

Entertainment and Sports Law

By Richard J. Idell

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Through my involvement in leadership of the ABA Forum on Entertainment and Sports Law Industries and my own practice as an entertainment lawyer for live entertainment performances, I have been able to observe firsthand the variety of issues that such practitioners face on a daily basis. At a time when specialization in the legal profession is the rule, lawyers whose day-to-day practice is advising parties in these industries must be multi-disciplinarians. They must be problem solvers with skill sets that cover a broad range of topics and endeavors, ranging from intellectual property to criminal law, from estate planning to rights of publicity. The present-day, multifaceted business models of artists and athletes demand such professional flexibility. Today, artists and athletes have diverse activities and revenue platforms requiring familiarity with a wide range of business and legal issues. In addition, the past decade has seen monumental shifts in the business paradigms of these industries, and practitioners must remain on top of the emerging developments that have resulted from these changes.

For example, in the music/live performance space, the shifts in the dynamics and economics of the “record business” are well known. Online piracy and dramatic generational changes in the buying habits of consumers have led to double-digit percentage

reductions in sales of physical products; while online purchases of music have increased, the profits margins are thinner and have hardly picked up the slack.

Up-and-coming artists can no longer look forward to advances on recording deals as such deals are less and less common. Baby bands produce their own CDs and downloads, selling product at gigs and on the Internet to generate volumes of sales; the more product sales a new band can show, the larger the attraction to independent record labels and others. In addition, the development of recording software that allows an artist to record a CD in a spare room in his or her house has led to the demise of venerable record studios as the demand for studio space has weakened.

The roles of various parties in the music business were for decades very clear: Managers developed artist careers; business managers kept track of the money; record labels made album deals, produced albums, and licensed music; merchandising companies developed and sold merchandise; music publishers administered publishing; promoters and venue operators produced and presented live entertainment; and ticketing companies provided ticket advertising, sales, and distribution for live entertainment. However, several major developments in the business and technology paradigms have occurred that have blurred these traditional lines.

The so-called “360 degree deal” has become the standard for managers and labels and indeed for the behemoths Ticketmaster and Live Nation, now merged, and AEG, their prime competitor. Under the 360 degree model, one entity handles all aspects of an artists’ career and endeavors, including recording, merchandising, live performances, music licensing, endorsements, publishing, Internet and fan club, and other entertainment endeavors. Some pundits say that recorded music will become a loss leader to induce fans

to attend live performances, others believe we will move to a 100 percent subscription model with music stored in the cloud, but whichever is the case, live performances have become the hub of the artist's music business, and all artists and their advisors are well served to understand the live entertainment business and its varied issues.

The traditional "music lawyer" who was principally involved in finding a "record deal" for an artist has seen the practice change dramatically, and that same lawyer has developed a much more complex skill set for advising his or her clients. As a performer's career develops, his or her "music business" may take on various elements including songwriting, recording music, live performances, merchandising, public appearances, and licensing music for television, film, and live dramatic works. The advisor to musical artists has to be knowledgeable of all the related areas of revenue generation, such as licensing, publishing, broadcasting, and merchandising.

So, too, in the sports industries, whether on the team side or the player side, practitioners must be prepared to advise on diverse topics and legal issues. Sports teams are deeply embedded in stadium and arena deals, broadcast deals, merchandising, online content, licensing, advertising, and publicity rights; an athlete's career development can include, in addition to team play, endorsements, sponsorship, and public appearances.

The day-to-day role of the entertainment and sports practitioner will today call on numerous areas of law:

Intellectual Property. The entertainment and sports practitioner must have a working knowledge of intellectual property issues: copyright, trademark, trade dress, and publicity rights. Branding the artist and/or athlete is at the core of the business strategy. Thus on a day-to-day basis, the legal advisor is concerned about creation of protectable names,

logos, slogans, and artistic expression and protecting the same through registration and rights enforcement.

Publicity. Every deal that an artist or athlete engages in touches on publicity rights and the exploitation thereof. Practitioners in the sports and entertainment world have to be able to identify contract terms that bear on a grant or reservation of rights of publicity and the related right of privacy. Accordingly, for example, in a public appearance contract, the promoter may want a right to use name, likeness, and image in connection with the marketing, promotion, and/or advertising of the event, while the artist/athlete will want to ensure that such grant of rights is limited to actual promotional activities and not to the endorsement of any product.

Clearance of rights of third parties. Music rights issues have always been traditionally complex, but with the advent of the digital era, the entertainment practitioner is called on to negotiate and draft complex transaction documents that give protection to songwriters and artists, or, if representing a producer or other consumer of intellectual property, provide adequate representations and warranties and limitations on liability to assure that third parties will not make claim to the final work product. Needless to say, clearance issues are paramount in all broadcast and exhibition. So, too, in the sports world, using music and film clips in an arena or stadium to drum up crowd excitement and entertainment requires proper clearance from the rights holders, including music performance licensing fees payable to ASCAP, BMI, or SESAC, the three performance societies collecting non-digital performance royalties in the United States, and SoundExchange, which collects digital performance royalties in the United States.

Contract law. The entertainment/sports practitioner must be an able drafter and negotiator as the daily life of artists, athletes, and the companies that do business in these industries includes the preparation and vetting of various agreements. Among the many issues that come into play, practitioners must spot and be sensitive to labor and employment issues, including issues that arise owing to collective bargaining agreements, which are pervasive in the arts and in sports.

Administrative law. In the sports world, there are a panoply of sports organizations, regulatory committees and bodies, and collective bargaining agreements that regulate everything about the sport and have jurisdiction over the athletes, from what to wear for an event, to what to weigh, to how a salary might be based on performance—not to mention regulation of drug use and drug testing. The sports lawyer practices among such rules and administrative procedures, all ultimately reviewable in court.

So, too, in the entertainment industry, there are administrative regulations that impact the business. For example, in some states talent agents (who procure employment for artists) must be licensed and bonded. There are rating boards for the amount of violence or sex in an entertainment product and rating standards that must be adhered to. There are administrative broadcast standards that are imposed by the Federal Communications Commission.

Licensing. In general terms, licensing is the granting of intellectual property rights to a third party. Without a doubt, negotiating and drafting licenses of various sorts and types is central to the entertainment and sports lawyer's daily practice. Deals take all sorts of shapes, sizes, and parameters, but at the heart of each is the monetization of what the artist/athlete has for sale, the exploitation of a body of artistic work or the performance by

and/or endorsement by an athlete. Entertainment and sports lawyers are in many respects primarily licensing lawyers and have to be sensitive to the myriad issues that come up in such licensing deals.

Risk allocation, indemnity, and insurance. As the saying goes, “anything can happen” whenever you bring large numbers of people together in one place. Every sports and entertainment performance deal involves allocation of risks, express indemnity, and insurance. The practitioner must be knowledgeable of available insurance products, concepts of the “named” insured versus “additional insured,” the appropriate limitations on indemnity, and the variety of applicable state laws (pure comparative negligence versus hybrid contributory fault jurisdictions).

Real estate. Live performance contracts demand a working knowledge of leases and licenses for use in the negotiation of a venue agreement. Such venue agreements not only bear on insurance, indemnity, and risk allocation but also noise ordinances, traffic issues, public entity licensing and permits, and environmental law—ordinances can require a “green” concert or zero waste through implementation of recycling of food products, paper, plastic, metal, etc.

Investments and fiduciary responsibility. The careers of successful entertainers and athletes will bring on the need for investment counsel and advice; the practitioner who advises them must be familiar with the issues that arise in such arrangements, including the suitability of the investments.

Litigation. Disputes arise, and the sports and entertainment practitioner is often the quarterback of the litigation team and called upon to make financial and strategic decisions including the choice of litigation counsel (big firm versus small firm, specialist

versus general trial lawyer) and strategic decisions that affect the litigation budget.

Throughout the litigation, the general practice entertainment and sports lawyer is a fact finder, a go-between with the client, and a sounding board for theories and procedural strategy, so a working knowledge of litigation and its many procedural and substantive strategic contours is essential.

Conclusion. Practitioners who handle the legal contracting and counseling for artists and athletes and related entities have to be well-versed in multiple disciplines. Each of the issues noted above could be the topic of an entire article or course, and thus this article should only be seen as an overview to highlight the varied practice of the entertainment and sports lawyer in day-to-day matters. The practice continues to be professionally challenging and ever changing with the shifts in technology and business.