Media & Entertainment Law Wypadki

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        2. Osbourne's music was likely to produce such a result
    3. Court said there was no duty

DEFAMATION

- Defamation- is the communication of a statement that makes a false claim, expressively stated or implied to be factual, that may harm the reputation of an individual, business, product, group, government or nation.

- Defamation Elements:
    - Publication (includes telling a third party) of a
    - False statement which is
    - Harmful to one's reputation, and is
    - Unprivileged (no consent, no lawful justification)

- Opinion: There can be no libel predicated on an opinion. The publication must contain a false statement of fact. However, where the alleged defamatory remarks could be determined either as fact or opinion, and the court cannot say as a matter of law that the statements were not understood as fact, there is a triable issue of fact for the jury.

- Preponderance of the evidence burden shifts to the P to prove a statement is not true.

- Defamation must actually damage a person's reputation: if one's reputation is terrible, defamation may not be possible.

Slander v. Libel

- Slander
    - Slander Per Se:
        - When you falsely accuse someone of…
            - a criminal offense
            - a loathsome disease

        - A matter incomparable with the proper exercise of the P's business, trade, profession or office or
        - Sexual misconduct.
    - Plead and prove special damages

- 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.

- Jurisdictions are split on whether television and radio are libel or slander

REPUBLICATION

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

WHAT CAUSES A JURY TO FIND FAULT

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

DISCOVERY IN DEFAMATION SUITS

- The 1st Amendment does not prohibit plaintiffs from directly inquiring into the editorial processes of whom they accuse of defamation.
    - REASONING: Because it must be false for a defamation claim to hold water, the thoughts and editorial processes of the alleged defamer should be open to examination.

- The discovery process is very intrusive…journalists should conduct themselves carefully.
    - Publishers need to develop clear policies about how their news is gathered.

DIFFERENT STANDARD FOR PUBLIC OFFICIALS AND FIGURES

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

Actual Malice: Reckless Disregard or Knowing Falsity

- Actual Malice that the P must prove consists of the publisher's knowledge that what he printed was false, or else disregard on the part of the publisher as to its probable falsity (Knowledge or High Degree of Awareness)
    - Hatred, ill-will, etc does not count, even though this is how the word "malice" is normally used
    - It is more common for courts to find reckless disregard for the truth instead of knowledge of falsity.
    - Must demonstrate actual malice by CLEAR and CONVINCING evidence

- Reckless Disregard – "high degree of awareness of falsity"…Garrison v. Louisiana. For reckless disregard to be found, "there must be sufficient evidence to permit the conclusion that the D in fact entertained serious doubts as to the truth of his publication."
    - Negligence is not enough.
    - SC went on to define reckless disregard by saying what it is not…
        - Disregard is more than reckless – conscious disregard is a better description of the test.
    - These cases usually fall into several categories, including:
        - A reliance on a source or sources who are not believable or who are relied on despite their known biases
        - Publishing an inherently improbable story
        - Failing to contact a necessary and proper source
        - Recognizing that the publisher has doubts about the truthfulness of the story and still publishes it.
    - Assigning a young reporter does not constitute actual malice
- Knowing Falsity
    - It is a type of malice
    - Like, reckless disregard for the truth

Libel per se

- damages do not need to be proved because they are assumed
- This is the standard…

- Of Course, Truth is a complete privilege!

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

Who constitutes "public official" or "public figure"

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

Public Official

- *Rosenblatt v. Baer* – the "public official" designation applies to, at the very least, those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of gov't affairs.
    - The Sullivan rule may apply to a person who has left public office where public interest in the matter at issue is still substantial.
    - Public official does not mean public employee!

- A Charge of criminal conduct against a present official, no matter how remote in time or place the conduct was, is always "relevant to his fitness for office."

- Courts vary significantly regarding who they will and won't include as a public official.

- Doesn't matter if the person is not employed as a public official…if that person is in a position to make policy and has access to the press (presumably for self-defense), that can add up to classification as a public official

Public Figure

- People who throw themselves into public controversies in an attempt to influence their outcomes are more than just anonymous residents and constitute public figures and are subject to Sullivan

- *Rosenblum v. Metromedia* – Publisher of nude magazines sues…May be extended to private citizens involved in libel whenever the news is a "matter of public interest"

- Policy:
    - Private citizens are at a disadvantage because they do not enjoy greater access to channels of communication like public figures do. They are more vulnerable and need more governmental protection
    - Media is entitled to act on the presumption that public figures have exposed themselves to an increased risk of injury

- *Gertz* decision analyzed
    - A public figure is created in two ways:
        - An individual may achieve fame or notoriety that he becomes a public figure for all purposes and contexts ("all purpose")
            - you need clear evidence of general fame or notoriety in the community and pervasive involvement in the affairs of society
        - An individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues. ("vortex")
            - to determine this, you need to look into the nature and extent of an individual's participation in the particular controversy giving rise to defamation.
            - EX: Firestone divorce case – woman was not a public figure simply because she allowed her private affairs to be aired in the public eye. She did not have "special prominence in the resolution of public questions" or "pervasive power or influence."
            - Thus, you do not use Rosenblum, which required the courts to examine the TOPIC of the news – instead you must now examine the INDIVIDUAL and his role in public life.

- The Sullivan rule applies to candidates as well – candidates are treated the same as occupants of the office. It does not matter if the public candidate/official's public or private reputation is ruined. Anything that might touch on an official's fitness for office is relevant.

- Public figures don't have to just be people – they can be organizations (Ithaca college ex)

Limited Purpose Public Figures

- Someone can be a public figure for a limited purpose.

- Bootstrapping – when a D will try to take a private person P and turn him into a public figure in order to require the P to pass the actual malice hurdle.

- NOTE: Average libel suit costs $175,000.

Cases

- *Prozeralik v. Capital Cities, Inc.*
    - TV station reported about beating connected to Mafia
    - Speculated about the identity of the victim, contacted FBI with Prozeralik's name
    - Agent said she didn't confirm Prozeralik's name, didn't give another name, didn't approve story
    - Prozeralik sued
    - Station erroneously blamed FBI for putting forth Prozeralik's name

- *Masson v. The New Yorker*
    - Altered quotes case
    - Masson was projects director of the Sigmund Freud archives
    - Reporter altered quotes
    - Deliberate misquotation of a public figure cannot be libelous unless the wording changes the meaning of what really was said

- *Walker v. Associated Press*
    - Justice Harlan's dissent
        - A public figure who is not a public official may recover damages for a defamatory falsehood whose substance makes substantial danger to reputation apparent on a showing of highly unreasonable conduct constituting an extreme departure from the standard of investigation and reporting ordinarily adhered to by responsible publishers
    - Test has too many qualifiers

DEFENSES AGAINST DEFAMATION

- Neutral Reportage – A useful, but not-to-be-trusted defense against libel lawsuits goes under the name "neutral reportage."
    -
        - Constitution protects accurate, unbiased news reporting of accusations made against public figures regardless of the reporter's view of their truth
            - What is newsworthy is that the accusations were made…the press is not required to suppress newsworthy accusations merely because the reporter has serious doubts at to the truth of the accusations.
            - BUT this only applies where the press is not taking sides or deliberately distorting statements in order to launch a personal attack.
        - Some states have accepted this doctrine while others have rejected it.
        - HOW DOES THIS SQUARE WITH THE REPUBLICATION RULE?

Three Main Defenses:

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

Qualified Privilege

- Three branches of Gov't have an Absolute Privilege
    - There is no defamation liability for what these people say in the performance of their officials duties.
    - Policy – the three branches of government work better when judges and politicians are able to speak their minds.

- Absolute Privilege for Citizens…
    - Absolute privilege to criticize the gov't
        - Exceptions
            - You can't reveal nat'l security secrets
            - Could be sued for defamation by an individual gov't actor
            - Can't discuss grand jury proceedings
            - Can't commit trademark infringement
        - Ex) using public college sports teams' mascots on t-shirts
        - Ex) NYPD t-shirts
        - Statutory limitations on using gov't seals and insignia

- Media has a Qualified Privilege in Public or Official proceedings
    - News media may publish defamation from legislative, judicial or other public and official proceedings without fear of successful libel or slander action
    - The Absolute privilege that these people enjoy would be of little use if the media was unable to report it. People need to know what is going on in these proceedings…thus, media is given a "qualified immunity" (limited immunity).
    - The privilege is "qualified" in that it must be FAIR AND ACCURATE.
    - An accurate quote published out of context may not be privileged if defamatory. However, a wrong fact taken accurately from records is protected.
    - Adding opinion or extraneous material may also destroy immunity.

- The qualified privilege for the press comes into play when a hearing is either official or public:
    - Official
        - In some states, a document filed with the clerk of court is part of an official proceeding, can be reported on with no danger of defamation
            - In some states, it's not and you have to wait until something comes before the judge before you can report on it, or else you could be subject to a defamation suit
        - Policy: The classic justification for being able to report of court proceedings is because the public must be aware of what is going on with the court system
        - In all jurisdictions matrimonial proceedings are secret
            - How does this square with Justice Holmes' assertion that "it is of the highest moment that those who administer justice should always act under the sense of public responsibility"
            - The counterargument would be that it is of public concern how the judiciary deals with private matters
            - Also, one of the main arguments against same-sex marriage is that marriage is of public concern
        - Judicial Branch
            - Reports of official activity outside of the meeting may not be protected.
                - In many states, the pleadings do not get protection.
                    - Campbell Rule (20 states follow this) – pleadings may be reported on fairly and accurately as soon as they are filed.
                    - Some states have rejected this saying the press does not have a legal or moral duty to report on accusations.
                    - Even jurisdictions where the pleadings are protected, 2 basic rules of reporting should be followed:
                        - It should be clear where the document is from
                        - Play fair – state when you have not gotten both sides of the story and why, for ex.
        - Executive Branch
            - Formal hearings are protected.
            - Informal hearings USUALLY are protected
                - informal investigations carried out by executive officers, for ex
                - Police reporters BEWARE! A preliminary police investigation may not be protected.
        - Legislative Branch
            - Can be even more difficult to determine which hearings are official or public.
            - Hearings often operate under lose rules.
            - Beware if:
                - No quorum
                - if the committee publishes material that its clerks have collected without itself first investigating charges in the material.
                - The committee has not authorized the work of its subcommittees

        - if reports are issued without the committees approval.

    -
    - Public
        - To determine what meetings are "public" – KNOW THE LAW OF YOUR STATE.

- The immunity is clearest when a hearing is both official and public. However, there does seem to be an emerging standard that even if a meeting is not public or official, it is important for the community to know what is happening where matters of public welfare and concern are involved…**If the media publishes non-public or secret materials containing defamatory information, the public interest in those materials needs to be compelling to afford the media protection from liability.

Truth

- Most states say that truth is a complete defense – SCOTUS hasn't decided.
    - Also, true statements when taken out of context may also be libel.

- Policy – why should an individual be awarded damages from harm to his reputation when the truth of the matter is that his record does not merit a good reputation?

- Burden of proving truth = largely on the Plaintiff.

- Presumption - The media should not be punished for statement that MAY be true.
    - If it MAY be true, no punishment
- Truth will not be destroyed by a story's minor inaccuracies (saying Aug 15th instead of Aug 16th)

- Republication Rule - Not a defense that media reported accurately and truthfully someone else's false and defamatory statements. ** (HOW DOES THIS SQUARE WITH THE NEUTRAL REPORTAGE RULE??)
    - "according to a reliable source" or "according to police reports" does not remove liability. Liability under the republication rule exists.
- Difference between this and Neutral Reportage:
    - However, even though every fact in a story may be true – an act of omission may result in libel (Mr. Thompson and Mrs. Fredrickson were found at the home without saying that Mr. Fredrickson was also there)

- Some states take ill-will into consideration when analyzing the defense of truth:
    - Public - Doesn't matter if ill-will or intent to harm is shown. If it is truthful, must show knowing or reckless falsehood.
    - Private – Truth is only a good defense if made with good intentions and for justifiable ends.

- Accuracy v. Truth
    - Quoting something exactly is ACCURATE, but it is not always truthful.

Opinion and Fair Comment

Non-Actionable Opinion- Courts weigh several factors including

- the content of the alleged defamatory statement,
- whether the statement is provable as false,
- the precision and specificity of the language used,
- the use of cautionary language or words of apparency,
- the verifiability of the statement,

- the context in which the statement is made,
- its intended audience and
- the medium in which it is communicated.
- Demand for Retraction- This is an imperfect defense, but in some states a P's permissible recovery in a defamation action may be limited if the P fails to demand a retraction in a timely manner or if a D does make a retraction upon the demand of the P.

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

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

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

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

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

Steps to Protect from Charges of Defamation:

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

RIGHT OF PRIVACY –V- PRIVACY TORTS

- Right to privacy is represented by interests protected in the Constitution's Bill of Rights

- Tort law of Privacy – deals with invasions of personal privacy by individuals or businesses making possible civil lawsuits for monetary damages.

Defamation –v- Privacy

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

2 Important Things to Remember about Invasion of Privacy:

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

4 Kinds of torts under "invasion of privacy:"

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

        1. Photographers stand in for the public, capturing images anyone could see if they were there
2. False Light.
    1. Statement doesn't have to be bad, just false and highly offensive
3. Appropriation (a.k.a misappropriation, right of publicity)
    1. Using someone's likeness or name
    2. Could be true or false
    3. Can't use for a commercial purpose
4. Publication of Private Matters
    1. Often goes with Intrusion

False Light

Components of a False Light lawsuit:

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

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

1. The interest protected is the interest of the individual in not being made to appear before the public otherwise than he is.
2. It is not, however, necessary to the action that the P be defamed.
3. It is enough that he is given unreasonable and highly objectionable publicity that attributes to him characteristics, conduct or beliefs that are false, and so is placed before the public in a false position.

- Unlike defamation which requires that a person's reputation be damaged, the false light tort requires only that the published statement be false, substantial and objectionable.

- Everything depends on context. If a picture's caption shows someone in a false light, don't use it!
    - EX:…picture of couple taken in the public. It was ok when it had a caption about Love, but not about Sex.

- *Duncan v. WJLA-TV*
    - News story video footage implied that innocent female bystander had herpes
    - P survived summary judgment, then won small award

Defenses to False Light Privacy Lawsuits

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

Appropriation of P's Name or Likeness

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

The Right of Publicity

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

EXAMPLES:

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

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

Republication of Private Matters

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

Privacy Right of Intrusion

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

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

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

Nonconsensual Entry/Refusal to Leave

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

- Trespass is both a crime and a tort.

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

Fraud Claims and Undercover Reporting

ABC v. Food Lion

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

Dateline Trucker case:

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

Tortuous Interference With a Valid Contract

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

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

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

Case:

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

LICENSE v. WAIVER v. CONTRACT

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

ACCESS AND THE CONSTITUTION

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

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

Records and Meetings of Fed Gov't

FOIA – Freedom of Information Act

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

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

Exemptions:

1. Records that need to be kept secret to protect national security
2. Matters related only to internal personnel rules and practices of an agency
3. Matter exempt from disclosure by statute
4. Trade secrets
5. Inter-agency communications regarding policy
6. files that would be a clear invasion of someone's privacy (medical files)
7. investigatory files for law enforcement purposes
8. reports prepared by an agency responsible for supervision of financial institutions
9. geological information

Electronic Freedom of Information Act

- Definition of a "record" now includes information stored electronically.

- Documents created on or after 11-1-96 must be made available for inspection or copying on-line as well as in hard copy form

- Requesters can specify the format and form they want to receive the record in, provided the information can readily be produced in that format

Open Gov't Act of 2007

- Created a FOI officer and a liaison to help answer FOI requests

- Jurisdiction: If you decide to sue after being denied a document, you can file in the Fed dist where you live, the dist where the records are kept or DC (the home to all executive agencies)

- Clinton tried to make it more open (Dept of Justice said it would no longer defend agencies that denied requests simply because it legally could do so) – Bush worked to make it less open (told agencies the Justice Dept would defend them)

- Bruden: (*US Dept of Justice v. Reporters Committee for Freedom of the Press*)
    - It is now the requester's burden of trying to prove that a record containing personal information ought to be released.

- Big lesson is that SCOTUS gives an enormous amount of discretion to gov't agencies

- Executive Privilege – Presidents and heads of Executive Departments may refuse to yield records.
    - Presidential Records Act of 1978 – National Archives assumes control of all presidential papers at the end of the president's term.
    - Records related to defense and foreign policy, plus presidential appointment records involving trade secrets may be restricted for 12 years.
    - George W Bush changed the Act and now presidents may decide if their records stay public or not.

Access to Judicial Proceedings

- With the "war on terrorism" secret judicial proceedings have been happening.

Closure is restricted to those cases in which there is a substantial likelihood that:

1. A D might be denied fair trial rights
2. there is imminent danger to parties, witnesses, etc
3. that ongoing investigations would be seriously jeopardized

- Motions to close proceedings must be made publicly and advanced notice must be provided.

Deportation Hearings have been controversial in the war on terrorism

1. The 6th Circuit held that they have to be made public
2. The 3rd Circuit held that they do not and that the cts should defer to gov't opinion.
3. SCOTUS declined to hear the cases and left the circuit split. The Fed gov't now decides what circuit to hear the cases in.

- Broadcasting of Trials --- *Chandler v. Florida* – States may work out their own approaches to allowing photographic and broadcast coverage of trials

- Gag orders are only ok if they are necessary to bring about a fair trial – otherwise they are unconstitutional
    - "It is necessary to consider whether the practice in question furthers an important or substantial governmental interest unrelated to the suppression of expression and whether the limitation of First Amendment freedoms is not greater than necessary or essential to the protection of the particular governmental interest involved."

- *Richmond Newspapers v. Virginia* – press has the right to attend criminal trials. SC relied on FIRST amendment reasoning, and not SIXTH amendment

In order to close a criminal trial, three things must be done by the Ct:

1. Must make detailed findings
2. must find a substantial probability of prejudice to a compelling interest of the D, gov't, or third party, which closure would prevent
3. must have considered alternatives and choose the least restrictive means to protect the compelling interests identified.

RADIO LOGISTICS

- Spectrum – FCC keeps people from talking over one another with the spectrum. The spectrum tells you what channel can be on what wave.
    - You can't tell where a radio transmission is coming from, unless they tell you. This is why we have call signs: N – is Navy's call sign.
    - One of the big movements to digital broadcasting is to free up spectrum space. Analogue TV takes up an enormous amount of bandwidth compared with digital.

- Broadcast commercial call signs can start with a K or a W. Every radio station is required to recognize themselves every hour at the top of the hour and their city of license. It's important for people to know where the station is coming from.
    - You used to be able to pick, but now…
    - West of Mississippi take a K – East of Mississippi take a W (WDAZ is an exception).

- Everything below 91.9 is reserved for non-commercial stations
- Everything above 92.1 is for everything else. Non-commercial can take this space, but commercial operations cannot take below 92

FM v. AM

- FM and TV are the same frequency. AM is different.

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

FCC

FCC is motivated by two things:

1. License renewal. A lot of their rules are enforced when a station keeps a log of their activities and then presents that log for the purpose of being licensed again.
2. Complaints. FCC enforcement is largely complaint driven

FCC monitors three categories:

Obscene: Something is obscene if an average person applying contemporary community standards finds it (1)appeals to the prurient interest, (2)depicts or describes patently offensive sexual conduct--defined by applicable law-- and (3) as a whole lacks serious literary, artistic, political, or scientific value.

- Obscene material is not protected by the 1st Amendment and
- Is prohibited from being broadcast at any time

Indecent: Something is indecent if it contains sexual or excretory material but doesn't rise to the level of obscenity

- It is protected by the 1st Amendment
- Cannot be broadcast between the hours of 6am to 10pm because children maybe watching doing those hours

Profane: Profane language includes those words that are so highly offensive that their mere utterance in the context presented may amount to nuisance.

- The use of the F*word is highly offensive and is **almost** always considered to be profane, if audio tape from an investigation of a mob boss on NPR uses the F*word in passing - it is probably ok - but the F*word accidentally said during an awards show by a famous person **NOT** ok.

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

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

CONTRACTS

Building Blocks of Contracts

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

Form of K

1. Normal: Always want date, parties, what the agreement is
2. Letter Agreement
3. Old Fashioned / Fancy; EX:Purchase Agreement (bold all caps)

- This asset purchase agreement is dated march 12, 2009, and is between Hexetron Nuclear Systems, inc., a Delaware corporation ("Hexetron"), and Vayatom Undersea Ventures Corp., a New York corporation

- Letter agreement In-line, or definitions section

Types of Contracts:

1. Implied in Law
2. Implied in Fact

PROTECTING IP

Big five ways to protect IP:

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

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

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

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

Copyrights

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

Idea vs. expression

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

Tort-Like claims:

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

Breach of Confidence

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

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

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

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

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

Cases

- *Desny v. Wilder*
    - Implied in fact contract
    - P telephoned Billy Wilder's office, spoke with secretary
        - Told secretary about an idea for a movie
        - Secretary told him to send in synopsis
    - P told secretary that if they were going to use the story to make a movie, he wanted to be paid for it
        - Secretary told him that he would be paid if his synopsis was used to make a movie
    - Movie was made very similar to P's synopsis
        - P sued and the court held that there was an implied in fact contract
    - Now, studios won't read anything unless it comes from an agent
        - Still doesn't protect them from a Desny-type suit
- *Faris v. Enberg*
    - Faris approached Dick Enberg with an idea for a sports quiz show with Enberg as the host
    - A similar show was made with Enberg as the host, but Faris got nothing

- Faris hadn't authorized Enberg to speak with anyone else about the format
- Faris didn't tell Enberg that what he was saying was in confidence

WHO'S WHO IN ENTERTAINMENT

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

Studio –

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

Talent Agents

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

Talent Managers

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

Entertainment Attorneys

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

Creative Executives

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

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

The Guilds

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

Producers-

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

2 Types of Producers:

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

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

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

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

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

SCHEDULE

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

Pre-Production – Preparing to film.

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

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

NEGOTIATING THE DEAL

1. Option – Producers and Studios will often purchase an option on property such as completed screenplays and books they want to turn into movies.
    1. This is the exclusive right to purchase the property at a set price within a prescribed period of time.
    2. Usually the option period is 12-18 months
    3. Negotiable whether the option price is applicable against the purchase price
2. Pay or Play
    1. Even if your script isn't used, you still get paid.
    2. WGA sets the minimum purchase price for an original screenplay (usually between 30-70,000)
    3. In some cases, the price the owner is paid may be tied to the budget, but the owner will usually at least set a floor
    4. (ex: Owner will receive 2% of the budget upon exercise of the option with a floor of $150,000)
3. Credit
    1. Generally determined in accordance with the WGA agreement. This is all negotiated
        1. EX: Based upon a short book by _____.
        2. Producers do not have the unfettered power to award writing credits.
    2. Credit Process- The WGA contract provides that a production company must send each writer a copy of the final shooting script and a "notice of Tentative Credits." If a writer agrees with the tentative credits, he does nothing. If he disagrees, he must protest within the time specified in the notice.
    3. A writer whose work represents 33% of a screenplay is entitled to a screenplay credit. However, for original screenplays, subsequent writers must contribute 50% to the final screenplay to receive a credit.
4. Reserved Rights
    1. Writer may retain certain rights
    2. Ex: if the book is already published, the owner must withhold the print publication rights
5. Right of Negotiation – non-exclusive, has really no affect other than to say the writer has to meet with one studio (it has no real legal affect in court)
6. Contracts are not merely legal instruments, not merely to allocate duties and responsibilities; they are methods of business communications, they function as ways for business persons to communicate with each other

- This statement may have no legal affect, but business persons may just take it as a cue to sit down and negotiate

1. Right of Last Refusal – (aka – Right to Match)
    1. if you go and talk to someone else, work up a deal, before you go through with it, you must come back to us and see if we want to match that offer
    2. This often just becomes a deal killer – the other party isn't going to want to put a huge effort into negotiations if you are obligated to go back to another party who has this right of last refusal or right to match
2. Warranties – certain representations about what you are buying
    1. Examples:
        1. The property is wholly original with the writer, and no part thereof is taken or copied from any other source except for public domain material
        2. The writer will not take any action that would interfere with the producer's enjoyment of the rights
3. Reversion – Owner will often request the right to reacquire her property in the event that the purchaser does not produce a motion picture, television film, or series based on the property within a certain, negotiated time period.

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

FINES AND FEES

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

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

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

COMPENSATION AND SERVICES FOR WRITERS

1. WGA sets a floor…$90,000 for an original screenplay (for a film with a budget of 5 M or more), $24,000 for a re-write, and $12,000 for a polish.
    1. IS MEMBERSHIP IN THE WGA MANDATORY??
    2. Usually what the writer has been paid in the past will be crucial to determining their pay today
2. Treatment – an adaptation of a story, book, play or other literary material for motion picture use in a form suitable as the basis for a screenplay
3. First Draft Screenplay, Rewrite, Polish: A studio will normally contract a writer an amount that includes the first draft, and one or more re-writes or polishes.
4. Pay or Play – Studio must pay the writer for each guaranteed step whether or not the particular step is actually ordered.

- In other words, the studio can fire the writer whenever, but is still obligated to pay.

1. Standard Reading and Writing Periods are as follows:
    1. First Draft: 8-10 weeks for writing / 4-6 weeks for reading
    2. Rewrite: 6-8 writing / 4-6 for reading
    3. Polish: 4-week writing / 2-4 for reading.
        1. Studio will often try for shorter writing periods and longer reading periods and vice versa. Writer wants to opposite because then he or she gets paid sooner.
2. Turnaround – a contractual right of an individual to take partial control of a project or script on a temporary basis.
3. Reversion – a permanent transfer of rights in and to the writers work.
4. Writer's Bungalo – Little house for writers to write in.

DIRECTORS

1. DGA (Director's Guild of America) – regulates many elements of a directors engagement on motion picture projects and in other media
    1. The agreement acknowledges that the director contributes to all creative elements (and be consulted of them) in the making of a motion picture.
    2. With few exceptions, a producer may assign only one director to a film. The director must be provided a private office at the studio.
    3. A studio cannot replace a director who directs 100% of the principal photography except for gross willful misconduct.
    4. The director is entitled to post-production creative rights. These creative rights include the right to be present at all times and to be consulted throughout the entire post-production period. Directors have a right to make a "director's cut."
2. When negotiating a director deal on a feature film, the following key issues should be addressed:
    1. Development services – such as attending story meetings, supervising the writer, etc
    2. Pre-Production Services – director is normally needed on an exclusive basis about 8 weeks before the scheduled date of principal photography. Casting and budgets are finalized, ser designs are completed, etc.
    3. Principal Photography Services – Director is obviously needed exclusively.

3. Production Requirements that the director must often comply with often include:
    1. Length
    2. Budget
    3. Screenplay conformity (this will not vary widely from the original screenplay)
    4. Rating (need to receive a low rating)…MPAA ratings
    5. Cover Shots...alternate scene and dialogue used to cover scene (such as those containing nudity or profanity) initially shot for the film's theatrical release in case the venue requires a more conservative version.
4. Post-Production Services – Director must supervise the editing of the film
    1. Sometimes directors get a development fee (usually about $25,000) for this time, but it is usually as an advance against the directing fee
    2. Usually payable one-half upon commencement of services and one-half upon the earlier of
        1. the studio abandoning the project, or
        2. the studio formally electing to proceed to production.
5. Directors get paid WAY more than writers
6. Studios and Producers usually impose a payment schedule for the director's fixed compensation:
    1. 20% of guaranteed fee payable in weekly installments during the 8 week period immediately preceding principal photography
    2. 60% in weekly installments over the period of the principal photo
    3. 10% upon completion of the director's last cut of the film
    4. 10% upon delivery to the studio/producer of the answer print
7. Directors may also negotiate for a participation in the studio's net proceeds. Directors who also write or act will obviously have more bargaining power.
8. Pay or Play – when a director gets this, her directing fee is guaranteed regardless of whether she actually directs the film. However, even if a director gets this, exceptions can be made if:
    1. the director's death or a disability preventing her from rendering services
    2. breach of K by director
    3. acts of force that affect the picture's production
9. Possessory credits ("A film by") are usually given to directors
10. Most directors will request a right of first negotiation to be engaged with any subsequent production (sequel).

- Directors will also sometimes be asked to remain attached to a project in a turnaround.

TV WRITERS

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

RECORDING INDUSTRY CONTRACTS

- Employment contracts
- Record company owns copyright to sound recordings
- Composer owns copyright to the composition
    - Get royalties if it's in a movie, Muzak, etc.
    - No royalties from radio airplay
- Artist is required to perform, do promotions
- Record company is required to give the advance, but not required to record or release
    - Artist can't record with another company, unless released by the company holding the contract
- Extendable at the sole discretion of the company
- In California, duration is subject to a 7 year limit
    - Record companies like to choose New York law
- California has minimum payments
    - Year 1 $9000

    - Year 2 $12,000
    - Year 3 $15,000
    - Years 4 & 5 $15,000 + $15,000 from another source (e.g., royalties)
    - Years 6 & 7 $15,000 + $30,000 from another source
    - The record company can make up for not having paid you by making the back payments
- The record company promotes the band's songs, and the band makes money by touring