

Developments In Entertainment Law: At The Forefront Of An Evolving Industry

The Editor interviews Justin B. Wineburgh, Head, Sports and Entertainment Practice, Cozen O'Connor.

Editor: Mr. Wineburgh, can you tell us what led you to the practice of entertainment law?

Wineburgh: Prior to joining Cozen O'Connor eight years ago, I started my career defending electrical engineers, in which I had done my undergraduate work, and then handled commercial and insurance matters. However, following my arrival at Cozen, I was contacted by a childhood friend who had moved to Los Angeles to get into the entertainment industry (and has since gone on to become one of the most prolific film producers in Hollywood), and who needed help with one of his projects.

The firm recognized the opportunity I had to represent this client, and, from this beginning, a full-scale Sports and Entertainment Practice, across the entire firm and all of its offices, has developed. With more than 500 attorneys and 21 offices in the U.S., Toronto, and London, the firm has provided a tremendous platform for the successful growth of this practice.

Editor: What does this work involve?

Wineburgh: As a member of the firm and head of the Sports and Entertainment Practice, I have been fortunate to be able to develop a diverse practice, counseling clients and litigating cases in the entertainment industry throughout the U.S. and abroad. This includes representing clients in the film, television, music, radio, new media and sports industries in complex commercial, defamation, and tort cases, in addition to privacy and publicity, intellectual property, employment and diverse corporate matters.

Our work also involves advising book and screenwriters, producers, directors, distributors, retailers, managers, agents, music engineers, production companies and artists in a variety of situations beyond litigation, from contract negotiations, to transactional matters and pre-litigation counseling. I have handled litigation and transactional work for clients including one of the world's largest independent film distributors, and serve as production counsel to a variety of successful films/television shows. This is in addition to representing clients at film festivals worldwide, including Sundance and Cannes.

Editor: What are the biggest risks facing entertainment clients and their counsel today?

Wineburgh: As with any industry, the entertainment sector faces unique risks, mostly financial in nature. Certainly, motion pictures are expensive to produce and distribute. Sporting events, such as the World Series or the Super Bowl, are extraordinarily costly as well. Even basic commercials can exceed budget and create problems. All of these undertakings entail a fact-driven analysis, and the solution is frequently dictated by the client's needs and expectations. Risks must be met with a real understanding of how creative work is developed, the varied ways in which that work may be exploited and distributed, and the public's desire to have access to that creation.

Editor: I gather, in light of the recent

writers' strike, that the negotiation of entertainment contracts is key. What advice do you offer to entertainment industry professionals when they initially structure these contracts?

Wineburgh: Listen to your clients. It is absolutely critical to hear their objectives and desires. Only then can entertainment industry clients be effectively counseled. I think there are many, many top-notch attorneys, but serving clients in the entertainment industry involves far more than simply knowing how to negotiate and draft a contract. This industry is unique, presenting particularized and complex issues, and it continues to evolve. There are times when it employs an entirely different set of rules than those dominating other industries. Knowing how to navigate such an environment is essential to serving clients effectively. Again, listening to your clients is key, and understanding your adversary's position is equally important.

Editor: Are there common terms that should be contained in such agreements?

Wineburgh: There are common terms invariably included in entertainment industry contracts, although the manner in which such clauses are integrated, and the process by which they are negotiated, varies with the circumstances presented.

Generally, every entertainment industry contract includes a provision clearly specifying the rights being granted. It is of fundamental importance that the parties clearly identify the rights that are being exchanged.

Equally important, a contract will include a provision concerning payment and compensation terms. Is payment based on a fixed amount, royalty percentage, or some combination of the two? Also related to the financial aspect of any agreement, the parties will need to define if payment is to be based on the gross or net revenue generated by the content. If it is the latter, the parties will undoubtedly spend countless hours negotiating (and frequently even litigating) those expenses that may be deducted from the gross receipts that are related to the development, production, promotion, advertising and delivery of the rights at issue.

Territory terms are always essential. Are the rights granted able to be exploited worldwide, or just in the U.S.? And, with respect to the terms of the agreement, it is critical to clearly identify the length of the agreement, and the manner in which it may be extended or terminated. A definitions section, identifying the parties and defining the terminology utilized in the agreement, is also standard.

Frequently included are provisions concerning a right of first negotiation (giving one party to the contract the right to negotiate before any third party), as well as a right of last refusal (enabling one party to reserve rights to match any third-party offer that may be solicited and obtained by the other).

Editor: What are other key provisions?

Wineburgh: It is vital to address situations when the parties are in different jurisdictions – as such, agreements will frequently



Justin B. Wineburgh

include provisions related to notice and service of process. Such clauses specify the manner in which the parties are to go about giving notice to one another.

Force majeure means "superior force," and entertainment industry contracts often include provisions for such circumstances beyond the parties' control. These would be situations that include war, strike, natural disaster, fire or flood – essentially anything preventing the parties from fulfilling contract obligations. Other common provisions address situations involving loan-out companies, incapacity, default, cure, suspension rights and remedies.

Finally, contract clauses that are unique to the entertainment industry cover use of name and likeness, as well as restrictions on publicity. Additionally, appropriate guild issues, and union rights and obligations are addressed, as are credit obligations.

Editor: When it comes to contract renewals, how can you ensure a level playing field and equal bargaining power?

Wineburgh: That is dictated almost entirely by the value of the asset, i.e. your client. I represent a number of individuals in the entertainment industry, and each is a unique asset, with different goals. For example, one of my clients is among the most well-known radio industry personalities and, obviously, his value as an asset allows for strong bargaining leverage. Again, it is critical for entertainment industry counsel to understand a client's strengths and weaknesses to level the playing field as much as possible.

Editor: When an artist wishes to terminate his or her contract before expiration, what recourse is available to the employer?

Wineburgh: Understanding contractual terms is essential. Invariably, every contract should include a notice provision prior to enabling a party to terminate the agreement. Have the notice requirements been met? Does the employer have a continuing obligation to pay the artist? After this preliminary analysis, the available remedies are going to have to be carefully examined. Is the employer permitted to bring an injunction to preclude the artist from engaging in other employment? Is there a non-compete provision, and, if so, is it enforceable given the circumstances? As is clear, there are many considerations, options and strategies to be evaluated.

Editor: In any business, a single problematic employee can impact the organization's reputation. When that person is a public talent, the damage can be catastrophic. When should an employer end a contract prematurely?

Wineburgh: The big issue here is determining when the artist's conduct has become so detrimental to the business that it is essential to terminate employment. An understanding of the applicable agreement, as always, is necessary. Does the agreement have, for example, a moral turpitude clause, which is a provision permitting termination of the contract following an act unbecoming to a particular employer? Having said that, I would cautiously point out that publicity from untoward behavior may, in fact, result in a boost in ratings and benefit the

employer. The entertainment industry is truly distinctive in this regard. The wise employer is going to have to consider many factors, which simply do not arise in other professional organizations, when terminating an employee.

Editor: If the employer does decide to terminate, what can it do to protect itself from liability?

Wineburgh: No employer is immune from sexual harassment, discrimination and unlawful termination claims. The parties' contract will usually spell out grounds for termination, and those provisions should be followed with considerable care. In addition, if the employee is a member of a union, the terms of the union agreement must be met. What the employer must do is conduct a strong investigation – carefully following its own protocols and policies – and document the results of that investigation. And, out of an abundance of caution, the terminating employer, if possible, should attempt to obtain a severance agreement or release to try to insulate itself from potential claims by the terminated employee.

Editor: Beyond contract negotiations, employment termination, and so on, how do you address challenges involving new media, where future risks are essentially unknown?

Wineburgh: There is a tremendous amount of entertainment content being distributed on an entirely new host of platforms. Each has its own demands. For example, electronic gaming is gaining popularity at an incredible rate, proving that, each time a new platform is developed, there is great opportunity to better serve clients – assuming counsel is prepared to commit to continued education in such cutting edge areas.

Editor: And, what is the next big legal issue for the entertainment field?

Wineburgh: It is not possible to have a discussion of the entertainment industry without mentioning community websites such as YouTube or MySpace. The impact of these developing platforms, especially with respect to distribution of video and music content, is significant. They raise ongoing copyright concerns, and practitioners continue to try to define the line between fair use and copyright infringement.

Additionally, we are seeing the emergence of a great deal of branded entertainment, which has led to the inclusion of marketing and targeted products in the content itself. With the explosion of TIVO and the like – which allow viewers to eliminate commercials – developers have sought alternatives by incorporating advertising into the content itself. Understanding the business model for advertising in the entertainment industry, while ensuring continued development of works is preserved, is crucial.

The creative process is an evolution, as are the associated legal issues. As such, there is not any one legal issue that will be the "next big thing." Rather, it is the nature of a creative industry, coupled with the public's desire for new content, which will implicate new legal issues. This is what makes the practice of entertainment law so exciting, rewarding and academically stimulating.

Please email the interviewee at jwineburgh@cozen.com with questions about the interview.