

Chapter 126

Entertainment

*by Michael P. Zweig**

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I. INTRODUCTION

§ 126:1 Scope note

It may fairly be said that there is no discrete or definable discipline of “entertainment law,” in that entertainment lawyers combine many divergent skills: those of transactional and finance lawyers, of deal makers, of contract drafters and business affairs lawyers, of copyright, trademark and licensing lawyers, of employment lawyers and, most recently, new media and technology lawyers. The nomenclature of this chapter notwithstanding, it is similarly difficult to reach a consensus of what it means to be an entertainment litigator, as separate and apart from the various areas of the law in which litigators having clients in the

entertainment industry (as broadly defined) must delve. That being said, while entertainment litigators, like entertainment lawyers, are to a large degree generalists, they are first and foremost, litigators. This chapter addresses some (but surely far from all) of the litigation subject matters frequently encountered in representing entertainment industry-related clients, with a particular emphasis on how these subjects are addressed in the federal courts. Areas such as copyright and trademark, while also the stock and trade of the entertainment litigator, are covered in other chapters of this treatise,¹ and are not the subject of this chapter.

In these introductory sections,² we address some of the threshold issues confronted by entertainment litigators in taking on and then approaching a new matter.

II. SPECIAL CONSIDERATIONS FOR THE ENTERTAINMENT LITIGATOR

§ 126:2 Conflicts of interest

It is not uncommon for entertainment lawyers and their law firms, particularly those with clients in television and film production, music and theater, to represent simultaneously various of the players involved in a particular transaction—artists, producers, directors, studios and/or their executives, investors, talent agencies and managers, etc. Some wizened entertainment lawyers were once fond of observing, only half-jokingly, “where there is no conflict, we’re not interested.” More rigorous application of the rules of professional responsibility, the potential for disqualification motions, and clients’ increasing sophistication have greatly modified (but not altogether eliminated) some of the casual attitudes regarding conflicts that previously existed. Litigators, quite clearly, can affect no such casualness. It is their job to ensure that all potential conflicts implicated by a matter in dispute, or potentially in dispute, be thoroughly vetted and explored at the outset.¹ This will likely mean unraveling the web of interconnected relationships typical of entertainment-related transactions. A conflicts “checklist” might include the following:

- (1) Identify with precision who is the client—This is not always so simple. In representing a rock band, for example, the individual band members may well perceive that each of them is being represented individually by the law firm in addition to,

[Section 126:1]

¹See Chapter 87 “Trademark” (§§ 87:1 et seq.) and Chapter 88 “Copyright” (§§ 88:1 et seq.).

²§§ 126:2 to 126:9.

[Section 126:2]

¹See Chapter 65 “Ethical Issues in Commercial Cases” (§§ 65:1 et seq.) for a discussion of conflicts and disqualification issues generally.

or as opposed to, the collective entity. This must be clarified upfront in the engagement letter. The same is true (even more so) in representing co-authors or co-contributors where the potential future conflict issues need to be weighed carefully. In representing a talent agency (or manager), the litigator may become involved in a dispute involving the talent agency's client, and it may develop as to a particular transaction with respect to which there is a potentially conflicted relationship. Care must be taken to identify who the actual client is and to secure independent representation if necessary. When conflicts or the potential for conflicts exists, disclose them clearly and, assuming the conflicts are waivable, secure the appropriate waivers in writing.

(2) Individual clients—In representing a television or motion picture studio or production company, individual employees or other players may figure prominently in the dispute, either as principals or witnesses. It is not uncommon for law firms (particularly entertainment law firms) to represent executives in other capacities on an individual basis (e.g. employment, estate planning, tax). Such conflicts must also be cleared appropriately.

(3) Subsidiaries and affiliates—Large entertainment clients frequently consist of a web of inter-related subsidiaries, affiliates and joint ventures. The litigator must discuss with the client whether, for purposes of the engagement (and future conflicts), she is representing only the subsidiary—and not the parent or any other related company.

(4) Issue conflicts—Entertainment litigators whose firms represent media companies may need to think twice, for example, about representing a celebrity client against even a non-mainstream media tabloid defendant, if it may mean creating “bad precedent” for the mainstream media client.

(5) Client instructions—Especially in the case of a multiple or joint representation, clarify upfront the person(s) from whom the lawyer is to take instruction and identify the person who is, in the client's absence, authorized to act for the client. In those instances where the artist's personal or business manager handles all legal matters, develop an appropriate *modus operandi* to ensure that the actual client is also kept fully apprised of all key developments.

Given the intertwined, sometimes incestuous nature of the entertainment business, business people and entertainment lawyers often display a high tolerance for certain types of conflicts. Such tolerance, however, is not generally found in the courtroom, where disqualification motions, malpractice actions and, potentially, disciplinary complaints founded upon violations

of the ethics rules are not uncommon.²

§ 126:3 Entertainment clients are a special breed

While studios and large media companies are often as corporate, traditional and hierarchical as any Fortune 500 company, some entertainment industry clients (particularly those artists blissfully unacquainted with legal proceedings) are less sophisticated about the niceties of legal process, the need for document preservation or for self-restraint with respect to their own e-mail and oral communications. The prevalent use of Twitter, Facebook and blogs by artists and performers adds another “universe” about which the client needs to be cautioned, given the risks of making binding admissions or chatting about issues which may later become deposition fodder. Even more so than with other clients, litigators should take nothing for granted: communicate directly to the client (not only her manager or agent) about the nature of the legal process, the steps involved, when her involvement will be required and the anticipated costs, time frame and potential outcomes. Litigators should not rely solely on e-mail (which may not be read) as a means of keeping a client apprised and should maintain a clear record of important oral communications.

§ 126:4 Insurance coverage

Upon receipt of a demand letter, cease and desist notice or a lawsuit, the litigator’s first instinct is to gather facts, investigate thoroughly, review relevant documents and e-mails, interview key personnel and then respond with a strident letter of outrage and denial. While all of those things will likely need to be done, one of the very first steps following engagement by the client is to ascertain from the client (and more likely the client’s insurance broker or risk manager) whether there is any potential for insurance coverage. Although both individual artists and production companies typically have some form of insurance coverage, clients frequently assume, without adequate due diligence, that there is no coverage. This is not the time for a laissez-faire approach. Earn a client’s eternal gratitude by exploring this issue with care from the outset. Review the policy, speak with the broker and, if necessary, retain insurance coverage counsel to aid in policy interpretation. While a demand letter or complaint may be submitted directly to the carrier, through the insurance broker, litigators might consider whether to enhance the case for cover-

²See e.g., *Cinema 5, Ltd. v. Cinerama, Inc.*, 528 F.2d 1384, 1387, 1976-1 Trade Cas. (CCH) ¶ 60698 (2d Cir. 1976) (holding it improper for an attorney to participate in a lawsuit against his own client in a situation in which the lawyer has traditional attorney-client relationships with both clients); see also *Universal City Studios, Inc. v. Reimerdes*, 98 F. Supp. 2d 449, 456 (S.D. N.Y. 2000) (while denying the motion to disqualify counsel because it was tactically motivated and would harm the client, noting that “[t]he proper place for this controversy is in the appropriate professional disciplinary body”).

age by presenting additional information regarding the circumstances and context in which the claim arose or with relevant facts that go beyond the literal words of a pleading and which may implicate coverage. Anticipate what are the likely grounds for exclusion, or lack of coverage, and where appropriate address these issues up front. This may be particularly relevant where the claim for a covered advertising injury, for example, is submerged in a pleading focused on fraud or deceptive practices, or where a right of publicity claim is characterized as a claim for invasion of privacy. In the entertainment litigation arena, media policies frequently cover claims of right of publicity, advertising injury, trademark, defamation and, in some cases, breach of implied contract. Although the gist of a claim may not always be readily apparent from a poorly drafted claim letter or complaint, litigators may be able to strengthen a coverage position considerably by isolating and identifying the facts and claims actually at issue and those for which coverage is available.

§ 126:5 Drafting and responding to cease and desist and demand letters

Cease and desist letters frequently provide the non-musical “overture” for the entertainment litigation that follows. Copyright, trademark or right of publicity lawsuits rarely are filed without observance of this ritual. Prospective plaintiffs typically send such a letter for a variety of reasons: to explore the possibility of a quick settlement, to gather or confirm facts, to put a putative defendant on notice of a claim and demand ameliorating action (such as an immediate retraction or takedown) or to create a “cloud on title” that may have to be cleared before an intellectual property asset can be transferred or sold. The letter may also help to establish, in the absence of a satisfactory corrective response, a defendant’s “willful” and knowing conduct. If one is seeking immediate injunctive relief, the court will likely want to know, before it acts, that judicial intervention is necessary, and litigants may be criticized or sanctioned¹ for failing to provide such notice.

A demand letter or cease and desist letter should not be sent prematurely, however, since the transmission of such a letter may set the clock ticking. The plaintiff who intends to seek immediate equitable relief in the form of a temporary restraining order or preliminary injunction will be expected to proceed to court with reasonable expedition following such a letter, and

[Section 126:5]

¹See *Dawes-Ordonez v. Realtor Ass’n of Greater Ft. Lauderdale, Inc.*, Case No. 0:09-cv-60335-JIC (S.D. Fla. Sept. 2, 2010) (awarding attorney’s fees against copyright plaintiff due to plaintiff’s failure to provide defendant with notice of the alleged infringement prior to filing suit); *Oravec v. Sunny Isles Luxury Ventures L.C.*, 2010 WL 1302914 (S.D. Fla. 2010) (same).

undue and unexplained delay in seeking such relief may be fatal.²

A few observations about writing and/or responding to cease and desist and demand letters:

- Because of their litigation implications, such letters should always be reviewed (if not written) by entertainment litigators, not transactional lawyers, despite the natural resistance litigators may encounter from their transaction-oriented brethren.
- When responding to a demand letter, especially where there is no opportunity to review all of the underlying documents and e-mails beforehand, litigators should resist the temptation (even at the client's urging) to send off a quick, vitriolic response. Given that a defendant's response letter may well be the opening exhibit at trial, prudence dictates a definitive and confident, but measured response. And remember—less is often more.
- In formulating a response, litigators should consider carefully potential choice of law issues, and must not concede, even implicitly, that a particular state's law governs the dispute. On certain issues (post-mortem rights in a right of publicity case, for example), choice of law may be outcome-determinative.
- Before sending a letter, both lawyer and client should consider whether they are comfortable with it appearing on TMZ, Deadline Hollywood or the numerous other Web sites that eagerly and with lightning speed re-publish such "breaking news." Some lawyers have attempted, with mixed success, to defeat republication or distribution of their responses to demand letters by asserting a copyright interest in the letter and proscribing re-transmission.

§ 126:6 Litigation in and through the media

Entertainment litigations and disputes often receive an enormous (albeit undeserved) amount of publicity. Litigators—and clients—should expect and prepare for a barrage of press inquiries following a court filing and should decide in advance both who will respond to inquiries and the substance of the response.¹ If a public relations agency or specialist will be involved to advise on media communications, the law firm should retain the consul-

²See *Total Control Apparel, Inc. v. DMD Intern. Imports, LLC*, 409 F. Supp. 2d 403 (S.D. N.Y. 2006) (denying trademark plaintiff's motion for temporary and permanent injunction relief due to lack of likelihood of irreparable harm where the plaintiff had not sent defendant a timely cease and desist letter); *Metrokane, Inc. v. Wine Enthusiast, Inc.*, 2001 Copr. L. Dec. P 28238, 2001 WL 204203, at *2 (S.D. N.Y. 2001).

[Section 126:6]

¹See Chapter 59 "Crisis Management" (§§ 59:1 et seq.) for additional discussion of media relations in connection with litigation.

tant as a public relations litigation expert, to seek to preserve and protect privileged or work-product material that must be communicated to the public relations specialist to explain the matter.²

In any press statement, or media release, either about the filing of an action or in response, the less said the better, although defendants may wish, in a thoughtful way, to go beyond the rote “no comment,” given that the entirety of the plaintiff’s case has just been publicly disseminated through a court filing. And although lawyers may differ on this subject, it is questionable whether, particularly in federal court, litigating a case through the media has any real value (except, perhaps, to the lawyer seeking to promote himself). Judges typically disdain and discourage such publicity; it is questionable ethically, given its potential for prejudicing prospective jurors,³ and can well backfire on the client in unexpected ways. On the other hand, lawsuits do not exist in a vacuum. Most courts now utilize electronic filings, and they are frequently and widely read by members of the media. In some cases, an overall media and public relations strategy may be necessary to counteract (or transform) the “din” in the blogosphere and mainstream media created following the filing of a lawsuit.

Public responses to lawsuits also have proven to be fertile ground for defamation lawsuits. One of many dangers in litigating in the media is that statements that prove to be false and harmful to the opposition may not be immunized from liability if they are made directly to the media (as opposed to in legal papers).⁴ A client’s public response to allegations in a lawsuit must be vetted carefully to ensure that it is not actionable. One effective and professional way to communicate a client’s story ethically and responsibly is through filed pleadings and motions that speak with a clear, consistent and powerful message.

§ 126:7 Arbitration

²See, e.g., *F.T.C. v. GlaxoSmithKline*, 294 F.3d 141, 148, 2002-2 Trade Cas. (CCH) ¶ 73728, 58 Fed. R. Evid. Serv. 1443, 53 Fed. R. Serv. 3d 98 (D.C. Cir. 2002) (attorney client privilege extended to communications shared with public relations consultants working with attorneys); *Haugh v. Schroder Investment Management North America Inc.*, 92 Fair Empl. Prac. Cas. (BNA) 1043, 2003 WL 21998674 at *4-5 (S.D. N.Y. 2003); *In re Copper Market Antitrust Litigation*, 200 F.R.D. 213, 218-19 (S.D. N.Y. 2001).

³See, e.g., *N.Y. Rules of Prof. Conduct, Rule 3.6*; *Application of Dow Jones & Co., Inc.*, 842 F.2d 603, 15 Media L. Rep. (BNA) 1105 (2d Cir. 1988) (affirming trial court’s gag order).

⁴See, e.g., *Mzamane v. Winfrey*, 693 F. Supp. 2d 442, 257 Ed. Law Rep. 296 (E.D. Pa. 2010) (defamation claim brought against Oprah Winfrey based on public statements she made in response to allegations that students had been mistreated at the Oprah Winfrey Leadership Academy for Girls); *Rodriguez v. Panayiotou*, 314 F.3d 979, 31 Media L. Rep. (BNA) 1657 (9th Cir. 2002) (defamation claim brought against singer George Michael based on statements he made in the press concerning his 1998 arrest for disorderly conduct).

Litigation in federal court may be stayed where there is an applicable mandatory arbitration provision governing the dispute.¹ Collective bargaining agreements between producers and actors,² directors³ and screenwriters,⁴ as well as in the theatre industry⁵ contain such mandatory provisions, which are often broad in scope and dispositive. Failure to timely invoke these clauses could result in their involuntary waiver.⁶

§ 126:8 Special issues at the discovery stage

Due to the notoriety of their clients, entertainment litigators frequently confront some unique issues during the discovery process. For example, the media may contend that they have the right to attend the key depositions in the case, arguing that the depositions form part of a public proceeding from which they cannot be excluded. This argument is generally unsuccessful.¹ Lawyers conducting depositions at their own law office presumably have the right to limit the attendance of uninvited parties.² An adversary, seeking publicity for himself or his client, may choose to invite media to a deposition at his own office or have television news cameras waiting outside. Lawyers who want to limit their clients' exposure to the media during depositions should secure in advance an agreement with the host of the deposition regarding potential attendees or do so as part of a protec-

[Section 126:7]

¹See Chapter 12 "Arbitration v. Litigation: Enforceability and Access to Courts" (§§ 12:1 et seq.).

²See Producer-Screen Actors Guild Codified Basic Agreement (2005), Section 9.

³See Directors Guild of America, Inc. Basic Agreement (2005), Art. 2.

⁴See Writers Guild of America Basic Agreement (2004), Art. 10.

⁵See The Broadway League and Stage Directors and Choreographers Society Collective Bargaining Agreement (2008), Art. XVI.

⁶See, e.g., *Burns v. Imagine Films Entertainment, Inc.*, 165 F.R.D. 381, 387 (W.D. N.Y. 1996) ("The right to arbitration . . . can be waived. A party waives his right to arbitrate when he actively participates in a lawsuit or takes other action inconsistent with that right."), quoting *Cornell & Co. v. Barber & Ross Co.*, 360 F.2d 512, 513 (D.C. Cir. 1966).

[Section 126:8]

¹See *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 32-33, 104 S. Ct. 2199, 81 L. Ed. 2d 17, 10 Media L. Rep. (BNA) 1705, 38 Fed. R. Serv. 2d 1606 (1984) (affirming entry of protective order against press attendance at depositions, and rejecting the argument that restrictions on public access to pretrial depositions impaired U.S. Const. Amend. I freedoms); *Kimberlin v. Quinlan*, 145 F.R.D. 1, 2 (D.D.C. 1992) (media representative barred from attending deposition).

²See *Kimberlin*, 145 F.R.D. at 2 n.2 (a non-party to a litigation can be excluded from attending a pretrial deposition); *Times Newspapers Ltd. (Of Great Britain) v. McDonnell Douglas Corp.*, 387 F. Supp. 189, 197, 1 Media L. Rep. (BNA) 2346, 19 Fed. R. Serv. 2d 714 (C.D. Cal. 1974) ("neither the public nor representatives of the press have a right to be present as such taking [of a deposition]").