COZEN O'CONNOR®

SUMMER 2008

SPORTS AND ENTERTAINMENT OBSERVER

NEWS ON CONTEMPORARY ISSUES

MESSAGE FROM THE CHAIR

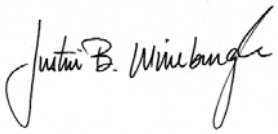
TO THE FRIENDS OF COZEN O'CONNOR:

We are pleased to bring you the Summer 2008 issue of the Cozen O'Connor *Sports and Entertainment Law Observer.* The summer is almost over, and the entertainment industry has made it through the Writers Guild of America's strike, which we previously outlined in the Fall 2007 issue of this publication. However, the expiration of contracts and ongoing negotiations between the Screen Actors Guild and the Alliance of Motion Picture and Television Producers has created a new period of uncertainty and slowed production, with significant ramifications for the industry. With all of these events, attorneys in the Sports and Entertainment Practice at Cozen O'Connor have continued to aggressively represent our clients in the industry, while contributing to the community through lectures, media appearances and public service.

In this issue, we examine two topics at the forefront of an ever-evolving entertainment industry. First, we examine the recent California Supreme Court decision in *Marathon Entertainment, Inc. v. Blasi,* a case that has redefined the relationship between managers and talent. Next, we explore considerations during a merger of companies in the entertainment industry with respect to the survival of intellectual property rights.

The intent of this *Observer* is to make you aware of recent developments in the entertainment industry, as well as update our friends and clients on the happenings within our practice at the Firm. I hope that you find this publication useful and informative, and would be pleased to discuss any of the topics with you at your convenience.

Very truly yours,



Justin B. Wineburgh, Esquire
Chair, Sports and Entertainment Practice

IN THIS ISSUE

RECENT DEVELOPMENTS: ISSUES IN THE ENTERTAINMENT INDUSTRY

HAPPENINGS

Philadelphia
Atlanta
Charlotte
Cherry Hill
Chicago
Dallas
Denver
Houston
London
Los Angeles
Miami
New York
Newark
San Diego
San Francisco
Santa Fe
Seattle
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Trenton
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RECENT DEVELOPMENTS: ISSUES IN THE ENTERTAINMENT INDUSTRY


Justin B. Wineburgh

BALANCING THE MANAGER-TALENT RELATIONSHIP: A SHAPING DECISION BY THE CALIFORNIA SUPREME COURT

Justin B. Wineburgh, Esq.

In the entertainment business, the relationship between talent agents, managers and artists is heavily regulated, with the intention to protect the rights of all parties. While there have been many cases addressing this relationship, the recent decision of the California Supreme Court in *Marathon Entertainment, Inc. v. Rosa Blasi,* is certain to have a long-lasting impact.

In 1998, Marathon Entertainment, Inc. ("Marathon") and Rosa Blasi ("Blasi") entered into an oral agreement for Marathon to provide Blasi with personal management services, including counseling and promoting Blasi's career, in exchange for a fee of fifteen percent (15%) of Blasi's earnings. Blasi subsequently appeared in the film *Noriega: God's Favorite,* and had a lead role in the television series *Strong Medicine*. In 2001, Blasi unilaterally reduced her payments to Marathon to ten percent (10%), and later ceased payment altogether, believing that Marathon was no longer acting in her best interest.

Marathon sued Blasi, seeking the fifteen percent (15%) commission from the *Strong Medicine* role. Marathon argued that it was entitled to its full commission based on the services rendered.

In response, Blasi filed a complaint with the California Labor Commissioner, claiming that Marathon improperly procured employment for her without a license in violation of the Talent Agency Act of 1978 ("the Act"). Blasi asserted that Marathon's unlawful conduct voided the parties' agreement, and entitled her to withhold commission payments. The Labor Commissioner agreed and, as a result, the trial court granted Blasi's motion for summary judgment, holding that the contract between Marathon and Blasi was void.

On appeal, Marathon argued that the Act did not apply to personal managers, who render services distinguishable from those of agents, as described by the Act. Additionally, it argued that the Act's enforcement mechanisms violate a manager's Constitutional rights to equal protection, due process and free speech. The Court of Appeals partially reversed the trial court, and held that the Act applied to managers as well as agents, but also stated that managers may be entitled to partial commissions for lawful actions carried out within the confines of the Act.

By way of background, the Act establishes strict licensing regulations that define and distinguish the roles of agent and manager. An agent is licensed to obtain employment for talent. In doing so, agents act as intermediaries between the buyers of talent and their clients. Conversely, a personal manager may advise, coordinate and organize the careers and personal lives of talent, but may not seek employment. For managers who act within these bounds, no license is required.

However, the Act clearly provides that any person who solicits or procures employment for talent must not do so without a talent agent license, or must work in conjunction with a licensed talent agent. Therefore, it is the act of "procurement", not one's job title, that requires compliance with the Act.

> *"The court has clarified that managers are bound by the same licensing requirements of talent agencies when 'procuring, offering, promising, or attempting to procure employment for an artist.'"*

As the Act does not spell out the appropriate remedy following the improper procurement of employment by a manager, the court in *Marathon* held that it had the authority to sever the parties' contract. The court stated that, if the central purpose of a contract is lawful, it can be severed from unlawful collaborations, based on the notion of equity. For example, a

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personal manager who spends 99% of the time managing a client, but procures employment the rest of the time, should not be punished with the complete invalidation of the parties' contract and deprived of a commission for the services lawfully provided.

The *Marathon* decision is bound to have a far-reaching effect on the entertainment industry. In its decision, the court has clarified that managers are bound by the same licensing requirements of talent agencies when "procuring, offering, promising, or attempting to procure employment for an artist." Thus, the court has more specifically defined the once ambiguous role of an unlicensed manager.

Importantly, the court recognized that the rights of personal managers must also be protected in manager-talent relationships. Originally, the Act had been created to protect artists from being taken advantage of by their managers. However, the court acknowledged that the Act also gave artists the ability to punish managers by refusing to pay commissions for proper services following a single improper act. Allowing for the severance of the parties' contract protects managers for duties properly carried out within the confines of the Act, despite isolated instances of procuring employment.


Scott B. Schwartz

LICENSE TO MERGE: SPECIAL PRECAUTIONS MAY BE REQUIRED TO PRESERVE IP LICENSING RIGHTS

Scott B. Schwartz, Esq. and Justin B. Wineburgh, Esq.

Despite a long history of case law relating to mergers, one area remains unclear, especially in the entertainment industry: the effect of mergers on intellectual property ("IP") licensing agreements. Recent case law contributes to this uncertainty and suggests that certain precautions may be necessary to preserve valuable IP licensing rights. Importantly, entertainment companies should anticipate these issues from the outset, and careful consideration should be given when first negotiating a license agreement. Moreover, depending upon the terms of the IP license at issue, when contemplating a merger, companies should be particularly vigilant, and may want to consider obtaining consent agreements to ensure that IP licenses will survive a merger.

Under state law, following a merger, a surviving or resulting company generally succeeds by operation of law to all of the assets and liabilities of the merged entities. As such, when a merger is completed, a company does not have to assign its rights to contracts and other assets to the new or surviving company – such rights simply transfer automatically. The ability to have such assets transfer automatically by operation of law is often desirable, particularly because license agreements frequently require the consent of the other party before a transfer or assignment of the license may occur.

"While the impact of a merger on the assets of the parties to the merger is governed by state law, IP licenses are also governed by a body of statutory and judicial federal law."

Accordingly, when attempting to complete an acquisition, entertainment companies might choose to structure the transaction as a merger in order to avoid having to get third-party consent prior to transferring contracts. Importantly, however, the practice of having contracts transfer as a matter of law, even if prohibited by the express terms of the contracts without consent, may no longer be reliable in the context of transferring IP content and licenses.

While the impact of a merger on the assets of the parties to the merger is governed by state law, IP licenses are also governed by a body of statutory and judicial federal law. More recent case law points to a trend of IP law starting to impact

how traditional state merger laws treat IP rights as different than that of other assets. However, the trend is neither uniform nor consistent.

In 2004, in a case addressing the effect of a merger on an IP license, the court found that "whether a merger effectuates an automatic assignment or transfer of license rights is a matter of state law."[1] On the other hand, other recent federal court decisions have held that the licensing agreement itself, rather than the applicable state merger statute, determines whether the license can be transferred to the surviving company without the consent of the licensor. This, in effect, means that unless the license agreement clearly permits assignment of the IP rights without the consent of the licensor, a licensor might successfully challenge the right of a surviving company in a merger to operate as the licensee under such license despite the fact that under state merger law, all of the rights under the license transferred as a matter of law.

IP licenses are treated differently than other assets, including other contractual rights such as leases, due to the fact that the licensor, or owner of the content, retains a vested interest in the identity of the licensee of the IP. The rationale behind this includes many reasons, such as protecting a licensor from being forced, by operation of state law, to have its IP licensed to a competitor without consent.

While the treatment of IP licenses varies from one state to the next,[2] part of the due diligence investigation to be completed prior to the merger should include a consideration of whether or not it will be necessary to acquire consent from content licensors to effectuate the transfer of a IP. Of course, after conducting this evaluation, an acquiring company may choose to assume the risk and proceed without obtaining consent, but it would be presumptuous to simply assume that the transfer of IP licensee rights will be effective without challenge simply because the transfer occurred by operation of state law as part of a merger.

Similarly, prior to entering into IP license agreements, parties should examine the plain language of the licensing agreement to accurately assess the intent of the parties and original licensor. If the intent of the parties is to permit IP to be transferable in a merger, this intent should be clearly and explicitly expressed or, alternatively, barred.

While it would be impossible to provide a complete discussion of all of the issues related to the transfer of IP licenses here, the most important lesson to learn is that licensors of IP need to be secure in the rights and able to determine who may ultimately come into possession of their content. Therefore, when negotiating or analyzing an IP license agreement, a careful determination must include an evaluation of both state merger and federal law, irrespective of which side of the table you are on.

1. *Evolution, Inc. v. Prime Rate Premium Finance Corp., Inc.,* 2004 U.S. Dist. LEXIS 25017 (D. Kan. 2004) (*citing* PPG *Indus., Inc. v. Guardian Indus. Corp.,* 597 F.2d 1090, 1093 (6th Cir. 1979).

2. For example, in California, the state statute provides that "the surviving corporation shall succeed, without other transfer, to all the rights and property of the disappearing corporations." *See* Cal. Corp. Code §11.07(a) (2003).

HAPPENINGS


Suzanne C. Radcliff

SPOTLIGHT ON....SUZANNE C. RADCLIFF

Suzanne C. Radcliff, a member of Cozen O'Connor's Dallas office, is the firm's Equine attorney, and has handled matters involving race and show horses, as well as veterinary malpractice, products liability, and hidden commissions cases. Combining business with pleasure allows Suzanne to serve her clients' legal needs while sharing their passion for horses. Recently, she has become a member of the American College of Equine Attorneys. Suzanne received her law degree from Southern Methodist University School of Law, and her Bachelor of Arts degree from the University of Oklahoma.


Barry Boss


Bernie S. Grimm


Camille M. Miller

IN THE NEWS

Barry Boss

- PBS - *"The News Hour with Jim Lehrer"*- Discussion on the Eliot Spitzer scandal

Bernie S. Grimm

- Fox News - "On the Record with Greta Van Susteren"

Camille M. Miller

- Listed as a Top Lawyer in *Chambers USA*
- American Intellectual Property Law Association - "Survey of Monetary Awards in Counterfeiting Cases"
- American Conference Institute – "Law Firm Profitability: Succeeding in an Uncertain Economy"

Scott B. Schwartz

- Appointed Adjunct Professor of Copyright and Trademark Law at Drexel University, Antoinette Westphal College of Media, Arts and Design
- International Trademark Association - "Anti-Counterfeiting Measures from the Trademark Administrator's Perspective"
- CN8 - *"Your Mornings"*
- Authored a chapter - *Inside the Minds: Settlements and Negotiations For Advertising & Marketing Law*
- The Philadelphia Associate of Paralegals Education Conference -"Trademark Law: Clearance and Searches Issues"

Justin B. Wineburgh

- Listed as a 2008 Pennsylvania Super Lawyer by *Law & Politics*
- ABC News - "Right Now on the Net" with Erin O'Hearn
- Appointed to Advisory Board for the Philadelphia Volunteer Lawyers for the Arts
- Philadelphia Volunteer Lawyers for the Arts, Greater Philadelphia Film Office, & Cozen O'Connor - "Borat: Hollywood's Lawsuit Magnet"
- Philadelphia Film Festival, Panel Discussion - "Film Financing 101"
- Gratz College CLE Series - "Borat: Legal Learnings for Make Benefit CLE"
- Appointed Adjunct Professor of Entertainment Law at Drexel University, Antoinette Westphal College of Media, Arts and Design
- Drexel University College of Law Symposium - "Rights and Property in the Creative Arts: The Entertainment Lawyer"
- Philadelphia Volunteer Lawyers for the Arts and Cozen O'Connor - "Developing an Entertainment Practice"
- Widener University, School of Law Sports and Entertainment Law Symposium - "Sports, Music, Video Games & Film/TV"

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