/50
- there was a new contract which altered the rights of the parties and KTTV no longer had the rights to destroy the tapes
- April tried to negotiate syndication agreements and purchase the tapes
- KTTV tried to renegotiate and there was a warning that the tapes would be erased unless there was an agreement to the terms
- the tapes were erased
- April's grounds – breach of an implied covenant of fair dealings and breach of fiduciary duty of a joint venturer
- she appeals from a dismissal without leave to amend

DISCUSSION: Respondents exhausted its own syndication rights then deprived appellant of its rights by destroying the tapes, which could be aggravated breach of covenant of fair dealing, Court finds that a joint venture existed, does not buy respondents' argument that appellant was independent contractor or that the contract negates creation of joint venture

Ct. finds sufficient allegations on both causes of action **Implied Covenant**

- the terms of the 1965 contract are contradictory – they wouldn't erase the tapes which negotiating syndication
- this can be reconciled by construing the erasure close to only take effect if syndication is not possible
- the 1968 contract also provides a cause of action

Joint Venture:

- "A joint venture ... is an undertaking by two or more persons jointly to carry out a single business enterprise for profit."
- **elements**
 1. **joint interest in a common business;**
 2. **with an understanding to share profits and losses; and**
 3. **a right to joint control**
- this may be shown by parol agreement or assumed as a reasonable deduction from the acts and declarations of the parties

Ct says whether a joint venture exists depends on the intention of the parties (which makes it a factual question not ripe for summary judgment)

- seeking syndication
- sharing profits
- the 1968 agreement didn't extinguish the earlier agreement

EJ says this is a bit scary because ct. said a person who contributes labor in return for profits may be a joint venturer

- Necessary elements of joint venture:
 - Joint interest in common business
 - Understanding to share profits and losses
 - Right to joint control
- Existence depends on intention of parties and may take parol evidence into account and may be shown by reasonable deduction from acts and declarations of parties

Breach of implied covenant of good faith and fair dealing

The Acquisition/Distribution Agreement

DeHaviland v. Warner Brothers

FACTS: plaintiff actress had contract with defendant but California Civil Code limited duration of contracts to seven years; studio claims that contract was still effective because she had not given them seven years of service; several terms of suspension had been applied over the course of the seven years, extending the contract; plaintiff contests that the contract is still in effect while defendant claims that plaintiff still owes 25 weeks of service

DISCUSSION: California Statute limits contract to seven calendar years, regardless of whether there were suspensions in service

Radioactive Records v. Manson

FACTS: Defendant singer bound to record label by contract (which designated NY as choice of law) but was loaned out to another label to record albums with one of its bands; group was very successful and defendant filed suit in California seeking to become a free agent and seeking declaratory judgment that the agreements were terminated and that, because original contract was more than 7 years old, it was no longer enforceable

DISCUSSION: Court must apply New York law here because it may only refuse enforcement of choice-of-law clause when there is no reasonable basis for parties' choice, or when application of chosen law would violate a fundamental public policy of another jurisdiction with materially greater interest in the dispute; Because agreement expressly designates New York law and there was a reasonable basis for choosing NY law, it applies here, regardless of whether later contracts were based in California and designated California law in contracts made between other parties

Liability for Audience Actions

Duty of Care

Any number of considerations may justify the imposition of duty in particular circumstances, including the guidance of history, our continually refined concepts of morals and justice, the convenience of the rule, and social judgment as to where the loss should fall. Weirum. Element- Foreseeability of the risk is a primary consideration in establishing the element of duty. While it is true that foreseeability is ordinarily a question of fact, it may be decided as a question of law if "under the disputed facts there is no room for a reasonable difference of opinion." CBS. 1st Am Defense- The First Amendment does not sanction the infliction of physical injury merely because achieved by word, rather than act. However, if you provide

warnings then it makes it more of a 1st Amendment issue. The constitutional guarantees of free speech and free press do not permit advocacy directed to inciting or producing imminent lawless action and is likely to incite or produce such action. Unprotected Speech- (1) (Jury) was directed or intended toward the goal of producing imminent lawless conduct and (2) (Court) was likely to produce such imminent conduct. CBS Poetry or Music Lyrics- Cannot be construed to contain the requisite "call to action" for the elementary reason that they simply are not intended to be and should not be read literally on their face, nor judged by a standard of prose oratory.

Scenario: DJ reads off a guy's license plate and tells them to pull over when it is safe. You would advise them that there is risk of liability, to put in warnings, and you would want to put it in writing and to write A/C privilege on top.

Weirum v. RKO General

(Supreme Court of CA 1975) J. Mosk

- **FACTS:** Plaintiffs, decedent's wife and children, brought an action for wrongful death against defendant radio station. Decedent's car was negligently forced off the highway by one of two minors who were attempting to follow defendant disc jockey's automobile as part of a contest run by defendant radio station.
- **ISSUE:** Is the radio station liable for the acts of third parties that were stimulated by its broadcast.
- **HOLDING:** Yes. The court held that it was foreseeable that defendant's youthful listeners would race to arrive first at a location to claim a prize, and in their haste disregard highway safety.
- **REASONING:** The harm to decedent, although caused by third parties, was stimulated by defendant's broadcast. The principle that one is not obligated to act as a good samaritan did not apply because plaintiffs' complaint was grounded upon an affirmative act of defendant which created an undue risk of harm.
- **1) Is there a duty of care?**
 - Ct. said the station owes a duty of care to the listeners – to prevent others from being injured
 - - determination of duty is a question of law – the court's "expression of a sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection"
 - **guidance of history**
 - **concepts of morals and justice**
 - **convenience of the rule**
 - **social judgment as to where loss should fall**
 - **FORESEEABILITY**
 - • RKO argued this wasn't satisfied
- **2) Is it foreseeable?**
 - Ct. said foreseeability is a question of fact for the jury – the jury found that this was foreseeable
 - so on review the court is only looking at whether there is any substantial evidence, contradicted or uncontradicted which will support that conclusion
 - the record amply supports a finding of foreseeability
 - large teenage following
 - it was summer
 - promotion offered money and notoriety
 - racing would induce the people to disregard safety

What could the radio station do to limit liability after this case:

- *a warning would transfer some liability to the drivers*
- *time it so that a different demographic was listening*
 - Restatement Rule which allows no duty to control the conduct of third parties where there is no special relationship does not apply here, also because the defendant created the harm

McCullum v. CBS, Inc.

(Cal. App. 1988) J. Croskey The Ozzy case

- **FACTS:** Plaintiffs, the family and estate of a teenager, who committed suicide while listening to certain recorded music, sued defendants, the composer, performer, producer, and distributor of the music, for negligence, intentional tort, and encouraging the suicide through their music in violation of Cal. Penal Code § 401.
 - The family is appealing from a dismissal sustaining a demurrer without leave to amend (demurrer - basically a 12(b)(6))
- **ISSUE:** Are Defendants liable for encouraging suicide through their music.
- **HOLDING:** No. Defendants' actions are protected by the First Amendment. Speech is not protected if it has intent and likelihood to invade a person's rights.
 - Unprotected Speech includes: (freedom of speech and expression are extended to all artistic and literary expression except:)
 - -
 - obscenity
 - libel, slander, misrepresentation, obscenity, perjury, false advertising, solicitation of crime, complicity by encouragement, conspiracy, false advertising, solicitation of a crime, complicity by encouragement, conspiracy, etc.
 - speech or writing used as an integral part of conduct in violation of a valid criminal statute
 - speech directed to incite or produce imminent lawless action
- **REASONING:** Plaintiffs failed to allege any basis for overcoming the free speech protections of the First Amendment, and Plaintiffs failed to allege sufficient facts to show any intentional or negligent invasion of plaintiffs' rights.

Ct. affirms

- **First Amendment Issue:** Was there incitement of violence which would eliminate 1st Amendment protection? NO
 - *Courts will generally stay away from the Constitutional issue, but not this one*
 - **Incitement** – speech which is directed to incite or produce imminent lawless action
 - **Elements:**
 - **1. Was directed or intended toward the goal of producing imminent lawless conduct**
 - **2. Was likely to produce such imminent conduct**
 - so to recover here:
 - 1. music must have been directed and intended toward the goal of bringing about the imminent suicide of listeners
 - 2. must have been likely to produce such a result
- Ct. said that this was an unreasonable reaction to the music and not the intended consequence
 - *EJ cautions we can't deduce intent on demurrer = jury issue*
- **Tort Claim**
 - **Is there a duty of care? NO**
 - **Determined by looking at:**
 - degree of certainty that plaintiff suffered injury
 - closeness of connection between the defendant's conduct and the injury suffered
 - moral blame attached to the defendant's conduct
 - policy of preventing future harm
 - extent of the burden of the defendant
 - the consequences to the community of imposing a duty to exercise care with resulting liability for breach
 - availability, cost, prevalence of insurance for the risk involved
 - FORESEEABILITY
 - **Is it foreseeable?**
 - ct requires a high degree of foreseeability because of the great burden on society of preventing the kind of "harm" of which plaintiffs complain by restraining or punishing artistic expression
 - ct. said this is normally a question of fact but it can be decided as a question of law here because "under the disputed facts there is no room for a reasonable difference of opinion"

- the suicide was not a foreseeable risk or consequence of defendant's remote artistic activities

Ct. says demurrer is proper because the facts are undisputed

- Court probably made many errors:
 - Did not grant plaintiffs leave to amend
 - Intentional harm to any particular victim is NOT the standard for tort liability (see Weirum)
 - Made rulings based upon issues that should have gone to jury
 - Wrong standard: victim was not a "reasonable person" but was a teen with alcohol and emotional issues
 - this seems to be the CA court protecting its industry

Possible Differences Between Weirum and McCollom

- specificity in how the art reached the audience
- immediacy in how the art reached the audience
- foreseeability
- who died

Labor, Guilds and Pitfalls for Talent

Entertainment Unions

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

Producers- Really in charge of the movie. Director is really only working on stuff going on in the set. 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. 2 Types- Executive Producer who is the dealmaker and financier. 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 I available when needed (usually hired by the executive producer).

Director- 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.

Director's Guild (DGA)- The agreement acknowledges that the director contributes to all creative elements (and be consulted of them) in the making of a motion picture. With few exceptions, a producer may assign only one director to a film. The director must be provided a private office at the studio. A studio cannot replace a director who directs 100% of the principal photography except for gross willful misconduct. 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."

Studios- Supply financing and have the distribution marketing arms.

Life of Film- 1) Development; 2) Pre-production; 3) Production; 4) Post-Production (scoring, editing, looping)

Literary Acquisition Contract- IS an agreement to acquire all or some rights in a literary property such as a book or a play. Producers typically use it to buy a screenplay or movie rights to a book. 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. 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. Buyers may usually obtain a Right of First Negotiation to these remaining rights. Writer also usually retains the right to use characters in a new plot. 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. 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). 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. 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?

Negative Pickup- Someone gets a finished product and another studio finds the film and picks it up. This is the purpose of the film festivals.

Good Terms- "Including without limitation" "For emphasis but not by way of limitation"

Deal Memo- Has incomplete sentences, mostly bullet points. Often they are signed.

Equity- Broadway, live performance for actors

WGA Credits- Producers do not have the unfettered power to award writing credits. 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. Writers may meet on their own and try to agree how credit should be allocated. If they cannot agree the matter will be resolved through arbitration. Arbitration- Writers have the right to challenge a reasonable number of arbiters. Three arbiters are selected from those remaining on the list. Identities remain confidential. At the request of any participating writer, the identities of the writers are not revealed to the arbitrators. Each writer may submit a written statement of his positions to the arbiters. Each draft should have your name on it and you should make a copy of it. But the arbitration has to be decided fast, as one of the reasons why producers allowed WGA to determine credits. See Marino. Specifics- They will read draft of the script and allocate credit. 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. The Guild guarantees the writer of an original screenplay a minimum credit of a shared story credit (irreducible story minimum). Admission- You need 24 credits for admission, which are not allocated evenly. The most is 24 for a screenplay in a feature-length film. Initiation fee is \$2,500. Rights- WGA agreement sets the minimum terms for options and purchases of material from professional writers and the minimum terms for the employment of writers for feature films and television programs. Guild members are prohibited from writing for non-signatory companies, and are encouraged to contact the Guild to ensure that any production company seeking to hire them is a signatory. The Guild encourages writers to negotiate more favorable terms known as "overscale" deals. Generally the employer is entitled to one revision within 14 days of first submission. Two meeting Rule- The second meeting has a story commitment. The company must indemnify the writer against claims or actions respecting material assigned to the writer.

Union Misconduct- Whether a union has breached the duty of fair representation. 1) Must decide whether the alleged union misconduct involved the union's judgment, or whether it was procedural or ministerial; 2) If the conduct was procedural or ministerial, then the P may prevail if the union's conduct was arbitrary, discriminatory, or in bad faith. However if the conduct involved the union's judgment then the P may prevail only if the union's conduct was discriminatory or in bad faith. Marino.

New Adaptations- A lot of unions will want lots of money for new adaptations for work. There might also be a treble damages clause. This is the reason why you don't see new DVDs of old shows. Need to look at the specifics of the contract Muller.

Loan-Out Company- writers, directors, and actors often incorporate themselves by setting up "loan-out companies." Most of those benefits have now been abolished, although some pension and health-plan benefits remain. In these companies, an employer contracts with the incorporated company. The company is called a "loan-out" company because it loans out the talent's services. Inducement Agreement- Studios will want the talent to sign this agreement as insurance in case the talent breaches the contract the studio can sue both the company and the person.

Employment Agreement- Writers- It is risky for companies to hire writers because they have to pay whether the work is any good. So some employers have the writer follow several steps to test him such as a) treatment/outline; b) first-draft screenplay; c) second draft; d) rewrite; e) polish. The Writers Guild sets minimums for each step and a payment scale. Deferred payments are iffy and used in low budget films where the producers can't afford to pay everyone full price so pay some of the pay is deferred upon a studio purchasing the work. Contingent payments are the most risky. Additional compensation is when producers give writers about 50% for a sequel and 33% for a remake. Don't forget force majeure clause. Actors- The actor's employment agreement will grant the producer the right to use the name and likeness of the actor in the film and maybe for merchandising, in which case the actor will be entitled to a percentage participation of the revenues. Agreements may contain a morals clause that requires the actor to conduct himself so as not to violate public conventions or subject himself to public hatred, contempt or ridicule. The employer may want to purchase life, accident or health insurance covering the actor. Minors- California law provides that a minor cannot disaffirm a contract if the contract has been approved by the Superior Court beforehand (via petition).

Types of Unions

SAG

Screen Actors Guild (highlighted in class)

- Jurisdiction
 - Movies, Prime time TV, Most TV commercials, Educational films.
- To Join
 - Get hired as a principal on SAG production, (the producer will have to pay a fine, b/c he could not find a SAG member for the part)
 - it is difficult to prove there are no SAG actors available
 - this is easiest for young children
 - Points system extras
 - you don't have to be in SAG to be an extra
 - Join AFTRA and perform as principal under AFTRA
 - there is no criteria for joining AFTRA
- Global Rule One: "No member shall work as a performer or make an agreement to work as a performer for any producer who has not executed a basic minimum agreement with the Guild which is in full force and effect."

AFTRA

American Federation of Television and Radio Artists

- Jurisdiction
 - Videotaped TV, Life TV, some TV commercials, all radio commercials, newspapers, discs jockeys
- To Join
 - Just pay a fee

Actors' Equity (Equity)

- Broadway plays

DGA - Directors Guild

WGA - Writers Guild of America

Marino v. Writer's Guild of America

(9th Cir. 1993) Circuit Judge Hernandez

- Marino wrote a screenplay and did Coppola and Puzo
- WGA started arbitration to determine screenwriting credits
- it was determined the two other guys would receive sole credit
- he requested a PRB hearing and they discovered that one of the arbiters hadn't read his treatment
- the arbiter read it and reaffirmed his prior decision
- Marino filed an action in state court
 - Marino contests that the arbitration procedure to determine screenwriting credit is fundamentally unfair
 - that the WGA failed to follow its own procedures
 - that the DC should have granted his motion to know the identity of the arbitrators
- WGA procedure
 - 1. A special committee conducts a hearing where evidence is presented
 - 2. A three individual panel, who remain anonymous, make a decision on creativity in isolation based on the written materials
 - 3. Review by the Policy Review Board – upon request they look to see if there is a serious deviation from the policy of the Guild or the procedures in the Manual

Marino should've raised his argument on the anonymity and bias in front of the arbitrators

- he should have raised his concerns before they found against him
 - *though this might not have been a good way to address the problem of arbitrator bias*

Analysis on the Union's Breach of Fair Representation:

- 1. Whether the alleged misconduct "involved the union's judgment, or whether it was 'procedural or ministerial'?"
- 2. If the conduct was procedural or ministerial, then the plaintiff may prevail if the union's conduct was arbitrary, discriminatory, or in bad faith? If the conduct involved the union's judgment, then "the plaintiff may prevail only if the union's conduct was discriminatory or in bad faith."
 - mere negligence isn't sufficient
 - to be arbitrary, "the union must have acted in 'reckless disregard' of the [union member's] rights"

Ct. says adoption of procedures is a matter of judgment and although this isn't the same as would be done in court, it is necessary in the industry for determining credit

Comments on this case:

- this is one of the few examples of what goes into guild arbitration
- the guild written opinions are not public
- the federal scheme provides a lot of deference to guild arbitration
- the thought is that this is set up through a union of writers so it is fair
- this arbitration procedure allows problems between writers to be solved quickly – which is important to producers

IATSE - International Alliance of Theatrical Stage Employees

Teamsters

- not an entertainment union but when you are making a movie, you will need vehicles and they will most likely insert themselves into your production

Exclusivity

- Guild members can only work for guild signatories
- Guild signatories can only employ guild members

Subversions of Exclusivity

- Exclusivity works only on a union-by-union basis, not across unions
- Working outside the union's jurisdiction (geographical or categorical)
 - But see, e.g., "Global Rule One" (you cannot work for non-union signatories anywhere in the world)
- Individual can go "financial core" ("fi core")
 - You do not have to be in the union to benefit from the collective bargaining as long as you pay the financial core of the bargaining process.
 - the person won't have to pay for the party fund, lobbying, etc
 - you can work on union and non-union productions
 - SAG doesn't want people to know about this because it undermines their power
- Production companies can have signatory subsidiaries and non-signatory subsidiaries.

CBA (Collective Bargaining Agreements) basics

- Employers generally have the upper hand in bargaining
- Workers negotiate as a collective against individual employers of industry employers grouped together
- As a group, workers get far more favorable terms than they would bargaining individually
- Union bargaining is an antitrust exemption
 - usually working together to set prices would be a problem
- Individual workers and employers cannot negotiate or waive guild minimums
- Individual workers can always get more than the minimum, and an employers can offer more than the minimums

Unions increase costs

- Minimum wage/prices
- Health care & benefits contributions
- Residuals - when the movie or tv show is running again, additional payments are made
- Type-of-work limitations (IATSE)
 - craft unions say someone who is a set director can't build anything
 - even on a small production, you will need one of everything
- Duration-of-work limitations
- Various bargained-for perks

How Unions serve as barriers to entry

- Some have difficult membership criteria
- They require the production companies to make large Production deposits (in the 6 figure range) required for production companies. This makes it hard for small productions.

Unions Circumscribing Entertainment Content and Distribution

- barriers to entry*
- New use fees - for use in the movie theaters is an old use, if you want to distribute the film on video or in other way would be a "new use" and you have to pay new use fees.

- if you change mediums (broadcast television, motion picture, home video) you are required to pay new fees for the new distribution channel and this can inhibit doing that
 - Ex. tribute to Lee Marvin from movies to DVD
- this is a lump sum paid for moving over – it is not a per unit basis
- the new use fees are in the collective bargaining agreement
- you could produce something as an experimental agreement and not pay up front but you will owe almost every dollar to the union on the back end
- Same people writing, directing, acting can cause lack of change over time
- Fewer and less risky productions are made because of increased expenses of union production

Contracting Tools

Devices in Contracts Dealing with Transactions

Representations

- statement of fact (something that happened in the past; present fact, existing condition)
 - could be something that happened in the past, present
- seller will want to include “Best of my belief...best of my knowledge...or as far as I know”
 - Within my knowledge
 - so to recover on the indemnification, you will have to prove bad faith – making representations that are knowingly false

Warranties

- promise that a representation is true
 - sometimes this includes a covenant

Covenant

- promise that something will remain true into the future

Indemnities

- a collateral assurance where one party promises to make good a loss by another party should a representation, warranty or covenant be breached
- “the teeth”
- ordinary a literary agreement will contain an express indemnity
 - seller = the writer
 - buyer = the producer
- you can be indemnified for any expenses (even if the person suing loses)
- Types of Indemnifications
 - all litigation expenses v. final judgments
 - could have a dollar amount cap
 - does it include attorney’s fees
- producers want this as a matter of production – but it is only as good as the assets of the indemnitor
 - so producers will also get E & O Insurance
 - this policy says if there is an infringement of IP rights, the insurer will pay the judgment and the litigation expenses of fighting it
- Reasons for wanting indemnification
 - creates a lien against the indemnitor
 - will give the writer incentive to be on your side in litigation
- Caution:

- it is no defense in copyright law to say that you bought the rights from someone in good faith
- the same is true with distributing a television program
 - if there is infringing content in Oprah, the small station who purchased it at NATPE is still liable

Muller v. Walt Disney Productions

(S.D.N.Y. 1994) J. Goettel

- arose out of a contract to conduct the score for Fantasia
- the Philadelphia Orchestra Association sued Disney for money for using the song “The Right of Spring”
- Disney is saying if they didn’t have the rights it was because of the conductor Stokowski’s screw-up, so they sued his estate (Muller)
- Disney is arguing there was an implied indemnification

Issue 1: Was there an express indemnification?

- Ct. says there is nothing to even remotely suggest an express duty to indemnify
 - clause 7 demonstrates that Disney knew how to create and express indemnification provision

Issue 2: Was there an implied indemnification?

- Ct. applies CA law to determine there was no implied indemnification
 - **Two Options for finding an implied indemnification in CA**
 - **implied by the contractual language not specifically dealing with indemnification**
 - the doctrine isn’t applicable to the facts alleged by Disney
 - **equities of a particular case**
 - there was nothing special about the contractual relationship that would support this
 - delivering an airtight agreement wasn’t of the essence of the Disney agreement with Stokowski
 - What was of the essence? to conduct and to provide the music

The producer will want a representation that it is the original work of the author, they want a warranty that this representation is true and an indemnity (where if the movie is made, but the copyright infringed someone else’s work) that the author will pay losses if the representation is breached.

Indemnification Negotiating Points

- There are many different levers within an indemnification that the buyer and seller can negotiate on...
 - All litigation expenses v. final judgments?
 - Cap \$\$ (up to \$100,000 maybe)(maybe the indemnification should cap at the amount paid to the writer – where then the writer would not stand to lose more money than they could gain from the contract)
 - Attorneys fees

The buyer wants the broadest possible

The seller wants the most circumscribed indemnities

Indemnification Clauses are contract principles – they are applicable between the contracting parties – THEY DO NOT APPLY TO THIRD PARTIES

Other Contract Terms - Litwak Chapter 5 – Notes

Right of First Negotiation – after this period expires (or if you're taking this to a different medium) you have to come to us first and negotiate with us first – “in good faith” – requires that the writer negotiate here first, rather than with a third party

- The legal affect of this is that it keeps you from talking to other people – a prohibition to negotiating with other parties for a period of time
 - doesn't obligate you to make an agreement with that party
 - this has a bargained for value
 - after the period of time, you can talk to a third party
 - There is no agreement to agree here – just an agreement to go here first

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)

- 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

Right of Last Refusal – (aka – Right to Match) – 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

- 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
- It's like poisoning the water

Muller v. Walt Disney Productions

- **FACTS:** Muller is the executor of the Estate of Stokowski, who was the conductor of the music in Fantasia. Stokowski worked for the Phil Harmonic at the time and was suppose to get a release from the Orchestra for their work in the movie, which he apparently did not. Now the Orchestra is suing Disney and Disney is seeking indemnificaiton from Stokowski's estate.
- **ISSUE:** Can Disney ask for indemnity from Stokowski's estate?
- **HOLDING:** No, there was an indemnifiacion clause in another part of the contrat so Disney knew how to make an agreement.
- **REASONING:** 1) Disney knew how to make an espress agreement 2) if Stokowski didn't deliver the agreement with the Orchestra they could have sued him for breach of contract and moved on to another conductor
 - But they didn't worry about the lack of documents until the movie did well

Marino v. Writers Guild of America

- **FACTS:** Marino claimed to have been a writer for the "Godfather III" and did not get writer's credit with Coppola and Puza. He went to arbitration for it and the arbitrators sided with Coppola and Puza.
- **ISSUE:** Marino is claiming that the arbitration procdures are fundamentally unfair and were not followed. He also wants to know the identity of the arbitrators.
- **HOLDING:** Issues with the arbitration process need to be raised during the process. Anonymity is an important part of the process and is part of the agrement, so he can't know the identity of the arbitrators.
- Two-step analysis used to determine whether union breached duty of fair representation
 - Whether misconduct involved the union's judgment, or whether it was procedural or ministerial

- If conduct was procedural or ministerial then the plaintiff may prevail if conduct was arbitrary, discriminatory or in bad faith; if conduct involved union's judgment, then plaintiff may prevail only if discriminatory or in bad faith

Agents, Managers, Attorneys and Employment Regulations

Managers

Unlike talent agents, personal managers are not covered by the Talent Agencies Act. Personal managers primarily advise, counsel, direct, and coordinate the development of the artist's career. They advise in both business and personal matters, frequently lend money to young artists, and serve as spokespersons. They cannot seek to get commissions by procuring work without an agent's license or they will be held to violate the Talent Agencies Act. Managers aren't licensed because it is hard to quantify what they do.

Agent

The agent is a salesperson whose primary role is to find employment for his clients. An agent spends a great deal of time covering the town to learn what kinds of projects and talent potential buyers are seeking and then tries to fill those needs from his client list. Agents can "counsel or direct artists in the development of their professional careers, but managers cannot function as agents in agent licensing states. Guild Regulation- All talent agencies that represent SAG members must be franchised by the guild in accordance with the franchise agreement that was created in 1939. The franchise agreement was originally created to protect actors from abuses by unethical agents. In addition to governing an agency's financial interests, the agreement also caps an agent's commission at 10 percent and regulates other aspects of the actor/agent relationship.

California Law - Talent Agencies Act

"No person shall engage in or carry on the occupation of a talent agency without first procuring a license therefor from the Labor Commissioner"

- talent agent – "person or corporation who engages in the occupation of procuring, offering, promising, or attempting to procure employment or engagements for an artist or artists, except that the activities of procuring, offering or promising to procure recording contracts for an artist or artists shall not of itself subject a person or corporation to regulation and licensing under this chapter

The Act's purpose is to protect artists seeking employment. The Act limits their compensation to 10%. Talent agents must first procure a license from the Labor Commissioner. Any problems with unlicensed agents must first be brought to the Labor Commissioner to meet the exhaustion of administrative remedies. A contract between an unlicensed agent and artist is void.

- talent have the ability to void the contract if the managers attempt to collect compensation for securing employment
 - clients can turn on managers
- an unlicensed manager MAY procure a recording contract

(PROS: 1) Keep managers in their place 2) promotes checks and balances 3) keeps agent fees low because it limits to 10% 4) elevates agents to a profession Also the agent doesn't collect until the deal is closed; CONS: 1) Disincentive to do useful things 2) creates work for agents which creates a situation where the talent now pays 30% (10% to agent and 20% to manager)

Buchwald v. Superior Court

(Cal. App 1967)

- Labor Commissioner has original jx to resolve disputes under the act
- attempts to procure employment subject you to the Act, whether or not you hold yourself out as manager or agent
- contract between unlicensed agent and artist is void and unenforceable

Wachs v. Curry

(Cal. App. 1993)

- carved out an incidental procurement exception to the licensing requirement

Waisbren v. Peppercorn Productions, Inc.

(Ct. App. 1995)

- incidental procurement exception incorrect dicta

Park v. Deftones

(Cal. App. 1999) Acting P.J. Nott

- FACTS: Park worked for the Deftones as their personal manager. The Deftones dropped Park after he got them a contract with Maverick Records.
 - the Deftones said he was acting as a talent agent without a license in Violation of the Talen Agencies Act
 - Park is appealing from summary judgment in the Deftone's favor (lower court found the contract void)
- ISSUE: Park claims that Maverick interfered with his contractual relationship with the Deftones and they now owe him commission.
- HOLDING:
 1. Park argued that the Deftones petition was not raised within the statute of limitations - the Labor Commission said that it was timely because the Deftones filed the petition within a year of the filing of Park's filing his action.
 1. Park argued that he was not acting as an agent because he was trying to get them a recording contract, and under the act a manager can do this, but even indirect procurment is acting as an agent under the Act.
 1. Parks argued that he was not being compensated, but the contract actually said that he was being compensated for this work. The court says that any form of activity that procures employment for an artist, whether there is commission or not, falls under the Act and a license is required.

he was seeking compensation only for the recording contract and not the live gigs

- court points out that the contract provided he would get 20% on all work procured (not just recording contracts)
- the act should be liberally construed to promote its general object and apply even where work is being procured without a commission
- a legislative report indicates intent to reject un-charged procurement
- court said that the live gigs procured would increase the stream of money from the recording contract

Comments on this case:

- the law is very strict

- BUT the court was being hard on this guy
- normally the statute would be construed to find a legal purpose
 - so the commission would only apply to the recording contract

Styne v. Stevens

(Cal. 2001) J. Baxter

- FACTS: Styne represented Stevens in a deal to get Stevens cosmetic line on HSN. Stevens was never paid for any personal appearances on HSN, only for the cosmetic line.
 - footnotes of the case say this is still employment, though they have no obligation to pay benefits (this would be up to the Labor Commission to Decide)

Stevens failed to pay Styne under the oral contract and claimed that it was a procurement of employment and Styne was not licensed under the Talent Agencies Act.

- - requires that people procuring employment have a license
 - if not the contract is illegal and void

Styne argued that the statute of limitations is up and she should have gone to the Labor Commission first

- talent Agencies Act
 - one year statute of limitations
 - all cases and controversies under the act must be brought before the Labor Commissioner, subject to de novo review in the superior court
- ISSUE: The trial court allowed the use of the Act as a Defense, but the Court of Appeals found that the defense was barred by the statute of limitations.
- HOLDING: Ct. found the statute of limitations didn't bar a defense matter BUT that she needed to go to the Labor Commission first

The statute of limitations does not bar the use of the Act as a defense as long as no affirmative relief is sought. If the Act is used as a defense, the court needs to issue a stay while an opinion of the Commission is sought.

- - There was no employment contract between Stevens and HSN and she would not be an employee by IRS standards either.

NY Law

managers are ok if there is an incidental procurement of employment

Attorneys

CA requires lawyers to have written fee agreements with their clients whenever the client's total expense, including fees, will likely exceed \$1,000. The lawyer must disclose whether they have malpractice insurance. Restrictions- There are rules restricting solicitations, advertising, and law service partnerships with non-lawyers. Whatever hat a lawyer is wearing, all applicable rules of professional conduct and enforcement procedures apply to licensed attorneys. 5-10% is a reasonable fee,

but contingency fees can be as high as 50% possibly. Malpractice- The cause of action does not accrue until the A/C privilege is severed Day.

- legally nothing prevents a lawyer from acting as manager or agent but beware the rules of professional conduct

Day v. Rosenthal

(Cal. App. 1985) J. Goldin

- **FACTS:** Rosenthal (attorney who also acted as accountant, business manager, record keeper & investment advisor) appeals judgment against him in amount of \$26 million for legal malpractice, fraud, breach of fiduciary duty, abuse of process; trial court determined that contract never existed, were invalid or unenforceable, and granted injunctive relief requiring Rosenthal to turn over trust funds & records
 - Rosenthal had a retainer agreement with Day and her husband for 10% of everything they had and litigation would be separate
 - *not uncommon but usually 5%*
 - Day relied on Melcher and Melcher relied on Rosenthal
 - they fired him and he sued for breach of retainer agreements
 - Rosenthal was found liable for legal malpractice, breach of fiduciary duty, fraud and abuse of process
 - he acquired money without their knowledge
 - he tried to change the administrator of their estate
 - he kept vital records, pertaining to the litigation, from them
 - Rosenthal appealed
- **ISSUE:** Whether appellees were required to prove appellant's negligence through expert testimony
- **HOLDING:** Ct. said Rosenthal had an obligation to disclose the implications of his agreement. Expert testimony not required to show that Rosenthal breached his duties
 - expert testimony wasn't necessary to show his negligence – it is only needed when it will assist the trier of fact and will not be needed in all cases
 - the Rules of Professional conduct are all that is needed to show what he did wrong
 - Attorneys are required to perform any service for which he has been hired with such skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly possess and exercise in the performance of the tasks which they undertake
 - Violation for attorney to assume position adverse to client without intelligent consent after disclosure
 - Rosenthal breached obligations as attorney beginning with retainer agreements
 - Granted percentage of income, not including litigation and services
 - Percentage included their property and income from corporations in which they owned substantial interest
 - Many advantages continued after he ceased to render services
 - Attorney has duty to protect clients
 - Failed to disclose conflicts, failed to provide competent legal services
 - Received profits from business dealings
 - Commingled, depleted, misapplied funds and failed to account

Protections for Persons as Subjects

Defamation

To How Many People: 1

Does the Communication Have to Be True or False: True

Highly Offensive: No - it only has to harm the reputational interest(though many probably are highly offensive)

Intent: Negligence for publication (but this differs by jx)

Post Mortem: No

- statement is defamatory if it tends to injure the reputation of the plaintiff
- Two Types:
 - Libel – physical form
 - Slander – spoken
- libel proof – a plaintiff doesn't have the requisite reputational interest
- courts are strongly protective of humor as long as it is understood as such
- statement must be a purported fact and not an opinion
- colloquium is required – it must be understood as referring to the plaintiff
- recovery may be restricted if the plaintiff doesn't first ask for a retraction
 - must be placed in an equally conspicuous place as the offending story
- public official applies to a public employee who appears to have substantial responsibility for government affairs
 - can be public for all purposes or public for a limited issue
- private plaintiff must prove fault but not actual malice

Cases

Bindrim v. Mitchell

(Cal. App. 1979) Associate Judge Kingsley

FACTS: Plaintiff licensed clinical psychologist sues defendant writer for mischaracterizing him and his treatment methods

- Dr. Bindrim uses Nude Marathons as therapy
- Mitchell is trying to write a best seller
- she wants to go to the class
- Bindrim only let her into the class after she signed an agreement that she wouldn't write about the class
- Mitchell wrote a book called "Touching" and depicted the events of the session and Dr. Simon Herford
- Bindrim sent letters to Doubleday and Mitchell
- Bindrim sued for libel and won and Mitchell appeals
- he alleged as libel:
 - suggestion that he used obscene language
 - inaccurate portrayal of what actually happened
- he was injured in his profession
- he was identified by certain colleagues as the character in the books

ISSUE: Whether book defamed psychologist HOLDING: Yes, defendants liable REASONING: Character was very similar to plaintiff and people who knew him could reasonably identify him with character; several witnesses identified him and his tape recordings show that the novel was based upon the sessions; Defendant's version of the sessions showed a reckless disregard for the truth; clear and convincing evidence that author and publisher had actual malice (publisher only upon reprinting of paperback) and it was appropriate for jury to assess punitives against publisher

- Ct said in order to recover for defamation Bindrim had to prove:
- **Actual Malice** – because he is a public figure
 - that the statement was made with knowledge that it was false or with reckless disregard for the truth
 - failure to investigate alone isn't enough
- **Publication** – can be to only 1 person other than the defamed
- Burden: Clear and Convincing
- Question of Fact Determined by the Trier of Fact
- Damages: punitive are awarded when a public figure shows actual malice

- No recovery: if the book is opinion or contains statements of fact
 - if the statement is unambiguously fact or opinion, the court can decide
 - but where it could be either – that is a triable issue for the jury

Ct. said there was enough to show actual malice on the part of Mitchell but not on the part of Doubleday with the first printing – before Bindrim wrote the letter Ct said that the differences between Bindrim and the book character don't preclude recovery where he was identified by several witnesses and the recordings show the book was based substantially on the sessions Ct. said this was not an opinion and the fact that it was a novel doesn't matter

- the test is whether a reasonable person, reading the book, would understand that the fictional character therein pictured was, in actual fact, the plaintiff acting as described

Dissent points out:

- this doctor doesn't have a monopoly on this type of therapy
- the letters didn't assert false statements of fact – they just had trouble with the outcome
- Publisher did not have duty to investigate prior to first publishing because it had been assured by author that book contained only fictitious characters; however, prior to paperback printing, duty arose because of the letter from plaintiff's attorney
- Does not matter that everyone who read the book did not identify character with doctor

Clark v. American Broadcasting Companies, Inc.

FACTS: Defendant aired presentation on prostitutes and showed image of plaintiff while discussing and contrasting prostitutes and interviews with regular women in the neighborhood, plaintiff's face shown while commentary about prostitutes made, included frontal close-ups showing plaintiff as being slim, attractive, and stylishly dressed with earrings and long hair (plaintiff was unaware that she was being photographed)

ISSUE: Whether defendant's summary judgment motion, based upon ABC's qualified privilege protecting it against liability even where statements are defamatory, was properly granted

HOLDING: Summary judgment improperly granted in defendants' favor

REASONING: Defamation Claim (Libel)

- Trial court had duty to determine as matter of law whether broadcast was reasonably capable of defamatory interpretation
 - incorrect standard applied and should only have been granted if the broadcast was not reasonably capable of a defamatory meaning
 - Definition: tends to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him
 - Plaintiff being portrayed as a prostitute clearly defamatory under Michigan law
- Ct. points out that the DC agonized over this claim
- Ct rejects the argument that court should be cautious in letting juries decide defamation cases which involve public interest reporting

ABC has qualified privilege which protects it against liability even where statements were defamatory, but privilege lost where actual malice as defined in New York Times exists **Qualified Privilege**

- if this Michigan Law is satisfied, it would bar recovery
 - the court looks at this first and will only address the First Amendment issue if necessary
- Court must decide as a matter of law whether

1. there is a recognized public or private interest which would justify the utterance of publication

2. Once the privilege applies, the Court must decide whether the utterance falls within the scope of the privilege

- Elements of the Privilege:
 - good faith
 - an interest
 - a statement, limited in scope to this purpose
 - a proper occasion
 - the publication is in the proper manner and to the proper parties only
 - this privilege doesn't extend to plaintiffs who are not the focus of the publication = merely incidental
- plaintiff's participation was merely incidental so it wasn't in the public interest and the privilege doesn't apply

No constitutional principle requires plaintiff to prove actual malice

- the First Amendment doesn't apply to misstatements of fact
- Plaintiff is not public figure, not generally famous or notorious, not limited public figure
 - Limited public figure requires:

1. "public controversy"

- this is all controversies of interest to the public
- might be satisfied here

1. nature/extent of individual's participation in controversy must be ascertained

- Nature/extent of individual's participation determined by considering three factors:
 - Extent which participation in the controversy is voluntary
 - Extent there is access to channels of effective communication in order to counteract false statements
 - Prominence of role played in public controversy

Ct. says she didn't voluntarily participate, she has no access to channels to counteract the false communication, her participation was merely incidental

State Law

North Dakota

NDCC 14-02-01 General Personal Rights

- everyone has a right to be free from personal insult, from defamation, and from injury to the person's personal relations

NDCC 14-02-02 Defamation Classified

1. Libel; or
2. Slander

NDCC 14-2-03 Civil Libel Defined

- false and unprivileged publication by writing, painting, picture, effigy, or other fixed representation to the eye, which exposes any person to hatred, contempt, ridicule, obloquy, or which causes the person to be shunned or avoided, or which has a tendency to injury the person in the person's occupation

NDCC 14-02-04 Civil Slander Defined false and unprivileged publication, other than libel, which:

1. Charges any person with crime, or with having been indicted, convicted, or punished for crime;
2. Imputes to the person the present existence of an infectious, contagious, or loathsome disease;
3. Tends directly to injure the person in respect to the person's office, profession, trade, or business, either by imputing to the person general disqualifications in those respects which the office or other occupation peculiarly requires, or by imputing something with reference to the person's office, profession, trade, or business that has a natural tendency to lessen its profits
4. Imputes to the person impotence or want of chastity; or
5. By natural consequence causes actual damage.

NDCC 14-02-05 Privileged Communications one made:

1. In the proper discharge of an official duty;
2. In any legislative or judicial proceeding or in any other proceeding authorized by law;
3. In a communication, without malice, to a person interested therein by one who also

is interested, or by one who stands in such relation to the person interested as to afford a reasonable ground for supposing the motive for the communication innocent, or who is requested by the person interested to give the information; and

1. By a fair and true report, without malice, of a judicial, legislative, or other public official proceeding, or of anything said in the course thereof.

In the cases provided for in subsections 3 and 4, malice is not inferred from the communication or publication

NDCC 14-02-09

- deferential to broadcasters
- if someone says something defamatory on the program, the company is not liable

NDCC 14-02-10 Uniform Single Publication Act

- you get one claim per publication
- a judgment in one jurisdiction bars action in another

California

- also protective of broadcasters
- if the broadcasters show they exercised care to prevent it, it won't be liable

Advice to Clients on Content

1. Be especially careful about portraying living people who are not public officials or figures
2. make sure you can prove defamatory statements are true – annotate your script with sources
3. Obtain releases whenever possible
4. Have your attorney closely review your script for potential liability before publication – change names if you can
5. Make sure the productions contains an Errors and Admissions Policy that includes you as the named insured

Notes

- Libel-proof: plaintiff lacks requisite reputational interest to bring a defamation action
 - Jack Kevorkian, John Cersani, Former boyfriend of Elizabeth Taylor, convicted killer of Martin Luther King, all found to be libel-proof

- Courts strongly protective of humor, so long as its comedic nature is understood by those viewing or hearing it

Appropriation/Right of Publicity

To How Many People: It isn't how many people, it just has to be commercial

Does the communication have to be true or false: Either or n/a - Could be true or false

Highly Offensive: No

Intent: No

Post Mortem: Varies by Jx but often

- increasingly states have enacted states which provide for this - right of publicity
 - CA
 - TN (Elvis)

Commercial Appropriation

- this is a privacy tort

Cases

Dora v. Frontline Video, Inc.

(Cal. 1993) Associate Judge Nott

FACTS: Plaintiff (well-known surfer at Malibu Beach) sues defendants for producing a video about famous surfers at Malibu which was a documentary that included footage of famous surfers, including plaintiff and included an audio portion of an interview with him

- Dora didn't agree to participate and claims they didn't have the right to use his name and likeness
- he sues for commercial appropriation
 - this came from the Warren (not the Justice) and Brandeis (the Justice) article on the 4 torts which have evolved from the right to privacy
 - Intrusion into someone's personal affairs
 - Public Disclosure of Private Facts
 - False Light
 - Misappropriation (now known as the right to publicity)

ISSUE: Whether defendants misappropriated plaintiff's image and voice for their production

HOLDING: No, defendants had the right to use plaintiff's image and voice in their video, as he was a well-known individual in the surfing community, and was instrumental in the development of the sport in their particular geographic area

REASONING:

Ct. said this was a public interest piece

- Program contains matters of public interest and respondent was not required to get consent to use appellants name/likeness/voice
- Public interest in subject matter of program gives defendants constitutional protection against liability
- Two Types of Appropriation (Johnson says this isn't as important today)
 - Right of Publicity – uses a name and likeness for commercially exploitable opportunities
 - Appropriation – taking name and likeness and injuring feelings, that concerns one's own piece of mind, that is mental and subjective
 - Ct said this is the claim the plaintiff is bringing because he wants to be left alone
 - the public interest protects the piece from liability
 - 1. public interest attaches to people who by their accomplishments or mode of living create a bona fide attention to their activities
 2. “a documentary about a certain time and place in California history, and, indeed American legend”
 - Appellant argued it didn't meet the CA newsworthiness criteria in *Maheu v. CBS, Inc.* (Cal. App.)
 - 1. The social value of the facts published
 - 2. The depth of the intrusion into ostensibly private affairs
 - 3. The extent to which an individual voluntarily acceded to a position of public notoriety
 - Ct. said these only apply to Public Disclosure and not Appropriation BUT even if it did apply that analysis – it would satisfy the criteria

Ct. also said plaintiff waived his right of privacy as all images were on the beach or in the water

Right of Publicity

- Tort of appropriation is one of four torts included in category of privacy torts: protects dignity of individual by prohibiting unauthorized use of name/likeness in offensive/embarrassing manner
- Split of authority as to whether non-celebrity has common law right of publicity; most jurisdictions permit actions brought by anyone (celebrity or not)
- Right of publicity is assignable and extends even past death in the majority of states
- De minimis use of identity will not constitute violation of right of publicity
- Most states that recognize right of publicity also recognize it postmortem (commercial property interest descendable in same manner as copyright)
- the first case was about using someone as an endorsement for a commercial product (woman on the bag of flour)
- now it would be using a well-known person's face on a product
- a book or movie can be a product
- there doesn't seem to be a parody exception – the First Amendment limitation is enough
- this protects commercial value
- this can be statutory or common law
- evidence needed to prove consent varies – some states require written consent
- you can get injunctive relief

Cases

Polydoros v. Twentieth Century Fox Film Corp.

(Cal. 1998) Presiding Justice Boren FACTS:

- Plaintiff's name and likeness was used in movie (plaintiff grew up with filmmaker) for character was very similar to plaintiff as a child
 - he claimed that the character in “The Sandlot” was him and he didn't give permission
 - at the end of the movie, it says that the events were fictional and the similarities were coincidental
 - *plaintiff claims commercial appropriation of identity, invasion of privacy, negligence and defamation
 - his commercial appropriation claim is under both the common law and CA Civil Code 3344

ISSUE: Whether defendants are liable to plaintiff for basing their character on him as a child

HOLDING: No

REASONING: Appellant unable to establish direct connection between use of name/likeness and a commercial purpose; court here determined that plaintiff and the character are very different and that observer of the film could not confuse the two, and that film is constitutionally protected; use of name/likeness in fictional work of art, even if created for financial gain, protected by constitutional right to free expression

Ct. said the movie is patently fictional and didn't invade his privacy, is protected by the constitutional guarantees of free expression and is not defamatory

- Ct acknowledges similarity in name, attire and activities but says plaintiff concedes it is fiction and says he hasn't been financially damaged
- Ct says to succeed in his Appropriation Claim he must prove:
 - a direct connection between the use of his name and likeness and a commercial purpose
 - Ct said this was never intended to apply to works of pure fiction – even if the fiction concerns a similarity or identity of names of a real person
 - court points to a difference in age that people wouldn't be confused
 - some of the similarities didn't make the film about his life
- Film is constitutionally protected
 - there is no question that this is fiction and because it is obvious fantasy, the plaintiff couldn't have suffered injury
 - the film isn't a portrait of his life but uses his name and physical appearance which are not private facts
- No negligence in violating the industry norm of obtaining releases because it isn't necessary

Comments on the case:

- EJ says the black letter law was there to have this come out the other way
 - there were a ton of similarities
- Right of Publicity is very broad and here the court is using the First Amendment to cut it down
- Common Law Right of Publicity is close to CA Civil Code 3344
 - "Any person who knowingly uses another's name, voice signature, photograph or likeness in any manner or in products, merchandise or goods for the purpose of advertising, selling or soliciting purchases of products, merchandise, goods or services without prior consent shall be liable
- Exceptions: news, public affairs, sports broadcast or account, political campaign
 - this statute provides for attorney's fees

White v. Samsung Electronics

White v. Samsung (9th Cir. 1992) Senior Circuit Judge Goodwin

FACTS: Defendant electronics company used robot in Vanna White's likeness for its television commercials without White's consent or paying her; plaintiff alleges Lanham Act violation

- Vanna White's image was used in a Samsung ad as a robot
- the robot had her features
- unlike the other celebrities in the ad, she didn't consent and she wasn't paid
- White sued under the common law and under CA Civil Code 3344
- lower court granted summary judgment in favor of the defendants

ISSUE: Whether use of plaintiff's image was Lanham Act violation

HOLDING: Yes, common law right of publicity not limited to only appropriating name or likeness and plaintiff has alleged facts showing that her identity has been appropriated and trial court erred in granting the defendants summary judgment on plaintiff's common law right to publicity claim

Section 3344 - Ct agrees with the lower court:

- says that they aren't deciding for all purposes when a caricature or impressionistic resemblance might become a likeness but the robot at issue here isn't a likeness

Right of Publicity - Ct. disagrees with the lower court that summary judgment was appropriate on the common law claim • California Common Law Right to Publicity Pleaded by alleging: Eastwood v. Superior Court (Cal. App. 1983)

1. the defendant's use of the plaintiff's identity
2. the appropriation of the plaintiff's name or likeness to defendant's advantage, commercially or otherwise
3. lack of consent
4. a resulting injury

the image didn't use the plaintiff's likeness but the common law tort isn't so narrow

- court said element one could be name appropriation, picture or other likeness appropriation BUT also could be identity
- court said the method of appropriation isn't as important as whether the defendant did so

Dissent:

- said there is no name or likeness here and there is no precedent for finding that identity can be appropriated and allowing this is evolving the common law which federal courts shouldn't be doing
- the court is extending the law, where the CA courts have taken a narrow view of these rights

Kirby v. Saga of America

- Kirby was the lead singer of the band DLight who sang "Grove is in the Heart"
- Saga used the Ooh La Lah character in a video game but denied using Kirby as a reference
- Kirby sued under the common law and CA Civil Code 3344

Ct. found that there were triable issues on both claims but that the Saga character was protected so Kirby had no claim

Comments on this case:

- she should have sued only under the common law because she had to pay under the statute as Saga was the prevailing party

Defenses

- use may be de minimus or fleeting so no violation is found (Men in Black Clip)
- First Amendment
- spin the facts (Polydorus)
- obtaining a release (for Sly but not Newt – although the law would apply equally to both)

Privacy Torts and Life Story Rights

Life Story Rights

- life story rights – a series of waivers and releases to prevent suits for defamation, right of publicity and invasion of privacy and are buying cooperation with the subject in terms of getting interviews, photos, etc.
 - typically you acquire exclusive rights through an option
 - typically in an option you get 6-12 months to purchase life story rights
 - you can extend by paying an additional amount

Privacy Torts

- there are four privacy torts
 1. Intrusion
 2. Disclosure
 3. False Light
 4. Outrage (IIED)

False Light

To How Many People: Public

Does the Communication Have to Be True: False

Highly Offensive: Yes

Intent: Yes

Post Mortem: Probably Not (same as defamation)

Elements:

1. Publication by the plaintiff
 2. Made with Actual Malice
- this depends on the jx and might not be required in most states
1. Put Plaintiff in False Light
 2. Highly Offensive to a Reasonable Person

some jx have abolished this because we have defamation there is a difference from defamation because reputational interest isn't necessary

Publication of Private Facts/Intrusion

Publication of Private Facts

To How Many People: Public

Does the Communication Have to Be True: True

Highly Offensive: Yes

Intent: Yes

Post Mortem: ?

- privacy interest ceases with death
- courts tend to favor defendants, especially media defendants, in determining what is newsworthy
- a corporation cannot bring a publication cause of action
- not all states recognize publication

Intrusion

To How Many People: n/a

Does the Communication Have to Be True: n/a

Highly Offensive: Yes

Intent: Yes

Post Mortem: n/a

Defense: Consent

Schulman v. Group W. Prods

(Cal. 1998) J. Werdegarr

FACTS: Plaintiff accident victim sues defendant television show producer for scene depicting the car accident that she was involved in claiming that her privacy was invaded by the cameras and microphones, and by the subsequent airing of her accident

- Ruth and Wayne (mother and son)
- Ruth was pinned in the car and is now paraplegic
- a rescue helicopter came and inside was a crew from Group W and 4MN Productions
- a responding nurse wore a microphone and the accident scene was taped
- it was broadcast as part of the program "On Scene: Emergency Response"
- Wayne isn't shown but Ruth is
- she didn't know the rescue was recorded and she didn't consent
- plaintiffs sued for publication of private facts and intrusion

ISSUE: Whether plaintiff had reasonable expectation of privacy during her rescue after the car accident

DISCUSSION: There is legitimate public concern in this case (difficulties facing rescuers), the challenged material is relevant and is not morbid or sensational prying into the plaintiff's life; on road, any passerby could have seen/heard what happened so the cameraman taping the scene didn't violate plaintiff's rights; two triable issues 1) Expectation of privacy in helicopter (ambulance); 2) Privacy in conversations with medical staff that attended to her

Ct. said summary judgment was appropriate for publication of private facts but not for intrusion Publication of Private Facts Elements:

1. **Public Disclosure**
2. **of a Private Fact**
3. **Which would be offensive and objectionable to the reasonable person**

4. Which is Not of Legitimate Public Concern

- Ct said this is the critical factor

Newsworthiness is a complete bar to liability

- **Analysis:**
 1. **Courts should make a normative assessment of the social value of a publication**
 2. **Depends on the degree of intrusion**
 3. **the extent to which the plaintiff played an important role in the public events (or voluntarily assumed a position of notoriety)**

this is a comparison of the information revealed and the nature of the event that brought the plaintiff to public attention

- where facts about a private person are caught up in events of public interest and bear a logical relationship to the newsworthy subject of the broadcast and are not intrusive in great disproportion to their relevance this is satisfied
- when a person is involuntarily involved in a newsworthy incident, not all aspects of the person's life and everything they say or do is newsworthy

Ct. said the subject matter of the broadcast was of legitimate concern = automobile accidents

- Ruth's involvement highlighted the difficulties facing emergency workers
- this was relevant to the newsworthiness and didn't constitute a "morbid and sensational prying into private lives for its own sake"

Intrusion Elements

- 1. **Intrusion into a private place (plaintiff's solitude or seclusion, private affairs or concerns)**
 - you must show penetration of some zone of physical or sensory privacy, or obtained unwanted access to data about the plaintiff
 - the plaintiff must have had an objectively reasonable expectation of solicitude or privacy in the place, conversation or data source
 - *generally you don't have this in a public place*
 4. **in a Manner which is highly offensive to a Reasonable Person**
 - motivation and justification are important here
 - routine reporting techniques could rarely be considered actionable intrusion
 - but violation of well-established legal principles of physical or sensory privacy-trespass into a home or wiretapping would rarely be justified
- Ct. said the cameraman's mere presence at the accident scene wasn't enough to satisfy element one BUT there is a triable issue about whether there was a reasonable expectation on the helicopter and in Ruth's conversations with the rescue workers
 - a patient's expectation of privacy in medical treatments supports this
- a jury could find recording the victim's conversation with rescuers and while in the helicopter highly offensive

Ct. said the press has no constitutional immunity or exemption from generally applicable laws

- although newsworthiness is a complete bar to liability for publication of private facts, the same deference isn't due when the claim is intrusion
- Newsworthiness (bar to common law cause of action)
 - Involves balancing the individual's right to privacy with the press's First Amendment rights
- Evaluation of newsworthiness

- Not newsworthy simply because people might be interested in it
- Degree of intrusion
- Comparison between information revealed and the event that brought this event to public attention
- Person's involvement in newsworthy event does not open up their entire lives for public scrutiny and viewing
- Intrusion tort
 - Elements: intrusion into private place, conversation, matter and highly offensive to reasonable person
- Test of newsworthiness, generally
 - Social value of published facts
 - Extent of intrusion into ostensibly private matters
 - Extent to which plaintiff voluntarily assumes position of public notoriety

Outrage

To How Many People: n/a

Does the Communication Have to Be True: n/a

Highly Offensive: Yes

Intent: Yes

Post Mortem: No

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. A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him. Clark. Libel- Defamation by written or printed words. Libel has been considered the more damaging form of defamation because printed defamation generally has greater permanency and reaches more people than oral defamation. Elements- 1) defamatory words (what words specifically?); 2) publication (All it takes is one other person other than the D & P to have read it. D must have intended to pub. it.) 3) inducement (what is the context?); 4) colloquium (how does it relate to P?); 5) innuendo (How it did in fact defame P. Is he a person to be avoided (maybe out of pity?), shunned & distrusted Belli.) Slander- Spoken defamation. Ps have to prove more to win a slander case, they have to prove not just general harm to one's reputation, but special damages. Elements- 1) defamatory words; 2) publication (another person heard it); 3) Inducement (trying to persuade something of something); 4) Colloquium (statements or proof of defamation); 5) Innuendo (suggesting something); 6) Special Damages (pecuniary loss or acute mental or serious physical illness). Slander Per Se- When you falsely accuse someone of 1) a criminal offense; 2) a loathsome disease; 3) A matter incomparable with the proper exercise of the P's business, trade, profession or office or 4) Sexual misconduct. The cases are clear that reckless conduct is not measured by whether a reasonably prudent man would have investigated before publishing. 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. Bindrim. Public people- There are two types of public figures. 1) Persons of persuasive fame or notoriety, such as celebrity sports figures, and 2) Persons who voluntarily inject themselves into a particular public controversy and become public figures for that limited range of issues (A) a "public controversy" must exist. (B) the nature and extent of the individual's participation in the particular controversy must be ascertained.) Malice required (Sullivan Standard)- There must be sufficient evidence to permit the conclusion that the D in fact entertained serious doubts as to the truth of his publication. Focus on D's attitude toward the truth or falsity of the material published Bindrim. If the movie makers say that it is based on a true story and that some of the characters are still alive, then they have to know something is true or false and will be defamed if they show something false. HMP- 1; T/F- F; Highly Offensive- N; Intent- Negligence standard; Post-Mortem- N; False assertion of fact. Defenses- 1) Truth- The D has the burden of proof unless it is a matter of public interest or public concern. Reason- Truth is an absolute privilege because society values truth more than it values protection of people's reputations. 2) Libel Proof- Only rare situations where someone may have such a bad reputation as to be libel proof such as Dr. Kevorkian. 3) Non-Actionable Opinion- Courts weigh several factors including A) the content of the alleged defamatory statement, B) whether the statement is provable as false, C) the precision and specificity of the language used, D) the use of cautionary

language or words of apparence, E) the verifiability of the statement, F) the context in which the statement is made, G) its intended audience and H) the medium in which it is communicated. 4) 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. 5) Husband and Wife Privilege- Reason- This policy encourages candid conversations between spouses. But the privilege does not extend beyond the marriage. So if your spouse the next day communicates the disparaging remark to a friend, that statement would not be privileged. 5) 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.

Steps to Protect from Charges of Defamation- 1) Change the names and circumstances so that the people depicted are no identifiable; 2) Obtaining a depiction release from those persons portrayed, or 3) Exercising any potentially defamatory material.

- Elements
 - Plaintiff must be a living person or a company
 - Defamatory statement
 - Communication is defamatory if it has tendency to harm reputation of another, to lower his standing in the community or to defer others from association with that person
 - Colloquium – statement has to be **“of and concerning”** the plaintiff
 - Publication - intentional or negligent
 - Injury
- Defenses
 - Truth
 - Opinion
 - Public Officials and Figures can prevail in a defamation action only if they prove by **clear and convincing evidence** that defendant acted **with actual malice**
 - Actual Malice - knowledge of falsity of reckless disregard for the truth. This protects the defendant's 1st Amendment Rights
 - Privileges
 - Absolute Privilege
 - Judicial Proceedings
 - Legislative proceedings
 - Government Officials acting within the scope of their duty
 - Husband and Wife
 - Consent
 - Conditional or Qualified Privilege - applicable only where defendant acts for certain well defined purposes and the privilege will be lost if the defendant acts out of malice or other motive not within the privilege

Commercial Appropriation (Right of Publicity)- IS using a person's name or likeness to gain a benefit without that person's consent. Protects the dignity of an individual by prohibiting the unauthorized use of a person's name or likeness in a manner that would cause the person to be offended or embarrassed. It is a commercial tort by protecting the commercial value of an individual in the commercial use of that person's identity. Every publication of someone's name or likeness does not give rise to an appropriation action. There must be more than a name or personality similar White. Elements- 1) Use of the P's name or likeness by the D; 2) to benefit the D (commercial or other type); 3) in a way that P suffered damages (reputation, but can't be a loser); 4) caused by the D. Miscellaneous- There is a split of authority as to whether a non-celebrity has a common law right of publicity. The right of publicity is assignable through licenses. Remedy- Injunctive relief is available in a right of publicity action. Compensatory damages are also available. The market value of the use is a recognized measure of damages. Several statutes have statutory damages because a value may be hard to compute. Postmortem- This right exists postmortem in a majority of states that have statutory right of publicity. This is because it is still commercial property similar to copyright. HMP- N/A; T/F- N/A; Highly Offensive-N; Intent- N; Defenses- 1) Consent- Some states demand that this be in writing. 2) De Minimis Defense- A use of a person's identity may be so fleeting or de minimis that no violation of her right of publicity will be found. 3) Public Interest- Matters which rests on the right of the public to know and the freedom of the press is not ordinarily actionable. Dora. Novels- It is generally understood that novels are written out of the background and experiences of the novelist. Polydoros. Film- is protected by the constitutional guarantee of free speech because it is a significant medium for the communication of ideas.

Polydoros. 4) 1st Am- Commercial speech is not protected & visa versa. If the publication has commercial undertones may still be protected if it concerns a legitimate matter of public concern. It just depends on what speech predominates (matter of law.) Motive doesn't matter. Right of free speech & press are given "breathing space" so as to not limit speech for fear of liability. Neither the right to privacy nor the right of freedom of press is absolute.

Life Story Contracts- No such thing as life story rights- when you buy them you are just getting a series of waivers and releases to prevent suits for defamation right of publicity. Buyer's Rights- There will be a provision that gives the buyer the right to embellish, fictionalize, dramatize and adapt the life story in any way he chooses. There will also be a warranty from the seller to never sue for an invasion of his rights of publicity and privacy or defamation. Normally the producer will want carte blanche, but alternatives are there such as hiring the man as a technical consultant or obtain a release a head of time for certain incidents. Seller's Rights- The person could also have the final say as to whether it is a true story or dramatized account. You can sue someone on a common law right to protect identity for impersonations.

Land- Location agreements should be sought from landowners or land possessors when shooting on private property, and permits should be obtained from the appropriate government entity when shooting on public property. Exception- A non-identifiable building would be an ordinary non-descript one that cannot be distinguished from many others. Although architectural works are copyrightable, the copyright does not prevent filmmakers from filming a building that is ordinarily visible from a public place.

- This is a property right not a tort
- It is the right to charge for (or bar entirely) the commercial exploitation of name, likeness, voice or "personality."
- Elements
 - Use of Plaintiff's name or image (some times voice)
 - Can the Plaintiff be recognized by the general public
 - Without consent of the Plaintiff
 - With financial benefit to the defendant or harm to the plaintiff
 - This element can also be proved by showing a financial loss to the Plaintiff, i.e. the use of plaintiff's name or image in some way dilutes his ability to sell it to other.
- Defenses
 - Incidental use
 - The use is so small that neither adds to the value of the medium nor damages the interest of the plaintiff.
 - Newsworthiness
- Note - Normally violated when one's name or likeness is placed on a product such as a mug. If the name and likeness are used in a book or a movie there is freedom of speech issue that protects the authors from a suit if there is a public interest at hand in the work or if the work is a fiction.

C: Dora v. Frontline- P is a surfing legend whose likeness and voice were captured in a documentary about surfing. He never gave consent. Appellant's evidence does nothing to establish that any private facts were disclosed. Publication of the interview is constitutionally protected in the absence of a showing that the publishers knew that their statements were false or published them in reckless disregard of the truth. The court presumes that the term "public affairs" was intended to mean something less important than news. C: Polydoros v. 20th Century Fox- Noncelebrity sued the makers of The Sandlot. In favor of Ds, AFFIRMED. A man in the movie was similar to one of the director's friends growing up. P concedes that it is a work of fiction, that a lot of the movie is not based on reality, and that he hasn't been hurt financially. C: White v. Samsung- The court found that the fact that the robot was wearing a long gown, blond wig, and jewelry; was turning a block letter on a game board; and was standing on what appeared to be the set of Wheel of Fortune constituted sufficient facts to establish a common law right of publicity claim. Lastly, the court found a jury could have reasonably conclude that beneath the surface humor of the series of ads lay an intent to persuade consumers that plaintiff was endorsing defendant electronics company's products.

False Light

- Elements
 - Creation of a false light or false impression

- Must show the information or image, as presented by defendant, created a false impression or put the plaintiff in false light in the eyes of the public, i.e. the information or image may be true but it creates a false impression
 - Of the Plaintiff
 - Plaintiff must be identifiable by a large group, not just the people that know him.
 - That would offend a reasonable person
 - This is a question fact for the fact finder. Must answer the question "Would a reasonable person in the same circumstances be highly offended by the impression created."
 - Normally involves impression of sexual or moral misconduct or misidentifying the responsible party in an accident or crime.
 - In publicity presented to the public
 - The information must be delivered to a large enough group to create and impression in the mind of the public.
 - By the Defendant
 - With malice or reckless disregard for the truth by the defendant
 - But not all states require actual malice
- Defenses
 - Failure by the plaintiff to prove all elements
 - Waiver or consent
 - Fair comment

False Light- IS a publication of a matter about the P, without consent, casting P in a false light, which would be highly offensive to a reasonable person. Elements- 1) Publication about P by D 2) Malice 3) Puts P in false light; 4) Highly offensive to a reasonable person. Doesn't harm someone's reputation (unlike defamation). If someone tells you that you won the medal of honor. HMP- Public; T/F- F; Highly Offensive- Y; Intent- Y + Malice; Post-Mortem- N 1st Am. Defense- There is a high burden on the P to overcome the freedom of the press. Is the newsworthy value & interest of the story stale and facts knowingly false?

Intrusion into private place (invasion of privacy)

- Intentional
- intrusion into a private place, conversation or matter
- In a manner highly offensive to a reasonable person.

Disclosure (Publication of Private Facts)

- Disclosure to the public
 - Or substantially certain that it will be disclosed to the public
- Of a private act
 - The information is not of legitimate concern to the public i.e. non newsworthy.
 - Acts done in public can't meet this requirement
- That is true
- Of and concerning the Plaintiff
- Not sure if it can be brought up post-mortem
- Plaintiff is permitted to recover damages for injuries that normally result from such an invasion of privacy
 - Injury to feelings or sensibilities
 - Past and future humiliation
 - Embarrassment
 - Depression and withdrawal from the society
 - Medical or psychiatric expenses
 - Punitive damages if D acted with hatred, ill will or spite

Intrusion- The tort of intrusion protects against an intentional substantial intrusion upon the P's solitude or seclusion, or her private affairs or concerns. It encompasses physical intrusion into the home, hospital room or other place the privacy of which is legally recognized, as well as unwarranted sensory intrusions such as eavesdropping, wiretapping, and visual or photographic spying. The only IOP tort that does not involve publication. Damages must be from the intrusion itself and

not from the publication of that invasion. Elements- (1) Intrusion into a private place, conversation or matter. Plaintiff must show the D penetrated some zone of physical or sensory privacy surrounding, or obtained unwanted access to data about, the P. Did the P have an objectively reasonable expectation of seclusion or solitude in the place, conversation or data source? (2) In a manner highly offensive to a reasonable person. Factors include its degree and setting and the intruder's motives and objectives. Damages- A split of authority exists as to whether injuries suffered as a result of the publication of the material obtained via the intrusion is recoverable through the tort of intrusion. Some jurisdictions permit the inclusion of harm from the public dissemination of the improperly obtained information. Defenses- 1st Amendment Defense- The mere fact the intruder was in pursuit of a "story" does not justify an otherwise offensive intrusion. Routine reporting techniques such as asking questions of people with information including those with confidential or restricted information could rarely, if ever, be deemed an actionable intrusion. At the other extreme, violation of well established legal areas of physical or sensory privacy-trespass into a home or tapping a personal telephone line, for example-could rarely, if ever, be justified by a reporter's need to get the story. Reason for Lower Threshold- The intrusion tort, unlike that for publication of private facts, does not subject the press to liability for the contents of its publications. HMP- N/A; T/F- N/A; Highly Offensive- Y; Intent- Y; Post-Mortem- N Defense- Consent- Whether consent can be implied from the activities of those involved depends on the jurisdiction. Some jurisdictions have adopted the view that property owners impliedly consent to the presence of the news media during a newsworthy event.

Outrage (IIED)- HMP N/A; T/F- N/A; Highly Offensive- Y; Intent- Y; Post-Mortem- N

C: Shulman v. Group W Productions, Inc.- Court concludes summary judgment was proper as to plaintiffs' cause of action for publication of private facts, but not as to their cause of action for intrusion. Ps had a car accident and were helicoptered out. A camera crew taped the whole rescue operation. The accident left Ruth a paraplegic. Court said that the footage was of legitimate public concern as a matter of law. She was identified in the footage, As broadcast, the segment included neither Ruth's full name nor direct display of her face. She was nonetheless arguably identifiable by her first name (used in recorded dialogue), her voice, her general appearance and the recounted circumstances of the accident. On the intrusion cause of action, the courts said that it isn't the custom or habit for journalists to join rescue missions. Also those conversations were somewhat private, but this is a triable issue. Whether the intrusion was beyond a reasonable person standard is also a triable issue. Distinction- Public interest killed disclosure; but Invasion is still there because there are other ways to get news. Dissent- Standard is "highly offensive" and they don't believe the jury could have reached such a verdict.

California Code of Civil Procedure § 425.16 - Anti-Slap Statute

- Exercising free speech rights on public issue
- Designed to stop lawsuits filed for reason other than making plaintiff whole
- Easy for defendant to collect attorney's fees but very difficult for plaintiff to collect attorney's fees
- if the plaintiff brings a cause of action based on constitutional rights, the defendant can bring a special motion to strike, unless the court finds that the plaintiff will prevail on the claim
 - have to be exercising your free speech rights on a public issue to use this special motion to strike
 - can consider the pleadings and beyond
 - there is no prejudice or res judicata
- the prevailing defendant gets attorney's fees and costs but the prevailing plaintiff only gets fees if the special motion is frivolous or solely to cause unnecessary delay

This statute was applied in Borat's suit by the frat boys

- they were the plaintiffs and the judge said they couldn't make out their claims for rescission, right of publicity, etc
- they were on the hook for Fox's legal fees

Cease and Desist Letters

- Lively & Singer have bulldog reputations in Hollywood
- sometimes the letters are used to later make a claim for actual malice and therefore create actionable defamation
- EJ says you can't slap confidential on the letters and expect them to be
- there wouldn't be a copyright violation for copying the letters
- these letters go beyond the black letter law but people are afraid of being sued and so they will deter conduct

Lindsay Lohan letter

- Legal effect outside of effect on reader: puts reader on notice
- Creates actionable defamation because if publication prints information after receipt of letter, there is actual malice

Other letters (Catherine Zeta-Jones and Jennifer Aniston letters)

- Different purpose
- Create record
- Law firm's aggressive letter may scare publications out of doing something that they may have right to do

Table: Analyzing Persons as Subjects

- Intrusion
 - To How Many? N/A
 - True/False? N/A
 - Highly Offensive? Yes
 - Intent? Yes
 - Post-Mortem Protection? N/A
- Disclosure
 - To How Many? Public
 - True/False? True
 - Highly Offensive? Yes
 - Intent? Yes
 - Post-Mortem Protection? Unknown
- False Light
 - To How Many? Public
 - True/False? False
 - Highly Offensive? Yes
 - Intent? Yes, Actual Malice
 - Post-Mortem Protection? Probably Not (Same as Defamation)
- Defamation
 - To How Many? 1
 - True/False? False
 - Highly Offensive? No
 - Intent? Negligence standard for publication
 - Post-Mortem Protection? No
- Outrage (IIED)
 - To How Many? N/A
 - True/False? N/A
 - Highly Offensive? Yes
 - Intent? Yes
 - Post-Mortem Protection? No

- Appropriation - Right of Publicity
 - To How Many? Commercial
 - True/False? Doesn't matter
 - Highly Offensive? No
 - Intent? No
 - Post-Mortem Protection? Often (Varies by Jurisdiction)

Trademark

Trademark- A trademark is a brand name that can be a word, a symbol or a device used by a business to distinguish its goods or services from those of others. A patent and copyright are physical things, but a trademark can only exist in connection to some good or service. Infringement Test- Likelihood of confusion. Creation- Trademarks rights are arise from 1) use of the mark or 2) a bona fide intention to use a mark, along with the filing of an application to federally register that mark. Tenure- Trademarks can theoretically last forever as long as they are used to distinguish goods. Priority- Ownership of a mark is established by priority of appropriation. Priority is established not by conception but by bona fide usage. So if a group first uses a name and their record company sell their name in interstate commerce, the group has priority New Edition. Something of importance also is what the public associates with the trademark. Miscellaneous- Selling- Cannot simply give a trademark away. If you want to sell it you have to provide something else with it to pass legal scrutiny because the law cares more about the public beign confused than the individual owner. Destruction- 1) Nonuse of a mark, combined with an intent not to resume use, can lead to a determination of abandonment of the mark that results in a loss of trademark protection. A mark designating a disbanded musical group is deemed to remain in use if the group's recordings continue to be played and sold, and the group continues to collect royalties. 2) When the word becomes part of the American diction. The courts strike a balance between the trademark owner's property rights and the public's expressive interests. The First Amendment may offer little protection for a competitor who labels its commercial goodwith a confusingly similar mark, but trademark rights do not entitle the owner to quash an unauthorized use of the mark by another who is communicating ideas or expressing points of view Barbie. Parody is OK when using the trademark.

Dilution (Likelihood of confusion, LOOK AT THIS)- 2 Ways- 1) Blurring; 2) Tarnishing (If it harms the product, if it's a good product then maybe not but may blur). You can argue that someone is trying to dilute your name. Dilution law is the antithesis of trademark law because it seeks to protect the mark from association in the public's mind with wholly unrelated goods and services. Example: Tylenol Snowboards. Exemptions 1) comparative advertising; 2) news reporting and commentary; and 3) non-commercial use (parody perhaps, you can make money on it, but used for 1st Amendment criticizing). 4) Normative Fair Use Defense- A use which the infringement laws imply do not apply, just as videotaping television shows for private home use does not implicate the copyright holder's exclusive right to reproduction. These situations are where the only word reasonably available to describe a particular thing is pressed into service because it does not implicate the source-identification function that is the purpose of trademark, it does not constitute unfair competition; such use is fair because it does not imply sponsorship or endorsement by the trademark holder. Example: When the Ds use the mark to refer to the product itself New Kids on the Block.

Trademark Registration- There is a registration system, but you are not required to register a trademark to establish your right to use it. Process- When an application has been filed, an examining attorney in the patent and trademark office will review the application and decide whether the mark may be registered. The office will make an initial determination about three months after the application has been filed. The applicant must respond to any objections within six months or the application will be deemed abandoned. Once the examining attorney approves a mark, the mark is published. Benefits- 1) the right to sue in federal court for trademark infringement; 2) the right to recover profits, damages and attorneys' fees; 3) Gives other constructive notice of your mark; 4) Allows the use of the federal registration symbol ®; 5) Allows one to deposit copies of the registration with the customs service to stop importation of goods bearing an infringing mark; 6) Permits one to sue for counterfeiting the mark, providing civil and criminal penalties; 7) Enables one to file a corresponding application in many foreign countries. Reasons for Refusal- 1) It is scandalous or disparaging; 2) it is an insignia of a governmental entity; 3) Without consent it identifies a living individual or a deceased president during the life of his widow; 4) It is confusingly similar to a previously registered mark, or to a mark previously used in the US and not abandoned; 5) It is merely descriptive or deceptively misdescriptive of goods or services; 6) Or it is primarily a surname and is not distinctive of such goods or services. Requirements- Likeness- Must contain either; 1) a drawing of the trademark

which shall be a substantially exact representation of the mark or 2) an adequate description of the mark. To register an image of likeness you have to obtain a registration covering every likeness and image of the person from birth until death Elvis Presley.

Trademark Term- To be protected by trademark law, a term must be primarily understood as a source identifier. Some terms, such as those that are coined, arbitrary or suggestive, are inherently distinctive and may be used as trademarks immediately upon adoption. **Secondary Meaning Necessary-** Other terms such as those that are descriptive, laudatory, geophraic or surnames, are not inherently distinctive and must acquire distinctiveness through proof of secondary meaning.

Trade Dress (packaging)- Trademark protection of packaging, the arrangement of things. To prevail on this claim a P would have to establish that its trade dress is protectable and that D's use of the same or similar trade dress is likely to confuse consumers. Trade Dress is protectable if it is nonfunctional and has acquired secondary meaning and if its imitation creates a likelihood of consumer confusion. **Morgan Creek. Elements-** 1) Nonfunctionality (Is it necessary for the success of the product or is it superfluous? Is it one package put together in such a way as to make it unique?); 2) Secondary Meaning (When movie purchasing public associates the dress with a single producer or source rather than just the product itself) and; 3) Likelihood of Confusion.

Trademark law is about Source

- indicating the source of something, it lets you know from where something came
- source is used to develop reputation
 - Functional product configuration is not protectable as a trademark

Reputation

- is the second most important word in trademark law
 - There are no tenants in common in a trademark

TEST

- The test for trademark infringement is **likelihood of confusion**.
 - *Source and reputation*, if someone is likely to be confused as to the source of goods and services than the reputational interest in a product will suffer (if you don't always know coke comes from coke, then their reputation is damaged)
 - A coke bottle has the curved shape that functions to show the source of the product.

Background

- you get a trademark by using it NOT by creating it
- current statute is the Lanham Act of 1946
 - Registration isn't mandatory to receive protection (but those in the federal register receive stronger protection)
 - you need either federal registration or a violation of the Lanham Act's false advertising or unfair competition provisions in order to enforce trademarks in US federal courts
- To get a federal trademark you must have a mark which can be words, names symbols or devices
 - mark must be used in interstate commerce
 - but not be immoral, deceptive or scandalous
 - not disparage or falsely suggest a connection with persons, institutions, beliefs or national symbols
 - may not merely be descriptive, unless there is a secondary use shown
 - not deceptively misdescriptive
 - not primarily geographically misdescriptive
 - not merely functional
- Classes of Marks

- Trademark – distinguishes one person’s goods from another
- Service Mark – distinguishes one person’s service from another
- Trade Name – used to identify a business (must identify the source of product or service)
- Certification Mark – used to certify the good in some way (Good Housekeeping)
- Collective Mark – held by a group for use by its members
- Trade Dress – distinctive packaging of a product (décor of a restaurant); must be inherently distinctive
- Product Configuration – distinctive design and shape of a product (Coke bottle)
- Classifications of Marks as Words
 - Arbitrary, fanciful and suggestive
 - arbitrary – no meaning other than as a trademark (Xerox and Lego)
 - fanciful – another meaning but one that has nothing to do with the mark (Apple computers)
 - suggestive – suggest a characteristic of the good or service (Coppertone sunblock)
 - Descriptive - one that identifies a characteristic of the article or service is marks
 - geographic (American Airlines)
 - surname (Dell Computers)
 - Generic – these cannot receive trademark protection even if they have a secondary meaning
 - genericide (aspirine)
 - Non-verbal Marks – dress and product configuration, sounds, colors, fragrances and other distinctive features of a product
 - must have a secondary meaning and not just be functional
 - function is a term of art in trademark law
 - it has some function other than the reputational trademark function (other than calling to mind source and reputation of source)
- If a mark is not registered, the test is priority and then protection only extends to that area of the market where it is used
- Registered marks receive nationwide protection
- If both registered and unregistered marks are used in a region, the unregistered mark can prevail if it was used first and only in the areas where it was used

Defenses

Genericide

- Bayer used to own Aspirin as a trademark, but it was then declared generic because it gave Bayer an unfair advantage over the marketplace having nothing to do with source or reputation, just the fact that the general public did not know any other term to define aspirin other than aspirin.

Functionality

- Common in trade dress and product configuration

Abandonment

- 3 consecutive years of non-use = prima facie evidence
- nonuse of a mark combined with intent not to use is abandonment
- a mark of a disbanded musical group is still deemed to remain in use if the group’s recordings continue to be played and sold, and the group continues to collect royalties

Non-Trademark Use

- you are not using the mark as a mark

Nominative Fair Use Defense

- The product or service must not be identifiable by any other means other than using the trademark
- Use only enough of the trademark so that you can ID the product i.e. reasonably necessary to id the product
- Must not use it in a way that will suggest sponsorship or endorsement by the trademark holder.

Remedies

1. Injunction
2. Damages

It Makes a Difference Whom you Pick a Fight With

- Elvis
- Three Stooges
- Lego
- NFL(Super Bowl)
- Marilyn Monroe
- Rosa Parks
- Martin Luther King Junior
- Disney (the BIG one)

Priority Battle

- it's not the first to create it or fix it or write it down, it's the first to take it to the marketplace because that's where the source and reputation are created

Multiple trademarks can indicate a single (same) source; one trademark cannot denote multiple sources

Grounds for a Claim

Confusion

AMF v. Sleekcraft Boats

599 F.2d 341 (9th Cir. 1979) Basic Inquiry:

- How strong is the mark being defended?
- How similar are the products in question?
- How similar are the marks in question?
- Have consumers actually been confused?
- Which marketing channels have been used?
- How likely is the consumer to exercise care when purchasing the products in question?
- What was the defendant's intent in selecting the mark?
- How likely are the product lines to expand?

Dilution

- only applies to famous trademarks.
 - To determine if a mark is famous look at:
 1. the duration, extent, and geographic reach of advertising and publicity of the mark, whether advertised or publicized by the owner or third parties
 2. the amount, volume, and geographic extent of sales of goods and services offered under the mark
 3. the extent of actual recognition of the mark
 4. whether the mark was registered under the Act of March 3, 1881 or the Act of February 20, 1905 or the principle register
- It is a trademark cause of action that is new and entirely separate from a regular trademark infringement
- It acts to devalue the trademark
- The idea that when you use a trademark, you may not be confusing customers, but you may be diluting the trademark value
 - Kodak ice-cream is taking away the relation between the work Kodak and cameras

Eastman Photographic Materials v. Kodak Cycle=

maker of Kodak cameras sued a company making Kodak bicycles

Two ways to Dilute a trademark=

1. Tarnishment - association arising from the similarity between the mark or trade name and a famous mark that harms the reputation of the famous mark
 - But this is limited by First Amendment protection
1. Blurring - Impairing the distinctiveness of the famous mark

To determine whether a use is likely to cause confusion look at:

- The degree of similarity between the marks
- The degree of inherent or acquired distinctiveness of the famous mark
- The extent degree to which the owner of the famous mark engages in substantially exclusive use of the mark
- The degree of recognition of the famous mark
- Whether the user of a mark intended to create an association with the famous mark
- Any actual association between the mark and the famous mark

What do you have to show for dilution?

Moseley v. V. Secret Catalogue (SUPCO 2002)

said you had to show actual dilution

Congress overruled this with the 2006 Amendment to the Lanham Act

Contributory Infringement

comes up in cybersquatting and landlords whose tenants sell counterfeit goods

Cases

In re Elvis Presley Enterprises, Inc. (1999)

(Trademark Trial and Appeals Board 1999) Administrative Trademark Judge Hanak *The limits of trademark...*

- *a famous person's likeness may be used as a trademark when a particular pictorial representation indicates a source of origin, but a trademark cannot be claimed on all images of a person*
 - *Babe Ruth's heirs tried to do this*
- Elvis Presley is the titan of trademark infringement
- The estate is trying to register a trademark on anything that looks like Elvis Presley
 - *They are trying to get right of publicity through trademark*
- Source and reputation are not about the right of publicity
- You know Elvis should lose because rights of publicity and trademark doctrine are completely separate
- Likeness and images of Elvis are vastly different from one another
 - Applicant's sample photographs show Elvis at different ages and in different clothing and show how different he looked at different times in his life
- Court rejects claim that the likeness and image of Elvis in general serves as a mark
 - Not supported by evidence

Court decides to affirm the refusal of registration on a procedural question – they can only register one trademark at a time and they are trying to register multiple

- all trademark applications must contain:
 - a drawing of the trademark which shall be a substantially exact representation of the mark
- OR
 - an adequate description of the mark
- in this case, each pose of Elvis is a trademark

The Star v. 20th Century Fox

Something that has fallen into the public domain of copyright cannot be claimed as a trademark

Registering a single title of a book or movie is allowed only upon a showing of a secondary meaning Registration of a series of books, periodicals, newspapers, television programs may be protected without a secondary meaning if inherently distinctive

Fictional characters are entitled to trademark only if there is a secondary meaning

Morgan Creek Productions, Inc. v Capital Cities/ABC, Inc. (1991)

(C.D. Cal. 1991) District Judge Lew *Trade dress analysis...*

FACTS: Plaintiffs movie studio sue television studio for trademark and trade dress infringement, claiming that defendant copied its movie poster for "Young Guns" and used it to promote a television program

- the promotional poster for the television show (used since 1989) was similar to movie promo poster (1988)
- the Young Guns people sued for two trademark infringement and one copyright infringement claims
- defendants moved for summary judgment on the trade dress claim

Ct said to prevail on Trade Dress, the plaintiff's have to prove:(Plaintiff's burden to prove each element)\

1. **That the trade dress is protectable:**
 1. **nonfunctional and** (functional means that it is essential to the product's use or if it affects the cost and quality of the product)

2. **has acquired secondary meaning** (when the purchasing public associates the dress with a single producer or source rather than just the product itself)
2. **That the defendant's use of the same or similar trade dress is likely to confuse consumers** (evidence of actual buyer confusion is not necessary)
 - *prove this element through surveys or EJ thinks the Patent Trademark Office will give you the benefit if you've spent a lot of money on advertising*

Ct. said summary judgment isn't appropriate:

- Functionality: the plaintiff is seeking to protect the total combination of the photograph, slogan and title and this has merit = combined this is distinctive
 - plaintiff seeks to protect the whole of the poster, including the words (wild and west), photograph, title; though elements alone not necessarily protectable, as a whole they are distinctive
- Secondary Meaning: this was pervasively used, enjoyed sales success and unsolicited media coverage
 - advertising for the movie relied heavily on the infringed artwork and the sales success and unsolicited media coverage are sufficient evidence of secondary meaning to create genuine issue of material fact
- Likelihood of Confusion: there is sufficient evidence upon which a jury could conclude there is a likelihood of confusion
 - actual evidence of buyer confusion not required to show trade dress infringement
- This is more the playground conception of trademark law – “stop copying me”

Bell v. Streetwise Records, Ltd.

(D. Mass 1986) *Who owns the mark...*

FACTS: plaintiffs are five members of singing group New Edition who are seeking their exclusive right to appear, perform and record under that mark; defendants who marketed, produced and recorded the first New Edition album and singles from the album claim that they hired the plaintiffs for a concept that they developed and is identified by the recordings and not the group members and that they are the owners of the mark

- Maurice Starr wanted New Edition to be the new Jackson Five
- New Edition wanted to go its separate ways but Starr wanted the name
- Starr says New Edition is a mark which identifies the concept and not the group members
- each side is asking for an injunction

ISSUE: Whether Plaintiffs have the right to continue to use the New Edition mark

HOLDING: Plaintiffs own the mark and have demonstrated likelihood of success on the merits and defendants have failed to do so

DISCUSSION: Plaintiffs had formed a group and had performed under the mark prior to defendants being involved; defendants did take plaintiffs under their wing and taught them and cultivated their talents; plaintiffs signed contract acknowledging that defendants own the mark, but priority for ownership is established by usage

- Plaintiffs acquired legal rights to the mark through their use of it in intrastate commerce; even if the use was simultaneous, plaintiffs were first to use mark in interstate commerce
- Though defendants' contributions were extensive, work was consistent with producing functions and functions of recording company

Court looks at priority of use and how the public viewed the name

- To Establish Ownership
 - Priority of Use in Interstate Commerce
 - Court said the plaintiff must demonstrate this his use of the mark has been deliberate and continuous, not sporadic, casual or transitory
 - Court finds:
 - only one relevant market = the entertainment market
 - plaintiffs called themselves New Edition starting in 1981
 - when they recorded Starr ran the show and the studio
- Control
 - the legal task is to determine which party controls or determines the nature and quality of the goods which have been marketed under the mark in question
 - plaintiffs claim their entertainment services are the goods
 - defense says it is the recordings
 - Two Steps:

1. **Determine that quality or characteristic for which the group is known to the public**
2. **Determine who controls that quality or characteristic**

- Court finds the quality is the individual people in the group and the goods are the entertainment services they provide
- No one but them controlled the quality of that service
 - Starr acted as a producer
 - the plaintiffs were known as New Edition long before Starr

Ct. finds that the plaintiffs get a preliminary injunction

- failure to issue the injunction will weaken the mark and do irreparable harm to the plaintiffs
- the injunction will cause minor injury to the defendants

Comments on the case:

- the court didn't focus on the fact that the contract said the company owned the name
- this is because SOURCE and Consumer Protection trump the contract

The New Kids on the Block v. News America Publishing, Inc.

(9th Cir. 1992) Circuit Judge Kozinski *Media Defending itself from trademark problems (next two cases - New Kids and Mattel)*

- start with likelihood of confusion = Infringement Test
- then go to the nominative fair use (some case law says you have to use this)

FACTS: plaintiffs music group suing defendants (two newspapers) over their 900 number used to poll fans on the group (for which they collected fees not shared with plaintiffs); defendants granted summary judgment based upon First Amendment defense

- the New Kids had 900 numbers where kids could call and get New Kids information
- two newspapers had polls asking questions about the New Kids
 - USA Today – Which New Kid is More Popular?
 - proceeds went to charity
 - The Star – Now which Kid is the Sexiest?
- The DC granted summary judgment against the defendants on First Amendment grounds

ISSUE: Whether defendants infringed upon plaintiffs' trademark

HOLDING: No

DISCUSSION: The mark is so large that it is difficult to refer to plaintiffs without using the mark; plaintiffs are protected against copycats and those falsely claiming plaintiffs' endorsement or sponsorship, but protection does not extend to rendering newspaper articles, conversations, polls and comparative advertising impossible (fair use defense); Defendants reference mark only necessary to identify them as the subject of the polls, logo not used, and do not suggest joint sponsorship or endorsement; Plaintiffs do not have the right to control their fans' use of their own money

- Though the same result is reached, Court examines all issues as it is preferable to resolve the case on nonconstitutional grounds

Ct. jumps right to Fair Use Defense

- said this isn't the classic case where the defendant has used plaintiff's mark describe the defendant's product
- the trademark is used to refer to the New Kids – in this case there is a new test:
- **Nominative Fair Use**
 1. **The product or service in question must be one not readily identifiable without the use of trademark**
 2. **Only so much of the mark or marks may be used as is reasonably necessary to identify the product or service**
 3. **The user must do nothing that would, in conjunction with the mark, suggest sponsorship or endorsement by the trademark holder**
- Ct. finds that the use meets all of the requirements of the defense
 - to do the poll, you have to use the name
 - they only use the mark to the extent necessary to identify them as the subject of the polls
 - the announcements don't suggest sponsorship or ownership

Comments on the Case:

- we shouldn't be talking about the defense if there is no infringement
- Trademark Infringement Test is Likelihood of Confusion and NOT use of the Trademark
 - *EJ says there is no infringement here*

Mattel, Inc. v. MCA Records, Inc.

(9th Circuit 2002) Circuit Judge Kozinski *Same judge as New Kids...10 years later*

FACTS: Plaintiff toy company sues defendants over "Barbie Girl" song, claiming trademark infringement

- Aqua produced the song Barbie Girl, which impersonates Barbie
- Mattel sued
- DC found this a parody and a nominative fair use, not likely to confuse or dilute the mark

ISSUE: Whether song is actual trademark infringement

HOLDING: No

DISCUSSION: Song makes fun of the values that the doll represents and targets the doll itself; Title is relevant to the song as the song is about Barbie and the values she represents and does not suggest that it was produced by Mattel; Lanham Act should only be construed to apply where there is possibility of consumer confusion

- Title is meant to catch attention and promote value of underlying work
- Title not expected to communicate publisher/producer's information
 - doesn't mislead as to source – to suggest the song was produced by Mattel

Ct. finds that MCA's use of the mark is dilutive but that it is not purely commercial speech so it is fully protected

- commercial speech does no more than propose a commercial transaction – if it does more than that, it is entitled to full First Amendment protection
- Barbie Girl also makes fun of and comments on Barbie and the values she represents

Comments on the case:

- in this case the mark is being used to make fun of the mark, so there is more First Amendment protection
- in the Cat Not in the Hat, the mark was being used to lampoon OJ Simpson

GAF Broadcasting Co. v. Caswell-Massey Co.

FACTS: dispute over the mark "Music of the Perpetual Past" with plaintiff claiming that it had been using the service mark for several years for its radio program and that defendant is not the owner of the mark it is attempting to register

ISSUE: Whether defendant has the right to register the mark

HOLDING: No, applicant is not entitled to register the mark

DISCUSSION: Plaintiff has established that it owns the mark because right of ownership in mark arises from its use with particular product or service and not from adoption of the mark and regardless of who created the title, the actual rendering or advertising of the services under the mark created rights in the mark

- No merit in applicant's argument that GAF was airing the program on applicant's behalf as GAF did the production and promotion nearly exclusively as applicant's role was solely of an advertiser and has not been involved in the program in several years

Notes

- Designation must be used in manner sufficiently consistent to be understood by the public as an identifying mark
- Famous person's likeness may be used as trademark when particular pictorial representation indicates source of origin but cannot apply to all images of that person
- To be protected by trademark law, term must be primarily understood as a source identifier
- Titles of series (books, periodicals, newspapers or tv programs) may be protected without showing of secondary meaning if inherently distinctive
- Fictional characters entitled to trademark protection if secondary meaning can be proven

Alltel Commercial

- Trademark analysis - It may be difficult to register something, but it may be easier to prove someone else's infringement of something – do the likelihood of confusion analysis. Always start there.
 - What's the likelihood that people will think that Sprint, Verizon or Cingular are the source behind this commercial? Probably not very likely
- Disclaimer at the beginning? Does it take care of the liability issue? Not always, not a magic bullet – but the disclaimer is dealing with right of publicity
- Trade Dress? The characters are not being used in the same manner, they just look like the other characters
- Dilution claim? Can the companies claim that the value of their trademark has now been diluted by this use?

- Fair Use? Sure – little bit of parody maybe...look at the factors

It is difficult to register the title of a single book or a single movie – different from registering a series (Star Wars, The Babysitter's club)

- This goes to the concept of source – the concept of source is meaningless if there's only one work

Notes on Trade Dress

- Trade dress is the total image, design and appearance of product or service, the overall impression created by the composition and design of its packaging, advertising or product configuration, including size, shape, color, color combinations, texture or graphics
- Trade dress is divided into two categories: product packaging and product design, configuration or feature for determining distinctiveness
 - Packaging that is not inherently distinctive may be protected by trademark only after it has acquired distinctiveness through evidence of secondary meaning
 - Product design can never be deemed inherently distinctive; proof of secondary meaning is always required to prove distinctiveness

Notes

- Trademark exists only when used in connection with good or service
- Nonuse of mark can lead to determination of abandonment of mark resulting in loss of trademark protection
- A mark designating a disbanded musical group deemed to remain in use if group's recordings continue to be played and sold, and group continues to collect royalties

Notes

- Test for trademark infringement: likelihood of confusion
- Person may identify self, personal history or scope of trade by truthfully informing the public of the products serviced (e.g., Volkswagen repair shop may use mark in advertising)
- Dilution: only available for protection of famous marks
 - Degree of similarity between mark and famous mark
 - Degree of inherent or acquired distinctiveness of famous mark
 - Extent to which owner of famous mark is engaging in substantially exclusive use of mark
 - Degree of recognition of famous mark
 - Whether user of mark/trade name intended to create association with famous mark
 - Any actual association between mark or trade name and famous mark
- Tarnishment: harms reputation of mark
 - Association arising from similarity between mark or trade name and famous mark that harms reputation of famous mark

Secondary meaning

- is when the consuming public now has a second understanding of what something means and they understand that as a source identifier
- Something that is merely descriptive cannot be trademarked unless you can show secondary meaning

Copyright

Copyright- Is a legal concept, enacted by most governments, giving the creator of an original work exclusive rights to it, usually for a limited time. Generally, it is "the right to copy", but also gives the copyright holder the right to be credited for the work, to determine who may adapt the work to other forms, who may perform the work, who may financially benefit from it, and other, related rights. Fixation- Requires that the work be recorded in a form that can be perceived directly or by means of a device now known or later developed. Examples- Writing, drawing, sculpting, recording and making notations all count as fixation. Improvisational and/or unrecorded performances of music, dance or drama are likely to be creative but not fixed. Something that is typed on a computer but never saved to a permanent storage medium might also be unfixed (but once the work is saved, it is fixed). Copyrightable Material- A work must possess more than a de minimus degree of creativity. Derivatives- To establish a valid copyright in a derivative work it must be shown 1) That the differences between the derivative work and the underlying work are more than merely trivial and 2) That the copyright in the derivative work will not interfere with the owner of the underlying work's rights to create or license subsequent derivative works. MalJack Productions. Content- Expression of ideas, not the ideas themselves (words and short phrases such as names, titles, and slogans, or the mere listing of ingredients or contents are not protected by copyright). Letters, lectures, speeches, manuals, catalogues and corporate documents as well as other traditional prose material such as novels, articles and scripts are protected by copyright. Mere themes and bare plots are not protected by copyright. Copyright protects not only towards, sentences, and paragraphs of a literary work, but also the dialogue, incidents, dramatic devices, sequences of events and the development of the interplay of characters. Insurance- Errors and Omissions Insurance protects the policy holder from claims for defamation, invasion of privacy, trademark and copyright infringement. Public Domain- Incidents, characters or settings which at one time may have been protectable expression, but are now as a practical matter indispensable, or at least standard, in the treatment of a given topic or genre, are no longer protected by copyright.

Titles- A) Unfair Competition- Titles are not copyrightable without showing a secondary meaning. Jurassic Park might not be copyrightable, but may be protected under the laws of unfair competition. Unfair Competition is mislabeling or misdesignating a product or service in such a way as to cause confusion to consumers as to the origin of its manufacture but first, it must be associated with the second meaning and be released. However titles of a series of books, periodicals, newspaper or television programs may be protected without a showing of secondary meaning if inherently distinctive; B) Obtain Title Report; C) Consider MPAA Registration (first party to register it there can use it, but only applies to all who are part of MPAA). Defense- Obtain release or change name of identifiable products, locations, characters and names. For Film Clips get permission from copyright owner, guild and unions, every person in clip, musician and rights to underlying musical composition.

Exception- Government works (Hubble photo) or functional works (gun mount). Obscenity- 3 Part test from Miller v. California, 1) Whether the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to prurient interest; 2) Whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and 3) Whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value.

Characters- 2 Tests; 1) Story being told test- As a practical matter, a graphically depicted character is much more likely than a literary character to be fleshed out in sufficient detail so as to warrant copyright protection. It depends on how distinct the character is characterized. Copyright protection may be afforded to characters visually depicted in a television series or in a movie; 2) Character Delineation Test- (Less stringent) Does the character have various character traits that are specific or have they changed over time? Can different actors play the character (as testament to the uniqueness of the character)? James Bond Commercial.

Employee Copyright Material- History- Prior to 1978 the party at whose instance and expense a work was created was presumed to be its legal author for copyright purposes. But later the presumption could be overcome with evidence of a contrary agreement between the parties. It didn't matter if it was an employee or independent contractor. Factors- 1) The hiring party's right to control the manner and means of creation; 2) the skill required; 3) the provision of employee benefits; 4) the tax treatment of the hired party; and 5) whether the hiring party had the right to assign additional projects to the hired

party. Employment Scope- If it was an employee, was it within the scope of the employment? Factors- 1) job description, 2) traditionally created by a person that job, 3) on the clock, 4) on employer's premises, 5) using the employer's equipment, 6) with the aid of the employer or employer's staff, 7) or using info available to the employee as part of the employee's employment. Restatement has other factors: a) it is of the kind he is employed to perform; b) it occurs substantially within the authorized time and space limits and c) it is actuated, at least in part, by a purpose to serve the master.

Copyright Act of 1976- Formed the basic copyright law regime which the US follows today. It provided a single copyright term: the life of the author, plus fifty years (seventy-five years from fixation in the case of corporate authors). It eliminated many of the required formalities and applied copyright at the moment the work was "fixed" in a tangible medium of expression. Post Law- Since then, the main revisions to the 1976 Act have been the Audio Home Recording Act of 1992, adding new laws pertaining to digital audio recordings; the Sonny Bono Copyright Term Extension Act of 1998, extending the term of copyright for an additional twenty years (see Duration); and the Digital Millennium Copyright Act of 1998, imposing new rules on high-tech works.

Duration- Individual, life +70 years. Collaboration, life of last survivor +70 years. For works for hire, 95 years after publication or 120 years after creation whichever is earlier. The term of copyright is automatically renewed.

Computer Program- Copying it into the RAM has been found to constitute an infringing reproduction. A website's linking to another website containing a copyrighted work has been held not to be a reproduction of that work.

Idea vs. expression- Copyright does not protect ideas, whether they are fact, opinion or fantasy. It only protects the expression of those ideas. Compilations of facts, such as encyclopedias, dictionaries and even telephone directories, can receive copyright protection. But the facts themselves cannot be copyrighted—only the expression of those facts can be copyrighted. This means that many database providers cannot rely on copyright to protect their data from being republished: they must rely on licenses and other elements of contract law. In other cases, the law of unfair competition can prevent one business from using another's compilations of information in an unfair way. How do you Protect Ideas?- A writer can make a binding oral contract by making it the subject of a contract. It is also advisable to put a copyright notice on your work before you publish it. Hire an entertainment attorney, a studio executive will think twice before ripping off a client of a powerful agency. A writer may restrict, in writing, the extent to which a company may shop material to third parties.

1. Infringement- To find infringement of the right to copy, a court must find a. Copying i. A) Direct evidence- 1. Some authors (especially authors of factual compilations such as phone books) plant minor errors in their works so there will be obvious evidence of any copying. In other cases, there may be evidence of the infringer's admission to copying. ii. B) Circumstantial evidence- 1. Access- a. Access can be proven by evidence that the D had actually read or heard P's work, or had a reasonable opportunity to view or hear the P's work. The reasonable opportunity to view or hear the P's work may be established by showing a particular chain of events by which the alleged infringer might have gained access through an intermediary; 2. Similarity- a. The accused work has sufficient similarities to the original, a court can conclude that illegal copying took place. What really matters is not the detailed dissection of the two works but instead the total concept and feel, theme, characters, plot, sequence, pace and setting Walker, Texas Ranger. b. A court may grant summary judgment for a D if the similarity between the works concerns only non-copyrightable elements, or if no reasonable jury upon proper instruction would find that the two works are substantially similar Arab Heart Case. c. The similarities can't be derived from ideas or small similarities that can be found in very dissimilar works. d. Factors- 1) Plot; 2) Mood (serious versus humorous); 3) Characterizations (of characters) 4) Pace (2 months quickly or long 2 years); 5) Setting; 6) Sequence of events; 7) Other claims of similarity. b. Improper appropriation- i. While copying is a fairly straightforward analysis, improper appropriation is often more difficult. ii. Actual Copying- When a work is copied word for word (or bit for bit), the copying can generally be considered to be improper appropriation. iii. Piecemeal Copying- The more difficult case is when only part of a work is copied—for example, when characters or plot devices from a literary work, or a chord progression or melody from a musical composition are copied to create a derivative work. 1. The key to improper appropriation is substantiality of the copying. Copying an insubstantial part of a work is not likely to constitute infringement. Whether copying is substantial is still a difficult question. 2. Judge Learned Hand concluded that "the proper approach" in answering the question must be "more like that of a spectator, who would rely upon the complex of his impressions of each character." This is known as the subjective test for improper appropriation. Some other courts, particularly in the Ninth Circuit, apply an objective test that compares each copyrightable element of the two works to determine to what extent the accused work copies the original. 2. Criminal infringement a. 17 U.S.C. § 506(a) provides that an infringer faces criminal liability in two situations: b. When their infringement is "for purposes of commercial advantage or private financial gain. c. "When they distribute "1 or more copies or phonorecords of 1 or more copyrighted works" with a total value of greater than \$1,000

within any 180-day period. a. Defense- Fair use- The Copyright Act provides (17 U.S.C. § 107) that a finding of fair use depends on: a. Purpose and Character of Use—e.g., whether it is for profit or for educational purposes. Commercial use is a factor against fair use, but it is not dispositive 2Live Crew. i. Purpose- To see whether the new work merely supersedes the objects of the original creation. If it was productive then it is more fair use likeable. ii. Productive- Creating a new work that was not there before. b. Nature of Work- This factor calls for recognition that some works are closer to the core of intended copyright protection than others, with the consequence that fair use is more difficult to establish when the former works are copied. Parodies don't use this factor. Nature of the original work. Published and Factual- If yes, then more fair use. c. Quantity and Value of the Materials used- This factor calls for thought not only about the quantity of the materials used, but about their quality and importance too. Here the attention turns to the persuasiveness of the justification for the particular copying done. i. Parody- Once enough has been taken out of the material to assure identification, how much more is reasonable will depend on the extent of the parody's overriding purpose and character to the original or the likelihood that the parody may serve as a market substitute for the original. d. The effect of the use upon the potential market for or value of the copyrighted work- Courts consider not only the extent of market harm caused by the actions of the infringer, but also whether unrestricted and widespread conduct of the sort engaged in by the D would result in a substantially adverse impact on the potential market. The court needs to distinguish between biting criticism that merely suppresses demand and copyright infringement which usurps it. b. Other factors. a. 1)Parody- If the commentary has no critical bearing on the substance or style of the original composition, which is used merely to get attention or to avoid the drudgery in working up something fresh, the claim to fairness in borrowing from another's work diminishes accordingly. b. 2)Copying for personal use, such as the "time shifting" permitted by Sony, the "space shifting" permitted by Diamond and photocopying of books for research purposes. But if such copying is used to escape licensing provisions (as may be the case with software or technical journals), it may not be considered fair use Cambell.

Other Crimes Associated with Copyright Law- Contributory infringement is when one who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another, may be held liable as a 'contributory' infringer. Elements: 1) Knowledge and 2) Participation. Vicarious infringement is a separate but related doctrine applied to those who have the power to halt infringing conduct, and derive a financial benefit from the infringing conduct. This is more closely related to agency. A person can be liable for vicarious infringement simply because of their relation with the infringer. The Digital Millennium Copyright Act of 1998 created a "safe harbor" for ISPs and server operators, protecting them from contributory infringement as long as they (1) have a policy of terminating users who are repeat copyright infringers, (2) adopt standard copyright protection measures, and (3) register an agent with the Copyright Office to receive infringement claims from copyright owners.

Registration- Copyright registration has never been a requirement for protection, but it has always been helpful to authors. The most important aspect of registration, which applies under all three copyright regimes, is that registration is a prerequisite to suing for infringement. Note that registration can occur after the infringement itself, but it must be made before any suit is filed.

Airplay- Radio can get away with playing songs on the air without purchasing the rights because the radio can't make money from them. Whereas movies, internet radio, and others can.

Cover Songs- §115 (compulsory way of obtaining the license) provides that once a song has been published in the first place then another group can cover it so long as they get a compulsory mechanical license under the copyright act. People can cover the song, but they can't distort the lyrics Pretty Woman (EMI). Adaptation (changing the lyrics) still needs the express approval of the owner of the copyright.

New Media (LOOK ON TEST) 1) Means of producing media have become cheap and available. 2) Democratization means of distribution (e.g., youtube). North Dakota "It's now because of the internet and powerful personal computers that people everywhere can create media and distribute it and be successful at it. You are creating entertaining content that a lot of people are appreciating and consuming and that is very meaningful from an overall entertainment standpoint. GFDL- Open source licensing that you are required to license your work to everyone using it and cannot sell it. A way for a community of people to license things to themselves, economically efficient to provide benefits to society. Example- Wikipedia.

Sampling- The practice of sampling portions of pre-existing recordings and compositions into new songs is common. Musicians sample pre-existing works either digitally, by lifting part of a song from a pre-existing master recording and feeding it through a digital sampler, or by hiring musicians who re-play or re-sing portions of the preexisting composition. Newton. 2 Licenses Required- 1) The Recording and 2) The Musical Composition. Under the Copyright Act- Sound

recordings and their underlying musical compositions are separate works with their own distinct copyrights. The rights of a copyright in a sound recording do not extend to the song itself, and vice versa. If only One License- A dissection is necessary to see what parts are licensed and what parts may infringe. For it to be infringement it must be a part of the composition that is unique, Newton. De Minimis Defense- To establish that the infringement of a copyright is de minimis, and therefore not actionable, the alleged infringer must demonstrate that the copying of the protected material is so trivial as to fall below the quantitative threshold of substantial similarity, which is always a required element of actionable copying Newton.

Joint Work - A 'joint work' is a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole. For a work to be a 'joint work' there must be (1) a copyrightable work, (2) two or more 'authors. Can author different parts (directing v. music). Author Factors: A) Whether the purported author controls the work and is the inventive or master mind who creates, or gives effect to the idea; B) Objective manifestations of intent by the putative authors to be co-authors; and C) Whether the audience appeal of the work turns on both contributions and the share of each in its success cannot be appraised. (3) Intentions of the Author's contributions to be merged into inseparable or interdependent parts of a unitary whole. Was it marked as a promotional tool for the group? Smashing Pumpkins.

Termination of Copyright- Any transfer of copyright executed by the author on or after 1978 may be terminated. In the case of a grant executed by two or more authors of a join work, termination of the grant must be effected by a majority of the authors who executed the grant. This termination must be done after 35 years of the initial grant. Under 1909 act the author could only transfer rights for the first 29 years. Authors can be contractually bound to renew that copyright with the publisher. But what if you die? There is no privity of contract with the heirs, then you are SOL.

Derivative Exception- The 1976 act permits someone who prepares a derivative work before termination to continue to use the derivative work during the extended renewal term under the terms of the grant Fred Alhert. If a post-termination exploitation of the derivative work cannot be undertaken within the terms of the pre-termination grant, then it has to be authorized. Purpose- To protect the rights of persons who have invested in creating the derivative work as well as to protect the rights o persons who have invested in creating the derivative work as well as to protect public access to derivative works. Look at the Contract- When someone terminates a copyright interest in a song, the right to authorize new uses of the Song reverted to the heirs, because that right is not within the terms of the grant preserved by the Derivative Works Exception.

Background

- protects expression of ideas, not the ideas themselves
 - mechanical transformations aren't enough to create a derivative work
 - words and short phrases such as names, titles, and slogans, or the mere listing of ingredients or contents are not protected by copyright
 - Scene a Faire Doctrine – incidents, characters and settings which at one time were copyrightable but are now indispensable, or at least standard, in the treatment of a topic or genre are no longer protected
 - mere themes and bare plots are not copyrightable
-
- modeled after the Statute of Anne – England 1710
 - Copyright Act of 1909
 - term was 28 years
 - renewable for another 28
 - Copyright Act of 1976
 - basic regime we follow today

Requirements

1. **Creativity – original works of authorship**

- Literary, Musical, Dramatic, Choreographic, Pictorial/Graphic/Sculptural, Audiovisual, Sound Recordings, Architectural Work (if not purely functional)
- Government works cannot be copyrighted
- if an article can't be separated from its functional component, it is a useful article and cannot be copyrighted

1. **Fixation – in a tangible form of expression**

Notice is NO longer required (©)

- but this is still encouraged and will help prevent an innocent infringement defense

Publication does NOT affect validity* this determines when deposit is required and the length of the copyright
Registration

- not required but helpful
- required before there is a suit (can be after the infringement)

Deposit

- person who registers must send two copies to the Library of Congress

Rights

- copy, make derivative works, distribute, publicly perform, publicly display

Ownership

- Created by:
 - Single Person = That Person
 - As Part of a Collective Work = can be copyrighted independently and the independent authors still have copyright to their contribution
 - Employee within Scope of Employment and **Work for Hire** = Employer
 - **Elements: 17 USC Section 101** (definitions)
 1. **Employee**
 - SUPCO's Reid Factors:
 - the hiring parties right to control the manner and means of creation
 - the skill required
 - the provision of employee benefits
 - the tax treatment of the hired party
 - whether the hiring party had the right to assign additional projects to the hired party
 3. **Work was Created in the Scope of Employment**
 - Factors:
 - whether the creation of the work is within the employee's job description
 - whether the work is the type traditionally created by a person in the employee's position
 - whether it was created during official hours
 - on the employer's premises
 - using the employer's equipment
 - with the aid of the employer's support personnel
 - using information available to the employee as part of the employee's employment
 - whether the work was related to the employer's projects

- if outside the scope, the employee is an independent contractor and if the work wasn't specially authorized or commissioned, the individual owns the copyright
 - 0. OR in order to find commission – there must be a written agreement specifying the work is for hire (a split of authority on whether the work must be signed)
 - 1. AND the work must be from a specified category
 - audio visual works
 - motion picture
 - translation
 - supplementary work
 - compilation
 - test
 - answer material for a test
 - atlas
- More than One Author = **Joint Ownership**

Each must:

1. **contribute independently**
2. **intend their contributions be merged**

often governed by contract this means they are tenants in common (not joint tenants where if the other person dies, you get the whole thing)

Morrill v. Smashing Pumpkins

(US District court for the Central District of CA 2001) District Judge Moreno

- the band, The Marked, is staying with Morrill
- he does a music video and is supposed to keep the tape but it disappears
- he later approached Corbin at a concert and asked if he wanted to do something with the video – Corbin declined and he dropped it
- The Smashing Pumpkins released a video which contained short clips from the tape
- Morrill sued for copyright infringement

Ct. finds Smashing Pumpkins are the co-owners of the tape and grants their summary judgment **9th Circuit Test for Determining Joint Authorship:**

1. **A copyrightable work**
2. **Two or more authors**

Criteria for Determining whether an Author

- Whether the proposed author controls the work and is the “inventive or master mind who creates or gives the idea effect”
 - Whether the putative coauthors make objective manifestations of their shared intent to be coauthors
 - Whether the audience appeal of the work turns on both contributions and the share of each in its success cannot be appraised
1. **The authors must intend their contributions be merged into inseparable or interdependent parts of a unitary whole**

Ct. looks at the author factors:

- finds both had creative control over the work

- the words and actions suggest an intent to be co-authors

Duration

Date of Creation: Created before 1978 but unpublished Date Copyright Attaches: January 1, 1978 Duration of Copyright: Life of the author + 70 years

Date of Creation: Published between 1923 and 1963 Date Copyright Attaches: Date of Publication Duration of Copyright: 28 years with option to renew for 67 more; if not public domain

Date of Creation: Published between 1964 and 1977 Date Copyright Attaches: Date of Publication Duration of Copyright: 95 years

Date of Creation: Created 1978 or later Date of Copyright: Date of Fixation Duration of Copyright: Individuals – life + 70 Corporate or Anonymous - Duration is 95 years from publication or 120 years from creation (whichever is less)

Generally things 1923 and prior are in the public domain and everything else is copyrighted unless someone failed to renew it

Division and Transfer

- can be divided and transferred
- transfer can be terminated
- What is a transfer?
 - assignment
 - this has to be signed
 - it can be terminated
 - Stewart v. Abend (SUPCO 1990) – said termination rights cannot be signed away
 - Fred Fisher Music – said you can be bound by contract to renew the copyright and assign it to the publisher
 - but if you die, there is no privity of contract, and the heirs could start fresh with better terms
 - exclusive license – a license doesn't have to be in writing and can even be implied

Fred Alhert Music v. Warner/Chappell Music

(2d. Cir. 1998) *Termination of transfers...*

- both parties are claiming the right to license the use of a derivative work – the Joe Cocker recording of “Bye-Bye Blackbird” for the movie “Sleepless in Seattle”
- Warner’s predecessors (Remick) got an assignment
- Warner granted a non-exclusive mechanical license to A & M so Cocker could make the recording – it covered only that recording
- the statutory heirs terminated the grant to Remick so Warner’s rights reverted to the heirs
- Dixon’s heirs transferred their rights to Ahlert
- TriStar sought permission to use the song in “Sleepless in Seattle”
- Ahlert issued the mechanical license to Sony
- Warner wrote a letter to Fox saying that they retained rights and Fox cancelled the license to Sony
- royalties have gone to Warner
- Warner is claiming the right to royalties as a derivative work
- Ahlert was granted summary judgment

Ct. looks at the Derivative Works Exception:

- a derivative work prepared under authority of the grant before its termination may continue to be utilized under the terms of the grant after its termination, but this privilege does not extend to the preparation after termination of other derivative works based upon the copyrighted work covered by the terminated grant
- the parties don't dispute that Cocker's recording is a derivative work
- they dispute whether it was made under the terms of the grant
 - the terms of the grant is the entire set of documents that created and defined each licensee's right to prepare and distribute the derivative work

Cocker's version of the song is a derivative work – the question is whether using that song on the movie soundtrack is within the terms of the grant

- as the DC found, Warner only granted a narrow license to use the song on Cocker's record and nothing else – it authorizes no other releases much less inclusion on the soundtrack
- the right to license the derivative in the movie was with the heirs

Offenses

Infringement

Copying

- Similarity alone isn't enough
- Ways to Prove:

Direct evidence Circumstantial evidence

1. Access (either evidence the defendant actually read or heard the work or had reasonable opportunity to do so)
2. Sufficient Similarities to the Original

Improper Appropriation of the Copyrighted Work

- KEY = Substantiality of the copying
 - some courts use a subjective test and others an objective
- Must prove ownership of a valid copyright
 - Must prove that the copying of constituent elements of the work are original.
 - It can be proven directly or indirectly
 - Indirect prove
 - Defendant had access to the work
 - Actual access to the work or a reasonable opportunity to view or hear the work, but bare possibility is not enough.
 - Defendant's work is substantially similar to plaintiff's work
- Must distill the material in the Plaintiff's work which is not protected by copyright, such as ideas, facts or non-original material, from the material in Plaintiff's work which is protected
- The copying must be substantial and material, either quantitatively or qualitative, to constitute infringement
 - The defendant took the heart of the work
- A de minimis use is not copyright infringement

Infringement of the Right to Distribute

Contributory and Vicarious Infringement

- if you have knowledge of the infringing activity and you induce, cause or materially contribute

Defenses

Fair Use

Factors: (from Section 107 of the 1976 Copyright Act)

1. **Purpose and character of the use (for profit or education?)**
2. **Nature of the copyrighted work**
3. **Amount and substantiality of the portion used in relations to the copyrighted work as a whole**
4. **The effect of the use upon potential market for or value of the copyrighted work**

Campbell v. Acuff-Rose Music, Inc.=

(SUPCO 1994) Justice Souter

- **FACTS:** 2 Live Crew parodied the Roy Orbison song "Oh, Pretty Woman." They were unable to gain permission from Orbison, but published the song anyway, giving credit to the authors and publishers.
- Orbison and Dees wrote "Pretty Woman" and assigned the rights to Acuff
- 2 Live Crew asked for a mechanical license
- Acuff refused but 2 Live Crew did a parody anyway
- 2 Live Crew asserted the Fair Use Defense
- DC granted 2 Live Crew summary judgment and the court of appeals reversed finding the commercial nature of the song made it presumptively unfair
- **ISSUE:** was this fair use?
- **HOLDING:** Maybe, the court looked at each of the factors to determine.

SUPCO looks at the four factors – reverses and remands Purpose/Character of Use

- this is a parody
- found this to be a commercial use

Nature of the Copyrighted Work

- Orbison's material falls within the core of what copyright protects

Amount and Substantiality of the Portion Used in Relation to the Copyrighted Work as a Whole

- 2 copied the opening base riff and the words of the first line but then it departed
- SUPCO said you have to take some of the song to do a parody and if they had taken any less, you wouldn't recognize the song

Effect of the Use Upon the Potential Market For or Value of the Copyrighted Work

- the parties didn't provide any information on this, so summary judgment was inappropriate

There are separate interests in a recording – the written composition and the actual sound recording.

American Geo Physical Union v. Texaco

journal articles are copied for the library of a corporation NOT Fair Use

Saga Enterprises v. Mapia

copying video games to a bullet board system for privacy NOT Fair Use

Munster Comm. v. Turner Broadcast Systems

taking footage and putting it into a documentary Yes Fair Use

Lan v. Starks

copying trailer to show 3D capabilities Not Fair Use

Sandeval v. New Line Cinema

fleeting use of photos in the movie Seven Yes Fair Use

Dr. Suess Enterprises v. Bantam Books

reworking the anapestic tetrameter to talk about OJ Simpson murder Not Fair Use - the court said that with parody you have to be mocking the thing you are using – here you are parodying the OJ trial

License

Motola v. EMI America Recordings

(US District Court, District of CA 1984) District Judge Rymer

- Stray Cats received a license for the song “Jeanie, Jeanie, Jeanie” through the Harry Fox agency
- the plaintiff sued for copyright infringement
- defendant made significant changes to the lyrics

Ct. found that the changes – with references to loud parties, free booze and sex was a perversion of the lyrics

- the rights in a compulsory license:
 - recording
 - distribution
 - a limited right to arrange or adapt the song to adapt the song to suit the performer’s style or interpretation
- BUT the rights cannot be so extensive to allow the song to be “perverted, distorted or travestied”
- you also cannot change the basic melody of the song or alter its fundamental character

Generally, the author has the exclusive right to the copyrightable work Except:

1. Radio Play

- there are two copyrights with a record:
 - Sound Recording
 - owner has no exclusive right
 - can be played on radio without infringing
 - this is the record company
 - Musical Composition
 - you have to get a license to play this on the radio
 - generally this is through a blanket performing rights society – ASCAP or BMI

1. Section 115 of the Copyright Act (17 USC 115(a)(2))

- once a song has been released, anyone can cover it
- this compels the composer to give them a license
- this is a long and complicated process
- Mechanical License - SO the industry created a private way to do this – they are voluntary and skip all the government bureaucracy
 - Harry Fox Agency – biggest firm to do this

Spectrum with Music

- very faithful or small rearrangements = compulsory license
- change it quite a bit = infringement
- go way far = parody

Copyright Misuse

prohibits use of copyrights for anti-competitive purposes

Statute of Limitations

3 years in criminal cases

de minimus use isn't recoverable

Copyright in the Music Context

“Circle P”=

- copyright in the sound recorded (p=phonorecord)
- Mozart is public domain – but a copy of a symphony playing Mozart is circle P
 - AM/FM can play all they want and will never owe money under this – there is no exclusive right to AM/FM performance
 - record companies make money by selling more records after they are played on the radio
 - There is a compulsory licensing scheme for webcasters, there is an exclusive right

“Circle C”

- © copyright in the musical composition (publishers on behalf of the writers or composers)

Performance right

- For musical compositions, there is a performance right for AM/FM/Satellite/webcast radio – they must get a license to play the song, even if they are just playing it and not making copies
- License comes from performance right society – BMI/ASCAP/SESAC
 - Stations will get a blanket license for a fee, set by how many listeners they have, how big the station is – paid per month, no matter how often the tune is played
 - There is a regulatory system on the rates between the societies

- Station must send a report of frequency to the society to track frequency of play
- The more plays a song gets at a station – the more of the cut they get from the flat rate paid to the society
- Mechanical License – issued to recording companies
 - 17 USC §115 - compulsory

Reproduction right

Violations:

- taking a legal copy of sheet music and playing a song for paying ticket holders
- if you run off copies of the sheet music, you could be violating the reproduction right
 - recording and selling copies

Synchronization License – a license to use a sound recording and a composition in an audio visual (motion picture or television show)

Sampling

this can infringe on both the sound recording and the musical recording

- if the sample is small enough, it won't infringe
- if you sample even the tiniest bit of a sound recording = you lose

Newton v. Diamond

(US District Court for the Central District of CA 2002) District Judge Manella

- a jazz flutist owned the copyright to the musical composition of a song
- the record company granted the Beastie Boys a license to sample the sound recording
- flutist sued the Beastie Boys
- Newton said it was not just the notes that were taken, but the way he performed them

Ct finds that three notes and a background note was taken and that is too little to constitute infringement the three note sequence is not original as a matter of law

- Court finds that the technique of playing was not recorded in the musical composition – they are protected in the sound recording which was licensed to Beastie Boys

Copyright requires:

Original Work Expressed in a Tangible Medium

- this might be why he loses – because the court looks at the sheet music

Ct. said even if the three- note combination was copyrightable – the sampling de minimus the copying of the protected matter is so trivial “as to fall below the quantitative threshold of substantial similarity, which is always a required element of actionable copying” (*EJ says the court is really saying this isn't a defense but a way of denying substantial similarity*)

Synchronization License

- License to use a sound recording and a composition in a visual work (such as a tv show)

Duration

- so complex that you can't figure it out in your head – use a chart, it is a patchwork of laws
- www.publicdomainsherpa.com

Transfers

- must be in writing, signed
- An assignment of the whole copyright
- Or an exclusive license

Non-exclusive licenses

- do not need to be in writing or even spoken, they may be implied

Assign

- If you are an individual author and you assign your copyright to a publishing house, there are provisions for you to terminate that grant in the future
- Works made for hire, by a corporation, there is no right to terminate (by the employee or employer)
- But if the employee assigns the copyright, there is a right
- Work for Hire (17 USC § 801?) (it's better to have a work for hire than an assignment – you cannot terminate work for hire, the hirer is the author in terms of copyright)
 - either
 - Employer/employee relationship, or
 - Written agreement and it must be from a specific category (includes audio/visual work)
 - Or both

Under 1909 for term of 28 years, renewable for 28 yrs, failure to renew results in public domain – if you die before 28 years, your heirs cannot be contractually bound to assign the copyright to the publisher

Pre 1978 works – windows exist to terminate rights

Post 1977 transfer

Joint Author

- Whether the purported author controls the work and is “the inventive or master mind” who “creates, or gives effect to the idea”
- Whether the “putative coauthors make objective manifestations of shared intent to be coauthors”
- Whether “the audience appeal of the work turns on both contributions and the share of each in its success cannot be appraised”

Joint Work

- a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole.”
- A copyrightable work
- Two or more authors
- The authors must intend their contributions be merged into inseparable or interdependent parts of a unitary whole

Joint authors are like tenants in common – not joint tenants

- You are in jail (i.e., the joint) and you murder your cellmate in his sleep – you get the cell to yourself – your cellmate cannot give his half of the cell to anyone else

Copyright Cases

Subject Matter, Ownership, Acquisition, Rights & Infringement

Maljack Productions, Inc. v. UAV Corp.

(C.D. Cal. 1997) *Derivative Work Copyright...*

FACTS: (consolidated action) plaintiff sues defendants for infringement of plaintiff's rights in screenplays for movie “McClintock!” and filed action against Register of copyrights for refusing to copyright screenplays

- Plaintiffs are Maljack and Batjac together
- Defendants are UAV and Goodtimes
- Batjac produced McClintock! and registered the motion picture for copyright but not the screenplay or any versions of the screenplay
- Batjac failed to renew McClintock! and it fell into the public domain
- Batjac took the movie McClintock! and panned and scanned it into a television format (which takes some creative choice because some things will be cut out)
- Batjac copyrighted the panned and scanned version in 1993
- Batjac transferred exclusive homevideo rights to Maljack in 1993 for a term of years
- Batjac registered the 1993 version with the Copyright Office as a Derivative Work
- UAV started putting out a version of McClintock that was photographically identical and largely aurally identical to B and M's version – BUT UAV replaced the original soundtrack with new music

HOLDING: Register properly refused to register screenplays and that defendant infringed copyright; Plaintiffs own a valid copyright for their revised version of the film

REASONING: Plaintiff's changes are sufficient to be protected by copyright: new editing method, sound alterations; Defendant is liable for infringing upon plaintiff's copyright

Ct said **to establish infringement**, the plaintiff must show:

Ownership of a Valid Copyright

- the burden of invalidity lies in the person making the invalidity claim

- the work must possess more than the de minimus degree of creativity – this applies to derivative works – the burden is low for derivative works
 - the pan and scan version had the requisite degree of originality to satisfy this
 - the changes to the soundtrack are also copyrightable

Copying of Original Elements of the Work

- this wasn't contested (though they did change the music)
- Performer may sue one who fixes, transmits or distributes the sounds or images of a live musical performance, without the consent of the performer
- To establish a valid copyright in a derivative work it must be shown:
 - That the differences between the derivative work and the underlying work are more than merely trivial, and
 - That the copyright in the derivative work will not interfere with the owner of the underlying work's rights to create or license subsequent derivative works

Lone Wolf McQuade Associates v. CBS, Inc.

District Judge Koeltl

FACTS: plaintiff brought suit against defendant, alleging that "Walker, Texas Ranger" violated his rights in a 1983 movie under Lanham Act, unfair competition and misappropriation law

- Orion gave Lone Wolf all right, title, and interest in and to all copyrights in the film BUT not interest in and to television series rights, so called television special rights, remake or sequel rights, or any other ancillary rights and/or allied rights
- CBS broadcast a Walker movie
- Lone Wolf is suing alleging that the Walker character infringes
- Orion intervened but in a settlement Orion gave a retroactive license
- the defendants are moving for summary judgment on two ground:
 - the characters are not substantially similar
 - Orion granted a retroactive license to use Lone Wolf in connection with Walker
 - defendants are conceding copying and the validity of the Lone Wolf copyright

DISCUSSION: General themes (scenes a faire) and basic stock elements common in action adventure heroes; Court must determine whether the total concept and feel of the characters and the plots substantially similar instead of looking at small details of each (Some dissimilarities will not automatically relieve infringer of liability)

Ct. says for the plaintiff's to prevail they have to show:

1. Plaintiff's work was actually copied by the defendant
1. The copying is illegal because there is a substantial similarity between the protectable material in the plaintiff's work and defendant's work
 - to decide whether there are substantial similarities in the characters, the court looks at the overall concept and feel of the two characters and the total concept, feel, theme, characters, plot, sequence, pace and setting of the two works
 - looking at this, the Court finds a reasonable jury could find substantial similarities
 - this is a triable issue

Ct says the copyright claims for free, pay and cable television are dismissed because of the retroactive license

MGM, Inc. v. American Honda Motor Co., Inc.

(CD Cal. 1995) District Judge Kenyon

FACTS: Plaintiffs claim that defendant violated their copyrights in James Bond films with its car commercials

- Honda had a commercial for the Honda del Sol which promoted the car's detachable roof and looked like a James Bond movie
- MGM alleged the Honda violated copyrights to 16 James Bond films
- Plaintiff's demanded the commercial be pulled
- Honda changed the voice to American not British and made the music less like the Bond theme
- the commercial aired during the Super Bowl

DISCUSSION: Plaintiffs can likely satisfy ownership test and James Bond is copyrightable character under the "story being told test" or the "character delineation" test; Plaintiffs will likely succeed on their claim that James Bond is a copyrightable character under either test

Court grants the plaintiff's motion for preliminary injunction **Claim for infringement includes:**

Ownership of Copyright in a Particular Work

Copying of a substantial Legally Protectable Portion of Such Work

- to establish a prima facie case, you need only show copying of a protectable portion of the work

Ownership:

- Plaintiffs own copyrights to the film
- Plaintiffs are not asserting violation of the copyright of the James Bond character but of the character as expressed and delineated in the films
 - and the person who owns the films also owns the expression of any significant characters portrayed therein

The James Bond Character is Copyrightable

- 9th Circuit Test - Sam Spade, in a book wasn't a copyrightable character because he wasn't the "story being told"
- 2nd Circuit Test - Air Pirates said that Disney comic book characters were protectable because they are distinguishable from literary characters (either because they are more the story being told or because graphic characters are more likely fleshed out in more sufficient detail than literary characters) = character delineation
 - *there is agreement among the courts that graphic characters are more easily copyrightable BUT the character has to be sufficiently fleshed out and not just a stock character*
- Court said James Bond qualifies under either

Notes

- Graphic characters are more easily copyrightable than a literary character
- Character is only protectible as part of larger work
- Copyright protection extended to the part of character which aids in identifying the character
- Copying computer program into RAM memory of a computer is infringing reproduction
- Website linking to another website containing copyrighted work is not a reproduction of that work

Music

Motola v. EMI America Records

FACTS: Plaintiff, owner and co-author of Eddie Cochran song entitled “Jeannie, Jeannie, Jeannie,” claims that rock band The Stray Cats have infringed on copyright by recording and selling a version of the song with vulgar lyrics

DISCUSSION: Court concludes that defendants have perverted and distorted original composition, though they had permission to use the song in exchange for royalties, the changes to the song’s lyrics were not authorized by the license

- Licensees have permission to use songs and rearrange them for particular performer’s styles, but may not “pervert, distort or travesty” the original song and statute requires that the basic melody and fundamental character of the song be kept intact
 - Consent of owner required prior to making this type of change

Bright Tunes Music Corp. v. Harrisongs Music, Ltd.

(SDNY 1976) District Judge Owen

FACTS: plaintiffs claim that defendant plagiarized the tune of a popular song; the tune of the original song contains a unique pattern and new song has nearly identical note sequence

- Bright Tunes owns the copyright for “He’s so Fine” which was recorded in 1962 and which uses a short musical phrase (3 notes) followed by another short musical phrase (5 notes)
- Harrison wrote “My Sweet Lord” was recorded in 1970 and has an identical harmony and uses the same motifs
- Harrison was aware of “He’s so Fine”

DISCUSSION: Though from defendant’s testimony, it does not appear that the songwriting intentionally infringed upon the copyright, the two songs are virtually identical except for in one part where an extra note was inserted; there is no question that defendant had access to the song, which was very popular at release, staying #1 for several weeks in both the US and the UK; Using the song is still copyright infringement even though the copying was likely a product of defendant’s subconscious memory Ct finds Harrison infringed, not deliberately,

General public license (GPU)

- Software-sharing that requires users who modify software to share it with others on the same basis that it was shared with them
- Subsequent users who refuse to share may be compelled to share their modifications under copyright law
- “Copyleft”
- E.g., Wikipedia

Infringement (cont'd) & Fair Use

Beal v. Paramount

FACTS: Plaintiff wrote book entitled The Arab Heart, alleges that defendant’s movie, Coming to America, infringed her copyright

DISCUSSION: Two elements required: Ownership of valid copyright & Copying of constituent elements that are original

- 11th Circuit uses two-part test for indirect proof of copying:
 - Defendant had access to plaintiff's work
 - Plaintiff must show that defendant's work is substantially similar to plaintiff's protected expression

Notes on Access

- Access may be proven by evidence that defendant had actually read or heard plaintiff's work or had reasonable opportunity to view or hear the work
- Bare possibility of access is insufficient to prove access
- Reasonable opportunity may be shown by chain of events which could have provided access through intermediary
- Submission to demo tape does not establish access by company's recording artist
- Copying must be substantial and material and can be found where large portion of work was not taken, but "heart of work" was taken
- De minimis use is not an infringement

Campbell v. Acuff-Rose

- Four factors to be considered for fair use:
 - Purpose/character of use
 - Nature of original work
 - Amount and substantiality of the portion used in relation to copyrighted work as a whole
 - Effect of use upon potential market for or value of copyrighted work

Copyright Part IV

Newton v. Diamond

FACTS: plaintiff flutist sues recording group Beastie Boys for their use of sample in a song

DISCUSSION: Plaintiff seems to ignore the differences between the sound recording (to which he has no rights) and the composition (which he has rights to); Plaintiff's technique is not notated in the musical composition and is not protectable as a matter of law because it is not original; lyrics are also not original ("clap your hand"); Defendant's use is de minimis (average listener would not recognize the misappropriation)

- Short note sequences can be protected where:
 - Accompanying lyrics
 - At heart of composition
 - Repetitive (and/or)
 - Based on analysis of both recording and written composition
- De minimis is not a defense but rather goes to negate an element of copyright infringement
- Sampling without record company's permission is nearly per se infringement of phonorecording copyright (but not quite per se, except in some jurisdictions, where there are bright line rules)

Morill v. Smashing Pumpkins

FACTS: Morill made a video of the Marked (now the Smashing Pumpkins) before they became famous. Morill then wanted to release the video after the band became famous. They said no, and Morill let it drop until they used clips of the video for another Smashing Pumpkins video. Now Morill claims that he is the sole owner of the copyright of the video.

DISCUSSION:

- Requirements of “joint work”:
 - Copyrightable
 - Two or more authors
 - Author is not merely contributor
 - Author controls the work and is the inventive or master mind who gives effect to the idea
 - Shared intent to be co-authors
 - Audience appeal turns on contributions of both
- Co-owner has right to grant licenses for the use of the work
- Tenants in common vs. Joint tenants
 - Tenants in common: co-owners absorb shares of deceased members
 - Joint tenants: owners continue to own rights after death and rights are passed on to assignees/heirs

Fred Ahlert Music Corp. v. Warner/Chappell Music, Inc.

FACTS: Dixon and Henderson wrote "Bye Bye Blackbird" and sold the rights to Remick (who later became Warner). After the passing of the 1976 Act, the Dixon heirs revoked the license and sold it to Ahlert for Sleepless in Seattle.

DISCUSSION: Derivative work prepared under authority of the grant before its termination may continue to be utilized under the terms of the grant after its termination (does not extend to derivative works prepared after termination)

- Prior to the termination, Warner had licensed a small part to AMN, so they get to keep the money from that license. If they had given all of the rights in the song to AMN, then they would get to keep it after the termination.
- If you cut a deal with someone while you own the license, you get to keep the money from that - even after the license is revoked; you just can't grant new licenses.

Broadcast Regulation, Obscenity, Telecom Regulations

Background on FCC

FCC

- a five member board
- an independent agency
- no more than three members can be from the same political party
- each has a five year term

Call letters:

- all call letters which are assigned now = west of Mississippi get a K and east get a W (four letter assignment)
- stations have to give a legal ID as close as possible to the top of the hour

Context is Key:

- FCC staff must analyze
 - what was actually aired
 - the meaning of what was aired
 - the context in which it was aired

Payola – you have to disclose what was paid for and by whom

Obscenity

A) Whether the average person applying contemporary community standards (jury unless civil case) would find that the work, taken as a whole, appeals to the prurient interest; B) Whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and C) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. A work cannot be held obscene unless each element of the test has been evaluated independently and all three have been met. *Luke Records*. A statute can't include non-obscene protected speech with obscene speech. Purpose- Lacks any serious literary, artistic, political or scientific value, and, therefore, makes no contribution to the marketplace of ideas or the political process it is not entitled to 1st Amendment protection.

Luke Records v. Navarro

(11th Cir. 1992)

- the Sheriff pushed that record stores not sell, *As Nasty as They Wanna Be*
- 2 Live Crew filed an action to enjoin the sheriff from interfering with the sale of the recording
- the DC found the recording obscene under the Miller test

Appellate Court reverses **Test for Obscenity – Miller v. CA**

- this applies to the music and lyrics as a whole
 - the burden is on the person alleging obscenity
1. **Whether “the average person, applying contemporary community standards” would find that the work, taken as a whole, appeals to the prurient interest**
 2. **Whether the work depicts or describes, in a patently offensive way, sexual conduct, specifically defined by the applicable state law**
 3. **Whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value**
- **this is not a community standard but a national, global standard**

only the plaintiffs put on evidence on the factors and the judge relied on his own opinion of what is obscene there was no expert testimony by the sheriff the sheriff had the burden to prove obscenity

Broadcasts

Can't edit the proposed broadcast in advance and to excise material considered inappropriate for airwaves. The prohibition, however, has never been construed to deny the Commission the power to review the content of completed broadcasts in the performance of its regulatory duties. Out of all the mediums, broadcasting has received the most limited First Amendment protection. FCC Power- The FCC does not merely have control over obscenity, but indecent or profane broadcasting as well. *Pacifica*. Reason for Limited Protection- Because the broadcast audience is constantly tuning in and out, prior warnings cannot completely protect the listener or viewer from unexpected program content. To say that one may avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the first blow. Also broadcasting is accessible to children, even those too young to read. A broadcast can enlarge a child's vocabulary in an instant. Violations- The FCC may revoke a station license, impose a monetary forfeiture, or issue a warning if a station airs obscene, indecent, or profane material.

Indecency

The FCC has defined broadcast indecency as “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.”

- Indecent programming contains patently offensive sexual or excretory material that does not rise to the level of obscenity.

Indecent does not require prurient interests, but merely nonconformance with accepted standards of morality.

Hours Prohibited- 6:00 a.m. and 10:00 p.m. (almost all networks have stricter standards for indecency and profanity)

Factors the FCC Applies to Determine Indecency 1) Explicitness or graphic nature of the material 2) Dwelling on them and repeating 3) Pander, titillate, or use shock value.

Profanity

The FCC has defined profanity as “including language so grossly offensive to members of the public who actually hear it as to amount to a nuisance.”

Like indecency, profane speech is prohibited on broadcast radio and television between the hours of 6 a.m. and 10 p.m.

FCC Payroll Broadcast Rules

Federal Communications Act, including the (FCC) rules, requires that employees of broadcast stations, program producers, program suppliers and others who have accepted or agreed to receive payments, services, or other valuable consideration for airing material must disclose this fact. Disclosure provides broadcasters the information they need to let their audiences know if material was paid for, and by whom. LAW- The Communications Act and the FCC’s rules require that:

Social Regulation

Luke Records, Inc. v. Navarro

FACTS: Plaintiffs appeal declaratory judgment that their music is obscene after winning injunction against Broward County Sheriff's Office from taking action to prevent the sale of their album within the county

DISCUSSION: Sheriff failed to provide any evidence other than the recording itself and judge relied on own experience within community without demonstrating that he has sufficient artistic or literary knowledge or skills which satisfy the last Miller Test prong - judge can only make determination as to prurient interest applying community standards and patent offensiveness as defined by state law

- Miller Test
 - Whether average person, taken as a whole, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest
 - Whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law
 - Whether the work, taken as a whole, lacks serious literary artistic, political, or scientific value
 - Work only obscene when each element evaluated independently and all are met
- Very hard to ban material based on obscenity argument

FCC v. Pacifica

FACTS: Defendant radio station aired monologue which contained several profane words at 2pm on a weekday; FCC issued declaratory order that Pacifica could be subject to administrative sanctions, finding the language as “patently

offensive”; later declaratory ruling indicated that FCC was not prohibiting the broadcast but wanted to limit it to certain times of the day

ISSUES:

- Whether scope of judicial review encompasses more than FCC’s determination of indecent
- Whether FCC’s order was form of censorship forbidden by § 326
- Whether broadcast was indecent within the meaning of § 1464
- Whether order violated First Amendment

DISCUSSION: FCC is not limited from imposing sanctions on licensees engaging in obscene, indecent or profane broadcasting; there is no basis for disagreeing with FCC that broadcast contained indecent language; constitutional analysis determines that FCC's exercise of power is appropriate in this matter and consistent with line of caselaw (certain types of speech in certain situations may be regulated – content and context are critical); Content of speech not entitled to absolute constitutional protection under all circumstances

- Special distinctions for radio broadcasts:
 - Audience constantly tuning in and out so prior warnings do not provide complete protection from content
 - Accessibility to children

Regulated by FCC

- Obscenity: never allowed on AM/FM radio and broadcast television
 - Miller standard
 - Hard-core porn
- Profanity: allowed during “safe harbor” time of 10 p.m. and 6 a.m.
 - Language only (swear words)
- Indecency: allowed during “safe harbor” time of 10 p.m. and 6 a.m.
 - Sexual content, excretory organs/activities
 - Standard is that of average broadcast viewer, not that of any individual complainant
 - Factors (FCC internal guidelines on pursuing complaints):
 - Explicitness/graphic nature of material
 - Dwelling and repeating – more said, longer time
 - Pander, titillate, or use shock value
 - NOTE: depiction of gay activities and oral activities more often found indecent by FCC

Reasons FCC regulation is required

- Scarcity of spectrum
- Intrusion into the home
- Accessible to the public

Theories for protecting stories

- Idea can be property
- Express contract
- Implied in-fact contract
- Implied in-law contract/unjust enrichment/quasi-contract
 - Parties weren’t aware that they had a contract
- Tort
 - Breach of confidence/breach of confidential relationship

Protection for Inchoate Entertainment

Deal Making- Due to the lack of long term contracts, there are a lot of negotiating in Hollywood.

Play or Pay Clause- What this means is that some actors who made contracts to appear in films, if the film does not get made or the actor is replaced then they are in breach of contract. What are their damages? Money they should be paid and some sort of a resume builder. The resume builder though is speculative and courts won't allow speculative damages. Nonetheless production companies don't want to take a chance. 13th Amendment (Slavery) you can't force an employee to take a job they don't want, but you can force the employer to hire someone they don't want. It is a disincentive to good filmmaking.

Overall Development Deals- Producers who enter overall development deals with studios sometimes have an incentive to make their films at other studios. Studios enter overall development deals with producers to ensure a steady flow of product. The producer benefits too by sometimes having an office on the studio lot, a secretary and perhaps a development person and more benefits. Essentially the overall development deal takes the financial risk of producing off a producer's shoulders and places it on the studio's shoulders. Exclusive- The producer agrees to distribute all his projects through one studio. First-Look- Gives the studio first look or first crack at the producer's projects. It is up to the studio to accept. This is preferred by the producer because the producer likes alternatives and might know how to use this to get leverage. Housekeeping- When the producer receives an office and development expenses but no advance. Typically this deal is offered to novice producers.

Option Contract- Make sure you also agree the purchasing price, or else they can quibble with the price and then you have an unenforceable worthless option on your hands.

Step Deals- When hiring writers on a step by step basis.

Merchandising Deals- There are product placement agents. The law does not always require a release to show a product in a film. Assuming you don't disparage the product, it is unlikely a manufacturer could successfully sue simply because its product was shown without consent. Your distributor and insurance carrier may want a release. Release- You won't have to bother writing to the manufacturer for permission. Freebies- Agents can give producers cartons of candy bars, free airline tickets or truckload of beer. Promotion- If McDonalds agrees to distribute millions of your movie cup to its customers, and spend millions advertising the promotion, the movie benefits from increased public awareness. Cash- Sometimes.

Deal Making Timeline- 1. Development a. Retainer agreement with attorney and/or agent b. Literary Acquisition or Option Agreement c. Writer Employment Agreement 2. Pre-Production a. Actor, Director and crew Employment Agreements b. Completion bond agreement c. Errors and Omissions Insurance d. Worker's Compensation, Negative Film and Other Insurance e. Location releases and permits f. Signatory agreements with union and guilds g. Financing and producing agreements 3. Post-Production a. Distribution agreement, if not already secured b. Music permissions c. Film and tape clip permissions d. Distribution/exhibitor agreements

Property based thinking, but morass. Contract deal. 3) Implied in fact contract- waiting for a court to get in there a bit more and make sure things are fair. 4) Implied in law contract- 5) Tort.

Ideas- Property- An idea is usually not regarded as property, because all sentient beings may conceive and evolve ideas throughout the gamut of their powers of cerebration and because our concept of property implies something which may be owned and possessed to the exclusion of all other persons Desny. Contract- The policy that precludes protection of an abstract idea by copyright does not prevent its protection by contract. Even though an idea is not property subject to exclusive ownership, its disclosure may be of substantial benefit to the person to whom it is disclosed. That disclosure may therefore be consideration for a promise to pay...Even though the idea disclosed may be widely known and generally understood it may be protected by an express contract providing that it will be paid for regardless of its lack of novelty. Implied Contract- Is one the existence and terms of which are manifested by conduct. The acceptance of the consideration offered with a proposal, is an acceptance of the proposal. A voluntary acceptance of the benefit of a transaction is equivalent to a consent to all the obligations arising from it, so far as the facts are known, or ought to be known, to the persons

accepting. Consideration can even be a moral obligation originating in some benefit conferred upon the promisor. The difference with this and a contract, is that you are obligated to pay someone for information in an implied contract but that information is yours to use as you see fit, there is no more red tape. It is not the idea that matters, but the saying of the idea. Densy. The law will not imply a promise to pay for an idea from the mere facts that the idea has been conveyed, is valuable, and has been used for profit. Elements- After consideration has been given, you can only recover if 1) before or after disclosure he has obtained an express promise to pay; or 2) the circumstances preceding and attending disclosure, together with the conduct of the offeree acting with knowledge of the circumstances, show a promise of the type usually referred to as implied or implied-in-fact. Breach of Confidence- Feris, an actionable breach of confidence will arise when an idea, whether or not protectable, is offered to another in confidence, and is voluntarily received by the offeree in confidence with the understanding that it is not to be disclosed to others, and is not to be used by the offeree for purposes beyond the limits of the confidence without the offeror's permission. IN order to prevent the unwarranted creation or extension of a monopoly and restraint on progress in art, a confidential relationship will not be created from the mere submission of an idea to another. There must exist evidence of the communication of the confidentiality of the submission or evidence from which a confidential relationship can be inferred. Factors- 1) proof of the existence of an implied in fact contract; proof that the material submitted was protected by reason of sufficient novelty and elaboration; or proof of a particular relationship such as partners, joint adventurers, principal and agent or buyer and seller under certain circumstances.

Things to put- 1) explain at outset, my idea, I expect to be paid; 2) Bring witness; 3) Sent "record marker" letter; 4) Get them to sign a K; 5) Record audio (secret?); 6) Follow up appointment. 7) Write a treatment and thereby go from mere idea to expression. 8) Keep notes; 9) Lie convincingly

Theft of Ideas, Breach of Confidence, Development Deals, Submissions

Ideas

- there is no copyright protection for this
- but there are other theories of recovery

Property

(NY but no CA decisions)

Express Contract

Buchwald v. Paramount Pictures Corp.

(Cal. App. 1990) Judge Schneider

FACTS: Plaintiff submitted registered treatment for consideration by movie studio for new movie; studio began to work on project then abandoned it, only to revive project later without plaintiffs

- Buchwald wrote a treatment
- Paramount liked it and wanted to develop it into an Eddie Murphy project
- Paramount abandoned the idea
- Buchwald entered into an agreement with Warner Brothers but cancelled when it was discovered Paramount was shooting "Coming to America"
- the movie came out and Buchwald got no credit

ISSUE: Sole dispute in this matter is whether Paramount breached its contract with Buchwald DISCUSSION: No question as to access of work, similarity substantial; Court determines that term “based upon” term in contract can be interpreted as “an ordinary person would find that any two items had more similarities than dissimilarities”

Ct. said this is primarily a breach of contract case

- Buchwald was entitled to payment if Paramount produced a feature length theatrical motion picture based upon author’s work

Ct. goes through a quasi-copyright analysis with access and similarity

- there is no issue on access – Murphy had access
- this doesn’t require as much similarity under this analysis
 - where the evidence of access is overwhelming, not as much on this point is required
 - ct. points to the similarities described by the attorney and said those alone are sufficient
 - ct. also looks at the facts of the development of the project

Implied-in-Fact Contract

Desny v. Wilder

(Cal. 1956)

FACTS: Plaintiff pitched his movie idea to defendant Wilder (director) secretary and discussed payment with her, also submitted written treatment; movie later made from plaintiff’s idea but without compensation to him was employed by defendant Paramount movie studio as writer, producer and director;

DISCUSSION: Plaintiff’s dictation to secretary is the same as submission in typed form, evidence supports that defendants received synopsis through secretary and they are charged with knowledge of conditions upon which synopsis was accepted

- Ideas cannot be regarded as property usually, but they can be the basis of a contract
 - Disclosure of idea may be of substantial benefit to the person to whom it is disclosed
 - Conveyance of idea can be valuable consideration and can be bargained for
- In entertainment field, producer may agree that he will pay for service of conveying a valuable idea to him
 - Inferred or implied promise must be based on circumstances known to producer at time of disclosure of idea and he must voluntarily accept disclosure, knowing the conditions
- Must have opportunity to reject disclosure
- plaintiff called Wilder’s office and said he had an idea to do a movie on a boy who was trapped in a cave
- the secretary told him to prepare an outline, and he did
- he gave it to the secretary over the telephone
- plaintiff told the secretary they could use the story only if they paid him the reasonable value
- she said if Wilder did it, they would pay
- they did the movie and didn’t pay him and it included a fictional scene which was in his synopsis
- this deals with the idea to produce a life-story about a boy who was stuck in a cave
- plaintiff lost on summary judgment

Ct. reversed **To recover for an abstract idea: Before or after disclosure, plaintiff obtained an express promise to pay, or the circumstances preceding the and attending disclosure, together with the conduct of the offeree acting with knowledge of the circumstances, show a promise of the type usually referred to as “implied” or “implied-in-fact”**

- when the plaintiff disclosed his basic idea to the secretary, these weren't met but the question is whether by accepting the synopsis, they did

Grosso v. Miramax

(9th Cir. 2004) J. Schroeder

- Grosso wrote the screenplay for "The Shell Game" and claims that Miramax stole his idea for the movie "Rounders"
- breach of implied contract and violation of copyright

Ct. said summary judgment on the copyright claim is proper because the works are not substantially similar – they both use uncopyrightable poker jargon Breach of Implied Contract summary judgment is reversed

- in Desny the court held a contract exists where "the circumstances preceding and attending disclosure, together with the conduct of the offeree acting with knowledge of the circumstances, show a promise [to pay] of the type usually referred to as 'implied' or 'implied in fact.'"

To establish a Desny claim for breach of implied-in-fact contract, the plaintiff must:

1. **show that the plaintiff prepared the work**
2. **disclosed the work to the offeree for sale**
3. **and did so under circumstances from which it could be concluded that the offeree voluntarily accepted the disclosure knowing the conditions on which it was tendered and the reasonable value of the work.**

here he submitted the work with the expectation, which was understood by the defendants, that he would be compensated
The third element saves the claim from preemption

- **the Copyright Act, 17 U.S.C. § 301 , establishes a two part test for preempting state law claims**
- 1. **the work at issue comes within the subject matter of copyright, and**

the state law rights are "equivalent to any of the exclusive rights within the general scope of copyright." the bilateral expectation of compensation transforms the action from one arising under the federal statute to one sounding in contract

Implied-in-Law/Unjust Enrichment/Quasi-Contract

Tort

Breach of Confidence

Faris v. Enberg

FACTS: plaintiff created idea for format of sports quiz show and registered format of idea, then contacted defendant about the show, show later appeared on television with defendant as emcee; plaintiff filed complaint

DISCUSSION: Facts of case do not support that idea was disclosed in confidence; Plaintiff can now say that he would not have disclosed without confidence but there is no evidence that defendant knew that disclosure was in confidence; was not communicated during discussions

What advice would you give to Faris if you could go back in time, to protect his idea?

1. Explain at outset; my idea, I expect to get paid
2. Bring Witness
3. Send a “record making letter”
4. Get them to sign a contract
5. Bring in a tape recorder (secret? in CA you are not allowed to do that – it differs state by state)
6. Set a follow-up appointment to show future discussions
7. Write a treatment and thereby go from mere idea to expression which would then take you into the realm of copyright law
8. Deposit the treatment, sealed, with the Writer’s Guild
9. Keep notes (so you recall what happened)
10. Lie convincingly

Theft of Ideas, Breach of Confidence, Development Deals, Submissions

Land v. Jerry Lewis Productions, Inc.

FACTS: Parties had discussions about a movie, discussing possible ideas and plaintiff shared a script that she had written and asked him to consider it; she later sent a release form with the script; script was rejected but movie was later made that was similar to script

DISCUSSION: Question of substantial similarity between two works: though there are similarities, they cannot support plagiarism claim; Breach of contract: because release signed and submitted at a later date, it only applies to the script and not to the earlier conversation between the parties

Notes

- Studios and production companies are concerned about possible claims regarding unsolicited manuscripts
 - Some will request submitter to sign submission agreements, often with provisions that studio is not obligated to read material but if material is reviewed, fee will be paid
 - Some state that studio not obligated to pay if material is used
 - Many studios or production companies prefer to work with writers that are represented by an agent approved by WGA or experienced attorney

Grosso v. Miramax Film Corp.

FACTS: plaintiff claims that defendant stole his ideas from his screenplay entitled “The Shell Game” and turned it into a movie (“Rounders”)

DISCUSSION: Only similarity is poker setting and usual dialogue in poker setting (common and unprotectable poker jargon)

- Desny claim requirements:
 - Plaintiff prepared work
 - Disclosed work to offeree for sale
 - Circumstances support conclusion that offeree voluntarily accepted disclosure knowing condition on which tendered and reasonable value of work
- Copyright preemption two-part test:
 - Work at issue comes within subject matter of copyright
 - State law rights equivalent to any of exclusive rights within general scope of copyright
 - To survive preemption, cause of action must protect rights that are qualitatively different from rights protected by copyright (must allege “extra element” that changes nature of action)

Legitimate Theatre

Theatre terms

- Broadway play/musical: term of art which does not necessarily refer to a production on Broadway
 - Refers to any production in New York City appearing in a venue of more than 500 seats
 - Off-Broadway: any production in New York City appearing in a venue of 200-499 seats
 - Off Off Broadway: in venue of less than 199 seats
 - West End Productions similar but appearing in London
 - First Class Production: in United States other than New York City, similar to Broadway play/musical category
 - Live plays/productions are referred to as “legitimate theatre”
-
- Producer
 - Boss of the production of the play/musical
 - Playwright makes contract with producer, producer then secures venues, finds funding, finds actors, assembles staff (including those that work on creative end as well as business end)
 - Producer doesn't change the script or edit the play in any way, as movie producer does
 - Much of theatre is nonprofit, important way to finance productions
-
- New production:
 - Playwright works with producer in developing the play
 - Dramaturgs are generally employees of the company and issues of copyright would not be raised as their work would be considered a work-for-hire
 - No changes to play without playwright's approval
 - Merger clause: when play is completed and no more changes are made; all contributors' work is merged into one work
 - Usually set for press opening of play/musical
 - Usually previews prior to that, but may be used to gauge audience feedback
 - Press opening is first day seats are sold and press publishes review the following morning
 - Contributors and playwright paid usually by advances and small percentages of box office ticket sales
 - Question as to whether people who contributed very small pieces of material should be compensated
 - Playwright may authorize productions in other locations, touring companies, etc. so long as they haven't given the rights away
 - Permission from other contributors not necessary after merge
-
- Issues in rights
 - Directors contributions: question as to copyrightability but not resolved in law as of yet
 - Director is finished after press opening
 - Production then run by stage manager
 - Question as to set designers' work
 - Production company has only license and playwrights retain rights to work
-
- Union
 - United Scenic Designers

- Stagehands
- Actors' Union – Actors Equity
 - Equity waiver – 99 seat plan: may be able to use actors without paying them

Case

Thompson v. Larson

(Ct. App. 1998) *When there is a new play or new musical, the theater company that is developing it for the first time, works with the playwright in a very collaborative way ...*

FACTS: Larson was the playwright for the play RENT. When he tried to get it produced, the production company ultimately hired a dramaturg to help Larson fine tune the play. The dramaturg, Thompson, is now claiming that she is the co-author of the work.

DISCUSSION: Apply the test for co-authors. Need the person claiming to be the co-author to prove 1) that they made an independent copyrightable contribution and 2) that the intent was to be co-authors.

- Larson never intended for there to be a co-author of this work. He did everything in his power to prevent anyone from being considered a co-author.
- NOTE: In plays, the playwright owns everything and can do whatever they want with it - unlike Hollywood where the studio owns everything
- usually a dramaturg is attached to a drama company and works for the company and everything they do is a work for hire
 - the dramaturg is a learned literary person in the company who really provides the chief creative officer role in developing plays
 - working with playwright, director and choreographer
 - these people change but the dramaturg stays within the company
- Thomson is brought in as an independent contractor – that doesn't come up all that often

Ratings

Ratings

- Ratings Point – Fixed quantity of households
 - nationally a ratings point is:
 - 1,098,000 households = 1 ratings point
 - (1% of all US households)
- Ratings Share – a portion of households viewing at any given time
 - 1% of households with a television on

So if you have a ratings share of 23 – 23% of the people watching television are watching your show (that will be good)

- share tells you how you are doing against other programming
- point is what advertisers are worried about – how many people they are reaching

Two Ways Nielson Collects Data

- People Meters – this can tell what you are watching and you tell the remote how many people are in the room
 - when these came out, the cable companies were happy because people were under-reporting what they were watching on cable

- Diaries – you have a piece of paper and you report what you are watching and how many people are watching it

Record Contracts

- Artist required to appear, perform, appear in promotions
- Record company typically not obligated to do anything
 - Don't have to record a record
 - If record a record, company does not have to release it
- California Civil Code § 53423
 - Minimum payments for record contracts:
 - \$9,000 first year
 - \$12,000 second year
 - \$15,000 subsequent years (3-7)
 - Contract still valid if it doesn't provide for above, but means that contract cannot be used as basis for preventing artist from going to another company
 - Artist may be able to sue for minimum payments if company does not pay
 - Royalties
 - Artist has to receive minimum payments of \$15,000 in years 4-5 in royalties
 - Artist has to receive minimum payments of \$30,000 in years 6-7 in royalties
 - Record company can pay royalties at any time, until filing for injunction
 - If previous not met, record company can make good by paying ten times the minimums (superstar provision)
 - Can be used to get injunction to prevent artist from going to another label
- New artist generally get 10-15% of royalties after deductions
 - Foreign reductions
 - 85% for Europe/Canada
 - Single as opposed to entire album
 - Reduction to 75%
 - 3% producer royalty
 - Packaging reduction
 - 15% free goods deduction
 - 35% Reserve against returns

Retrieved from "http://www.law.und.edu/Class/entlaw/wiki/index.php/Consolidated_2008