Venues: Festivals[1]

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I. Introduction.

Summer music festivals have become a staple in the offerings of annual music events. In the U.S., Bonnaroo®, held in the state of Tennessee, Coachella®, staged in the California desert near Palm Springs and the San Francisco's Outside Lands Music and Arts Festival® in San Francisco's Golden Gate Park are three prominent festivals, and prime examples of the subject of this Chapter. The design, production, implementation and presentation of these festivals is tantamount to creating a small town for a three- or four-day event, with all of the human needs, liabilities and legal entanglements that one would expect in bringing over one hundred thousand people together in one area for such a short time.

II. The Festival Brand.

Promoters of festivals intend to create a brand that can be brought back year after year. As the festival grows in popularity, the patron base becomes more predictable and the entertainment acts will tend to plan their appearance around their tour schedule. Branding the festival is generally tied to the name and location; selecting a protectable name is a major consideration, and it is essential to secure multi-year rights to the venue so that there is consistency in the locale. Festival promoters will want to build their website, advertising, marketing and promotion around a protectable name, so from the earliest planning stages finding a name that can be registered as a trademark is essential. In registering the festival name as a trademark, consideration has to be given to what goods and services will be offered. Typically registration would be sought in the following international categories: (1) International Class 041: entertainment services – such as planning, organizing, promoting, producing and conducting a live musical entertainment festival; live performances by musical bands; providing an Internet website featuring non-downloadable recordings of musical performances from live entertainment festivals, musical videos, related film clips and photographs (this is a services category); (2) International Class 009: pre-recorded CDs, videotapes and DVDs featuring musical performances; downloadable MP3 files; downloadable video recordings; (3) International Class 016: paper goods and printed matter - such as informational flyers, circulars and printed hand-outs; printed tickets; posters, booklets, brochures and programs; (4) International Class 025: clothing; and (5) International Class 038: streaming of audio material on the Internet; streaming of video material on the Internet (also a services category). Seeking registration in International Class 41 for entertainment services is, of course, essential, but the other categories reflect the potential exploitation of the brand. In the U.S., trademark applications can be made based on an "intent" to use basis, and so

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promoters of a festival would be urged to select a brand and seek registration early in the process to avoid untoward trademark rights conflicts later.

Of course, there will be a website for the festival. The website serves as the ongoing source of information for patrons and is used by patrons on their mobile devices throughout the festival to keep abreast of schedule issues and other information. The website contains copyrightable materials and accordingly all of the contracts with the web designers, web-master, etc., if not employees, require work-for-hire agreements with back-up assignment and license language to assure that the festival owns all rights in the contractor's work product. This would include all artwork, graphics and written text. Other legal issues for the website include development of appropriate terms of use for the website and various e-commerce issues. The festival branding will include obtaining the URL for the website consistent with the festival name and the promoters will want to capture all of the related-name URL's (.com, .net, .biz, etc.) necessary to assure that patrons will make their way to the festival website.

The website may also be the portal to the ticket buying public for obtaining tickets to the festival. Typical ticketing deals for ticket selling services or software will include development of a link between the festival website and the backbone of the ticket company so that a patron who clicks on the "Buy Ticket Now" button is seamlessly sent to the web page of the ticketing company, which enables a purchase to occur. The legal relationship between the festival promoter and the ticketing company and the structure of that contract is beyond the scope of this Chapter but ticketing can be an additional source of revenue for the promoter and such a relationship carries with it important legal considerations.

III. **Venue Agreement for the Festival Venue.**

Festivals can bring as many at 60,000 patrons per day together for a three- or four-day event. In order to accommodate that many people and provide the entertainment and other services required, a large outdoor venue is necessary. Venue sites will thus be large tracts of private land or a government-owned public park. If the land is privately owned and controlled, in the U.S., the venue agreement takes the form of a rental, lease or license agreement. Typical legal issues will include: (a) rent and how it is calculated, if not a fixed dollar amount; rent can be based on a percentage of net or gross receipts; (b) description of the premises; (c) allocation of responsibility for any construction or maintenance of existing structures; (d) responsibilities for security; (e) insurance and indemnity (normally the landowner wants the festival to indemnify and insure for all risks). If the landowner is a governmental body there will be an additional level of compliance issues that arise from issues common to public contracts and, depending on the jurisdiction, there are generally rules and compliance issues beyond the typical private lease or license which can include, among other things, enhanced benefits for workers and green issues, including mandatory composting and recycling.

IV. **Permitting and Licensing; Laws Compliance.**

Whether the landowner is a governmental entity (when the festival is in a city or national park), or a private entity, the use of the land for a multi-day public assemblage event will be subject to an application, hearing and permitting process by the local governmental jurisdiction. Every jurisdiction will have different rules, regulations, ordinances and application processes, but the festival will be required to have a valid permit for the use intended. Such permits can be combined with the process for issurance of the lease or license agreement when the landowner is a governmental body. The review process will consider operational and environmental issues and will require assurances that other laws and compliance issues are identified and that there is compliance.

In reviewing the festival plan for issuance of a permit, the reviewing body will look at traffic flows and traffic congestion to the festival site and the adequacy of parking availability. They will look at the availability of public transportation and the impact on public transportation. If the site is in a city park, there will be concerns over the impact of the festival event on local neighborhoods. A related issue is the impact of sound. Some jurisdictions have sound ordinances and issues may arise regarding compliance with existing ordinances or exemptions with mitigating conditions (music must stop by a certain time, etc.). As the emphasis on sustainability and green considerations have become more prominent, local jurisdictions may impose stringent procedures for dealing with paper and metal waste for recycling, compost of compostable waste and other trash issues. The local jurisdiction will require coordination with local law enforcement for security and it is not uncommon for promoters of festivals to be asked to underwrite the cost of add-on law enforcement personnel.

The permit process will also require providing adequate insurance and full indemnity to the governmental entity and its officers, directors and agents. This will include naming the entity and its officers and directors as additional insureds (discussed below). Indemnity for claims of third parties will be required regardless of the availability of insurance coverage and will require full indemnity for the local jurisdiction.

The permitting process can involve showing that there is compliance with other permitting and licensing requirements including music public performance licenses. Both in the U.S. and abroad, public performance licenses are required for the presentation of live music. In the U.S., these licenses are obtained from the American Society of Composers, Authors and Publishers ("ASCAP"), Broadcast Music Inc. ("BMI") or SESAC, Inc. ("SESAC"). In the U.S., such licenses are based on either a percentage of revenues or a fee per patron. Outside of the U.S. the rates or tariffs are usually based on a percentage of gross revenues and can range from 1.5 % to as much as 10 percent. Each country has its own organization(s) that administer the performance licenses and a review of those issues is beyond the scope of this Chapter.

Compliance with laws in the U.S. also means compliance with the Americans With Disabilities Act ("ADA") and related state laws ("Disability Laws"). Such laws require access to the event for the disabled and can involve special consideration to paths of travel to assure disabled access, signage in Braille, seating to accommodate wheelchair

access, sign interpreters for the hearing-impaired and/or special listening devices. Landowners and government licensors of the venue will always have the promoter take full responsibility for such compliance.

V. Bands and Other Entertainment.

Festivals can involve presentation of dozens of musical and other acts over a multiple day period. Promoters negotiate with the artists for the terms and conditions of their performances. Such negotiations and the eventual contracts are not dissimilar from the format and form of contracts for other venues, however, special care must be given to ensure that the insurance and indemnity obligations of the artist agreements conform to the requirements of the landlord in the underlying lease agreement and to the requirements of the permit issued for the event, as well as conform to the principal insurance policies of the Promoter and the standard indemnity and insurance requirements of the Promoter.

The centerfold of the live entertainment performance is the artist performance agreement. That agreement generally is a straight forward agreement to appear and perform for either a fixed sum, a percentage of the revenues subject to deduction for certain expenses or a minimum guaranteed amount against a percentage. The agreement is accompanied by at least two riders – a technical rider and a legal rider.

The technical rider sets forth the artist's needs and demands for all technical aspects of producing the performance. Many acts travel with their own sound and lights. A two- to three-hour performance may involve one or more truckloads of sound and lighting equipment, sets, instruments and other equipment necessary for the production. Loading in and loading out for the festival can take one or two days each. Numerous stagehands and "roadies" are involved in the load-in and set-up for the festival, sometimes implicating union contracts, depending on the venue. There are also rehearsals and sound checks. The technical rider sets forth in detail all of the mechanical, electrical and other technical requirements of the artist's performance. Responsibility for providing personnel and payment are also set forth in that rider. The technical rider will also deal with transportation to and from hotels, the set-up of dressing rooms, provision of meals, alcohol and snacks for the artist and their entourage.

The legal rider sets forth terms for provision of security, backstage personnel, ticketing and box office, allocation of band tickets, insurance, indemnity, *Force Majeure*, legal liability for damage to equipment, responsibility for music performance licenses, provisions regarding the sale of merchandise, provisions concerning the right or prohibition on recording, filming, Internet streaming, publicity, advertising and promotion or other ancillary exploitation, representations and warranties, and various other contractual rights and obligations.

VI. Vendors.

A distinct feature of live entertainment festivals is the variety of food, wine, merchandise and other vendors displayed. Since the patron may be on premises for seven to ten hours on a festival day, there is opportunity to present a variety of food offerings and shopping opportunities with the attendant ancillary revenue gain. Generally, such food and/or beverage services are outsourced to beverage entities, catering companies or restaurants. Merchandise made available includes both festival merchandise as well as artist merchandise.

When negotiating the various contracts with these vendors, each vendor will have their own form of agreement. The festival promoter will develop a vendor rider in order to assure consistency with other agreements and in particular indemnity and insurance. The rider will cover issues such as revenue splits, insurance and indemnity obligations, laws compliance (including comformity with permit requirements), construction of facilities, recycling and compost, hazardous materials, and other site compliance issues.

There are specific compliance issues that arise in regards to the operations of the vendors regarding alcoholic beverages. In the U.S., each state has its own unique set of rules and regulations that govern the distribution and sale of alcoholic beverages. After the abolishment of prohibition, the states instituted what is referred to as a three tier regulatory system, which in very general terms says that you have to choose whether you are in the manufacture, distribution or retail sale of alcohol and that you cannot be engaged in more than one tier. There have been some recent court cases that have changed the statutory landscape but by and large these "Tied House" rules remain in effect. For the festival promoter, in the U.S., compliance with these laws is non-negotiable. Generally, the promoter should be able to outsource such responsibility to the beverage providers, but some jurisdictions may also require overall festival permitting. These rules will vary from locale to locale and compliance may mean consultation with a beverage law expert. Additional legal complexity can arise in the context of sponsorship by beer or other alcohol beverage companies.

VII. **Sponsors.**

Another revenue source for the festival is the sale of third party sponsorships and exhibitors. Sponsorships can take many forms with varying benefits and cost. Presenting sponsors and beverage sponsors are common. In addition, electronics companies, automobile manufacturers, software companies and Internet companies all present sponsorship opportunities. These companies will set up a tent or other exhibit focusing on their industry and products. Sponsorship benefits can include signage, banners, website advertising, streaming of festival content, special VIP tents or areas for sponsor dignitaries and/or guests and sponsorship pavilions for display and promotion of products. In the months and weeks leading up to the festival, the festival and the sponsors will cooperate in co-marketing arrangements. The sponsorship agreements will cover benefits to be provided, respective obligations of the parties, co-marketing and promotion arrangements, compensation, extension and renewal provisions, representations and warranties, indemnity and insurance. Typically, the sponsor will provide additional insured status (see below) for the festival and the festival will provide

additional insured status for the sponsor. Care must be taken to be sure that there are no conflicts between sponsors of the festival and sponsors who have agreed to sponsor an artist's tour, such as a tour presenting sponsor.

VIII. **Insurance and Indemnity.**

Insurance and indemnity issues crop up in every facet of the festival agreements. All live performance agreements involve public assemblage. Thus, there is always risk of injury and harm from interpersonal contact. The variety and circumstances of potential situations is boundless, *i.e.* a patron claims hearing loss allegedly due to the sound emanating from speakers; a patron loses a finger when two fans fight over a laced shoe thrown from the stage by the artist into the crowd; nuisance claims based on sound in excess of municipal limits; a patron injured while in police custody following his ejection from the venue and arrest for public intoxication;; a patron injured when an artist summons patrons to the stage; a patron injured in a mosh pit;; a patron injured by defective merchandise;; a stage worker injured when assaulted by an artist; a patron dying while trying to scale a fence to gain admission. The examples are endless.

Insurance and indemnity provisions in the various contracts allocate risk by and between the artist, the festival promoter, the venue, the service providers (sound and lighting companies), and security companies and concessionaires (food purveyors and merchandisers). Additional related insurance issues pertain to damage to equipment owned by the various participants in the festival and the responsibility for infringement of intellectual property and publicity rights. The practitioners representing the festival must assure that these agreements are complementary and do not leave any gaps in coverage or indemnity (or unnecessarily duplicate coverage or indemnity). Generally the indemnitee wants the indemnitor's insurance to be primary and does not want the indemnitee's policy to be contributory.

Indemnity provisions are typically broader than insuring obligations and the practitioner has to make certain that the promises regarding what insurance is to be provided in fact is available. Often such analysis will require consultation with the client's insurance broker. Insurance policy forms vary and it is important to confirm that the insurance language in the contract is consistent with what can and is actually being provided. If the insurance provision in the contract differs from what is required, in most jurisdictions the client can be liable for indemnity that the indemnitee believed would be covered by insurance.

In most states of the U.S., there are general equitable principles of fault (or comparative fault) that are the default clauses in the event of no agreement, however, it is almost unheard of to see a contract concerning the presentation of a live entertainment performance that fails to specify the allocation of risk. The extent of indemnification obligations in a particular instance may mirror the negotiating clout of the various parties, as with other issues, at the same time, the scope of indemnification can be limited by public policy statutes including statutes that prohibit parties from exculpating themselves from fault. In analyzing indemnification provisions, all of these issues must be considered

and the state law governing the agreement reviewed. It is essential for the festival promoter that insurance clauses in artist, vendor or sponsorship riders be consistent.

Indemnification clauses define the obligation to defend and indemnify and the scope of the indemnity. It is important to specifically define who the parties are that are intended to benefit from the indemnification as well as the breadth of the coverage for indemnity. The indemnitee wants to make sure that the indemnitor will not only provide indemnity for a judgment or settlement, but also will defend the matter until judgment as well since, practically speaking, defense costs can well exceed the value of many claims. Indemnity clauses should survive termination since the statutes of limitation will extend beyond the conclusion of the performance. An indemnity provision should be enforceable whether or not there is insurance.

Generally, for liability insurance, occurrence policies, known as commercial general liability policies, are issued. They provide insurance and indemnity for "covered losses" that occur during the policy period. Definitions and exclusions must be reviewed to fully understand the bounds of coverage under the policy, but essentially such coverage will provide defense and indemnity to the named insured for general negligence that causes either personal injury or property damage. Some clauses may require that copies of policies be provided. The clause on the provision of insurance should track the indemnity clause; however, practitioners need to keep in mind that there are events and claims that may be subject to indemnity obligations that are not at all insurable, such as intentional assault and battery. A claim can be made that alleges both intentional conduct and negligence in the alternative. Most states do not permit intentional conduct or punitive damages to be covered. Generally a defense must be provided if there is a potentiality of coverage and the duty to defend is always broader than coverage.

Often, the contract will provide that the form of policy must be approved by the indemnitee. The broadest commercial liability policy includes "Broad Form Coverage" providing for "Advertising Injury" and "Personal Injury Coverage." This coverage expands the types of claims and damages covered. While some property damage coverage is included, it usually is limited to coverage for damage to property of third parties and will not provide coverage for the party providing the insurance, requiring an additional policy or coverage to be obtained. All states have laws with regard to worker's compensation coverage and indeed all performance contracts should contain clauses assuring that each party shall take out and maintain statutory limits of worker's compensation coverage.

All live entertainment endeavors involve exploitation of intellectual property, including copyright, trademark and rights of publicity when there is ancillary exploitation of the performance, venues, promoters and presenters will want warranties and representations that the artist owns the results, product and proceeds of the performance (or has obtained necessary clearances, rights and permissions). Representations, warranties and indemnities will provide protection but it is not unusual for errors and omissions coverage to be taken out on those creative elements of the show. Often times the carrier issuing such policies will require that the contracts for the various elements of the show be scrutinized by counsel and an opinion letter given. Other types of coverage

include rain insurance or cancellation insurance to provide coverage in the event of inclement weather or other causes of cancellation.

The party requesting the insurance, as a matter of good order and prudence, wants evidence of coverage before the show loads in. This is generally done by a provision of a "certificate of insurance." However, a certificate is merely "evidence" and does not constitute coverage. When a party is added as an additional insured, an endorsement to the policy is required to perfect coverage. While the insurance and indemnity provisions are often viewed as boilerplate, in fact, there are very substantial risk allocation, coverage and defense issues that are often times complex and must be carefully scrutinized during the negotiation and drafting of agreements pertaining to the presentation of a live festival.

IX. **Termination and *Force Majeure*.**

We have all heard the saying "rain or shine, the show must go on." Presenters and promoters of outdoor festivals will not cancel a show even in the face of a downpour until and unless it is clear that there is no chance of a break in the weather to allow the performance to proceed. However, weather can interrupt the festival and cause cancellation or postponement, as can other factors or conduct beyond the control of the parties. Default, termination and *Force Majeure* are related clauses in festival riders that define the parties' obligations when there are events that interrupt performance and the show cannot go on as planned.

Default and termination clauses determine liability for non-performance in live entertainment contracts typically based on fault. Usually, live entertainment contracts will provide for default provisions that allow for a notice period and an opportunity to cure after breach. Time periods for cure can vary (15 to 60 days) and can also provide that in the event that provision of specified notice periods is unreasonable under the circumstances, notice can be shortened in the reasonable determination of the party giving notice. So if the show is scheduled to begin in 24 hours when an event of breach occurs, perhaps a four-hour notice period is reasonable. Failure to cure a material breach can give rise to termination. Since typically, in live entertainment contracts, payment is made either post-performance or a partial deposit prior to performance and the balance post-performance, and re-scheduling is so difficult, indeed near impossible with a festival setting, there is every incentive on everyone's part that the show does go on.

Force Majeure clauses generally define events that do not arise due to a party's fault or conduct. In the face of a potential worldwide pandemic of the H1N1 flu virus, the applicability of *Force Majeure* clauses was highlighted. If public buildings are closed due to the virus or even if patrons stay away out of fear of contagion of the disease, will that circumstance constitute a *Force Majeure*?

The impact of the clause can be significant since in many cases the applicability of the clause will relieve the parties of any obligation under the contract. In practical terms that means no rent for the venue owner, no compensation for the artist, no revenue for the vendors, each of whom, of course, continues to have their own internal financial

obligations. Accordingly, due care should be exercised in negotiation of a *Force Majeure* clause to be certain that the clause does not permit application for a risk of an event that should be included in one party's allocation of risk.

Without a well-drafted *Force Majeure* clause, impossibility and impracticality of performance and frustration of purpose are doctrines of contract interpretation found in the common law that can form the basis of excusing a party from liability. However, the bounds of such case law will vary from state to state and there will be risks of litigation and transaction costs associated with reliance on prevailing on a particular litigation position. Accordingly, parties will typically negotiate a *Force Majeure* clause for events that may interfere with performance and which are not within the reasonable control of the parties. A typical clause may read: *"The Parties shall not be liable to one another for any failure to perform as required under this Agreement if such failure is due to any Act of God such as fire, earthquake or natural disaster, war, terrorism, rebellion, insurrection, civil war, military action, government regulation, blackout, or strike."* Sometimes the phrase *"or otherwise beyond the Parties' reasonable anticipation or control"* is included.

Practitioners must be careful not to allow the *Force Majeure* clause to become a basis for avoiding liability for a foreseeable and predictable event. For example, if the clause allows for relief from liability from a "blackout," use of the limiting phrase "city-wide" will assure that a negligent failure of a party's power supply or generator is not used as a purported *Force Majeure*. Likewise, an imminent labor dispute in a facility may be known to one party but not the other and a *Force Majeure* event described generally as a "strike" should not excuse performance of a known event. So if the 9/11 attack on the World Trade Center results in cancellation of all flights, an artist will be excused from performing if his or her commercial jetliner cannot take off, but the breakdown of a tour bus due to the failure to properly maintain the engine will not. Generally, since the effect of the clause is to excuse performance in order to separate the function of the clause from other bases for default or termination, the clause should cover events which are not in any way due to the actions, conduct or activities of the party, the event must be unforeseen and the consequences of the event must have been unpreventable. Application of the clause should be limited to actual interference and not threat of interference. The intention is generally to give an excuse for performance where the interference is beyond the reasonable control of the parties and causes a material interference.

In general, advance negotiation of the definition of *Force Majeure*, the bounds of the application of the clause and risk allocation in the event of the occurrence of *Force Majeure* is far preferable to sorting liability issues out in the context of legal claims based on impossibility, impracticality of performance and frustration of purpose with the inherent cost and unpredictability of litigation.

X. Ancillary Exploitation: Broadcast, Streaming, Download, CDs and DVDs.

Traditionally, in the concert promotion business, the concert promoter looked to ancillary revenues to enhance profitability. Ancillary revenues can include parking, concessions, merchandise and sponsorship. Closely linked to sponsorship opportunities are the ancillary opportunities for additional revenue from broadcast, streaming, download and production and sale of CDs and DVDs of the festival performances. In addition, sponsorship opportunities can have tie-ins with these types of ancillary revenue opportunities since broadcast and streaming afford an opportunity to have a virtual presenting sponsor as well as both content sponsors and website sponsors. The possibilities for ancillary revenue opportunities are varied.

At the same time, this type of exploitation raises numerous rights issues that add another level of contract negotiation and administration to the legal side. In order to obtain the rights to move forward with any broadcast or streaming, the practitioner first must determine who will hold the copyright on the finished piece or pieces; that entity must determine what the precise usage is for the audio and audio-visual pieces, *i.e.* live streaming, then for "X" days as a pre-recorded stream and subsequent production of a CD or DVD. The purpose of setting this goal of exploitation is to craft the rights language for the bands, labels and songwriters that is clear so that everyone knows at the outset of the negotiation process the intended usage and grant of rights.

The centerfold of the rights acquisition for this ancillary exploitation is obtaining the rights to exploit the results, product and proceeds of the artist's performance. Determining the intended usage is essential since artists will generally not give carte blanche rights to the use of the results, product and proceeds of their performance and the pricing of necessary publishing licenses will be based on that anticipated usage.

Many bands/managers/labels will look at streaming as a promotional opportunity which eases the clearance process, but most, if not all, will view this ancillary exploitation as a revenue stream in which they should share separate and apart from the performance agreement and fee. Any exploitation that involves audio-visual presentation may implicate the need for synchronization licenses from the rights holders of the underlying musical composition being performed. The songwriters/publishers will charge a fee for this exploitation. Broadcast, streaming and production of a DVD of the audio-visual piece will be a negotiated fee. Production of an audio only CD or download will be the subject of mechanical licenses. If a band owns all its own music, then the promoter might be able to negotiate synchronization licenses for the songs as part of one contract. Bands and publishers will often ask for most favored nations status, which can affect the overall cost.

Thus, the ancillary rights package the promoter of the festival needs includes: (1) a results, product and proceeds rider for the artists, which also should include a grant of publicity rights both for the exploitation and for the advertising, promotion and marketing of the work; (2) label consents where necessary which are usually part of the artist rider; (3) an inducement letter if the artist has a loan-out company; (4) synchronization licenses from all rights holders to the underlying songs for audio-visual exploitation which is fixed in a tangible medium; (5) clearances for any master use rights holders (recorded

music that may be part of a performance); (5) work–for-hire with back up assignments and licenses with all persons in the chain of creation of the piece, such as a director, film crew, etc.; and (6) mechanical licenses for audio-only productions and downloads. All clearances and licenses have to allow advertising to be wrapped around the piece and embedded in the piece in order to effectively exploit the pieces through broadcasters both traditional and on the Internet. Competent clearance counsel should vet the entire process to be sure that there are no gaps in rights. Any contract for exploitation will necessarily include representations and warranties that the work is fully cleared, that all necessary licenses, permissions and consents have been obtained, that exploitation of the piece will not infringe the rights of any third party and that the licensor (festival producer) has all rights necessary to give the grant of rights for exploitation of the piece.

XI. **Conclusion.**

The production of a multi-day festival has many moving parts. From the point of view of the lawyer handling the legal work, the process involves numerous legal disciplines including real estate issues, license/lease arrangements, governmental entitlement and permitting, environmental clearance and compliance, governmental regulation, such as sound ordinances, allocation of risk through insurance and indemnity, copyright, trademark, right of publicity, trade secrets and personal injury defense as well as traditional contract drafting, negotiation and administration.

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