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A Slice of Pie Productions v. Wayans Bros. Entertainment

Expression Misappropriation and Screenwriting

BY JAMES J. LARocca

*"[W]riters are the most important part of the making of a motion picture
and we must do everything in our power to prevent them from finding out."*¹

—Irving Thalberg, MGM Studios

As an aspiring screenwriter,² expression misappropriation in the screenwriting field strikes a particular chord with me. If any aspect of entertainment is unglamorous, it is the life of a screenwriter³—particularly the unknown screenwriter. Unknown screenwriters rarely have the resources (or the talent) to turn their manuscripts into motion pictures.⁴ Accordingly, after spending countless years working on a project, they may submit their scripts to those that have the resources, only to experience continual rejection.⁵

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Legal Aspects of Big Sports Event Management

Part II: Sponsorships

BY VERED YAKOVEE

Sponsors are essential to the commercial success of large-scale sports events. Conversely, such events provide a forum for sponsors to obtain benefits including increased brand recognition and affiliation with an event's goodwill. While the mutual benefits of sponsorship are contemplated, unforeseen disputes inevitably arise. Part II of this series describes some of those issues and explains how to plan for additional insured coverage by virtue of a sponsorship agreement. Part II's separate, spotlight feature, *Swimming with Sharks and Protecting a Good Name* (see page 28), draws on the trials and tribulations of the Father of Surfing, Duke Kahanamoku, to illustrate the issues faced by an individual

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Slugging Through Boxing's Contractual and Legal Minefields

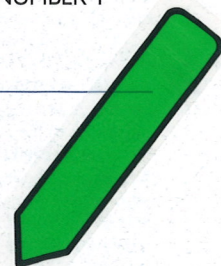
Practical Solutions to Restore a Great Sport

BY ARNOLD C. JOSEPH

The May 5 world championship fight in the Super Welterweight division between World Boxing Council title holder Oscar De La Hoya and his challenger, Floyd Mayweather, was billed as the "Fight to Save Boxing." Because there are countless weight divisions and almost as many "sanctioning" organizations, a "World Championship Fight" takes place just about every weekend in some corner of the world. But this fight was different because it can be used as a case study in the proper way to arrange a mega-fight and to help ensure the future of boxing.

To be sure, there are some obvious reasons for the success of the fight. There have not been many marquee fights in the past few years and boxing's premier division—heavyweight—has become irrelevant over time. It has presented average fighters with less-than-average Q ratings and the lower

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Slugging Through Boxing's Contractual and Legal Minefields: Practical Solutions to Restore a Great Sport

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weight classes have become dominated by fighters with limited regional appeal.

This fight, however, was different. It pitted two of the sports' most talented boxers against one another: Oscar De La Hoya offers the sports' best marketing machine. He is adored by fans worldwide, has somehow garnered the support of the elusive female boxing fan, and has harnessed that fame to generate more revenue for the sport than any other fighter in history. He is also a skilled competitor—methodical, powerful, fierce, and focused. Floyd Mayweather is probably one of the most gifted boxers to come along in years. His speed, power, and instincts make him almost invincible.

Added to this dream matchup was the clash of personalities. Oscar seems to have a gift for saying the right things and Floyd appears to make statements for the purpose of agitating both the media and the public. Together, these factors offered a "fight for the ages." Hollywood could not have written a better script.

Additionally, both the participants and their representatives wanted to give the public a match to anticipate. What's more—and here's the lesson to be learned—the fighters were not bound by restrictive promotional agreements. Instead, their situations appropriately allowed them to earn the lion's share of the revenue generated from the bout. The promoter worked out shrewd deals with the networks and the sites to satisfy all participants. The fighters, promoters, and all involved were fairly compensated and the public got what it wanted and deserved.

This article will examine the challenges that have faced the sport of boxing in recent years and offer suggestions for how to overcome them. First, it appears that the average fan is not as interested in the sport as his father or grandfather was. The best boxers don't

generally fight each other, boxing is no longer shown on free network television, and fights, with relatively low ticket prices, no longer take place weekly in every major city. Instead, bouts are aired on pay-per-view television for \$50 per household and staged in glitzy Las Vegas casinos and large, upscale arenas in which ticket prices often exceed \$1,000. Added to this is the fact that fights between the best fighters are usually the exception. The superstar fighters don't generally compete with one another because of the ways in which boxing deals are structured.

Those who have financial interests in boxing have formed

SUPERSTAR FIGHTERS DON'T GENERALLY COMPETE WITH ONE ANOTHER BECAUSE OF THE WAYS IN WHICH BOXING DEALS ARE STRUCTURED.

alliances with and against each other and are engaged in what can best be described as trench warfare. The many contracts and regulations are destroying the boxing landscape because they control and filter boxers and, ultimately, what images the fans are allowed to see. Caught in a "no-man's land" are the boxers, the fans, and, ultimately, the sport itself.

So what's the correct way to perpetuate the sport of boxing for future generations to enjoy? We need more mega-fights and the only way to get them is for the lawyers, managers, promoters, and television executives to collectively resolve to do what is right for boxers and the fans. The best way to describe my vision is to choreograph the making of a mega-fight.

Imagine two fictitious fighters standing across from each other on opposite ends of a boxing ring—boxer A and boxer B. They have risen through the ranks to become "stars." They both have impressive records, high Q ratings, and fighting styles that attract viewers. However, standing between them and blocking their ability to "get it on" are various obstacles—contracts and regulations—that, if not negotiated and drafted properly and in good faith, will forever keep them apart.

You have been retained by boxer A to help him remove these obstacles so that he can fight boxer B. A fight of this magnitude would enhance both boxers' careers and give the fans what they want. What are the obstacles and how do you eliminate them?

EXCLUSIVE PROMOTIONAL RIGHTS AGREEMENTS

One could spend a lifetime discussing exactly what these are, what they mean to boxing, whether they are necessary, and if they have damaged the sport. However, I truly believe that if properly prepared, they are both necessary and useful.

Boxers A and B came into the boxing world much like lawyers enter the legal profession—ambitious, eager, and full of energy and promise. They did not have any affiliations, ties, encumbrances, or connections. They were free to succeed or fail based on their own talent in the ring and business acumen. All of their legal rights were intact and in their possession.

If the two got together during this early stage in their careers, they would have been able to arrange a fight on a specified date. It would have required identifying various agreeable partners to participate—a venue willing to pay for the right to stage the bout, a television platform ready to purchase the license fee to air the match, and sponsors prepared to pay for the right to advertise their products in connection with the fight. They could have arranged this fight themselves, keeping all of the revenue and splitting it equally

between them. This arrangement would allow them to reap the economic fruits of their labor while physically challenging themselves against the best competition.

Unfortunately, like lawyers fresh out of law school, no matter how talented these boxers were, they could not do this without some help. Here's where the promoter and the exclusive promotional rights agreement enter and muddy the landscape. The Nevada State Athletic Commission, which I consider to be the preeminent boxing association, defines a promoter as "... any person who produces or stages any professional contest or exhibition of unarmed combat."¹ Promoters arrange for bouts to take place. They match opponents and take care of all of the details associated with staging the bout. They negotiate the television licensing, site, and sponsorship deals. This, however, typically comes at a cost that is measured not only in dollars but also in time and freedom. The price is the exclusive promotional rights agreement. In many cases, this gives the promoter the right to negotiate all bouts for the fighter and the ability to exploit all rights associated with the staging of such bouts. The promoter pays the fighter a fee for his participation and the fighter becomes little more than an employee of the promoter.

Why would one give up so much for so little? In most cases, the boxer has no choice because of the way the system has developed over time. When a fighter begins his career, he generally does not have much money and unless he is promoted by a powerful promoter, other fighters who are under exclusive promotional rights agreements will not be allowed to fight him. The fighter is thus left to flounder and most likely fail, until he obtains the protection of a promoter. Additionally, the new boxer is rarely interested in the business side of his profession. He just wants to get out and do what he was trained to do—fight.

In this case, both boxers A and B have exclusive promotional rights agreements with promoters, which all but eliminate their ability to

negotiate for this mega-fight or to be properly compensated for their participation in the fight. The fight is therefore a dead issue unless the promoters conclude that it is economically feasible for them to allow the fighters to fight. How can this obstacle be removed?

I believe that both exclusive promotional rights agreements and promoters are useful if properly controlled. The typical promotional rights agreement for boxers just beginning their careers or for boxers with established records who had inadequate representation when negotiating their deals is usually the very definition of adhesion contracts. They usually run for a four-year initial term (with option provisions if the fighter reaches certain benchmarks like winning a title); allow the promoter to select all of the fighter's opponents (with minimal

THE MANY CONTRACTS AND REGULATIONS ARE DESTROYING THE BOXING LANDSCAPE.

ability on the fighter's part to object to an opponent selected by the promoter); grant the promoter exclusive worldwide rights, in perpetuity, to exploit all rights associated with the boxer's fights; and the ability to determine the amount of compensation that the boxer receives for each of the fights in which he participates.

A knowledgeable lawyer will obviously do all that she can to make this agreement more favorable to the boxer. Thus, she will negotiate to limit the duration of the agreement. In so doing, she will give the boxer the flexibility to evaluate his options and switch from promoter to promoter if it is in his best interests to do so. It also will have the practical effect of giving the promoter the incentive to make the boxer happy. The lawyer will insert provisions that allow the fighter, in collaboration with the

promoter, to have the ultimate say in whom he fights and in the terms of the agreements. She will ensure that the fighter does not give up the worldwide rights associated with his fights. She will negotiate a fee that the promoter is paid for staging the bout instead of the promoter paying the fighter a fee. Finally, and perhaps most importantly, she will ensure that the fighter is consulted and participates in all the arrangements that the promoter negotiates. For example, if the promoter speaks to a television station about airing the bout, the fighter or his designee should have the right to attend the meeting. The talented lawyer also will make certain that the fighter has audit rights to review all of the promoter's financial records related to him.

Now let us go back to our hypothetical "fight of the century" between boxers A and B and assume that each has talented lawyers when negotiating and entering into their promotional agreements. If so, each fighter may have a promoter, but the promoter is essentially the fighter's employee who must follow the fighter's instructions. This obstacle has been rendered neutral. The fighters can now demand that the promoters move forward to arrange for the fight and to maximize the revenues associated with it. The next step is securing a television deal. Without such a deal, the fighters will only be fighting for pride because there will not be enough money to pay for their shorts and mouthpieces!

TELEVISION

Once you've removed the promotional obstacle between the boxers, the next contract to be addressed is the licensing/distribution agreement. Television is critically important to staging a world-class boxing match because the television licensing fee that the station will pay for the right to air the bout on live television is the biggest financial component. Major boxing matches are typically aired in one of two ways: either "live" on a network or by "pay-per-view." In live television, the network pays a fee for the right to

air the bout across its network so that the general public can turn on their television sets and watch the bout at no cost. The same principle applies when cable television systems offer the bout to their subscribers at no charge. Unfortunately, the fights that typically wind up on live television are those between two boxers on the way up the ladder to stardom or on the way down. The true mega-stars only fight on the second medium—pay-per-view.

In this arrangement, the general public pays a fee so that the television network grants them access to the signal for the fight. Instead of receiving a set licensing fee for the bout, the network is paid a distribution fee that it shares with the various distributors it employs to disseminate the bout to the public.

How does a good lawyer eliminate this obstacle or make it work for the boxer? If she did her job well and effectively managed the relationship between promoter and boxer, then this part will be a little easier. When negotiating with the network, the lawyer must understand and appreciate the competing internal conflict with which the network executive must deal. On the one hand, it is in the network's long-term best interests to put its top programming on free television so that its viewers are happy and so that it can attract new viewers and, in the case of cable providers, new subscribers. Frequently, however, the network budget does not allow them to pay an adequate amount to satisfy the fighters or, in most cases, the promoters. The network will then be forced to satisfy its short-term interests and suggest that the bout be aired on pay-per-view to reduce its costs. The network instead will be paid a fee for the opportunity to distribute the bout.

This creates a problematic situation in which the fighter is not guaranteed even a low payment from the network and will earn only as much as is generated by the pay-per-view revenue. Many fighters prefer not to take this risk but to shift it to someone else instead. The lawyer's job is to convince them that higher rewards come from higher risks.

The best way to handle this situation is to evaluate the probable number of pay-per-view buys based on an analysis of fighters of similar ability appealing to similar demographics. If the risk outweighs the probable reward of pay-per-view, negotiate with the television network for the highest possible licensing fee for live television instead.

SITE

You are almost there. There are only two other major obstacles in the ring separating your clients from a mega-fight. One of those obstacles is the contract for the site where the fight will be staged. Here again, there are some major considerations to be taken into account when picking an adequate location. Price is generally the first and foremost consideration, with details such as how much the site is willing to pay to stage the fight and how it will be paid. There are any number of ways in which that can be calculated. It can range from a flat fee, in which the site pays a certain sum to allow you to stage the fight in the arena and it keeps all revenues from ticket sales, to a situation in which the site charges you a fee for the rental of the site and you keep all of the ticket sales revenue. The typical deal is usually somewhere between the two extremes. Again, there is no substitute for good research to determine the best deal for your client.

The site fee is only a small part of the equation. Also important is the venue in which your client will feel the most comfortable. Considerations include such factors as whether it is the hometown of one of the participants, if the state commission appoints fair, impartial, and talented officials and whether the site is in a geographical location that may adversely affect your client such as a high altitude or a different time zone.

Once you consider all of these variables, you can negotiate the site deal. You would think that after you've gotten the fighters and promoters on board and created a purse of money that will economically satisfy all involved,

you've got a fight. There could be one remaining obstacle separating these anxious warriors—the sanctioning bodies.

SANCTIONING BODIES

Odds are, if boxers A and B have the star power to participate in a mega-fight, one or both of them hold a world championship title from one of the major sanctioning organizations. If they do, this factor could be the biggest obstacle to stand in the way of the fight. There are four major sanctioning organizations for boxing that have world titles in each of the boxing weight classes: World Boxing Council (WBC), International Boxing Federation (IBF), World Boxing Association (WBA), and World Boxing Organization (WBO). A fighter typically becomes a world champion by defeating a title holder. Fighters covet those titles just as pro basketball, football, and baseball players covet world championships, but with those titles come responsibilities that often hamper lucrative fights.

Each of the sanctioning organizations requires the world champion to defend his title against a mandatory challenger selected by the sanctioning organization. This challenger is rarely the next best fighter in the champion's weight division but is typically a fighter who has fought the requisite number of fights to get to that position. Thus, the mandatory defense is rarely a mega-fight. Neither the networks nor the sites want to pay top dollar for the rights to those fights, creating a dilemma. Do you stage the fight or forfeit the title? How do you create a situation in which you placate your fighter or the sanctioning body so that the mega-fight can take place? Again, it's up to the lawyer to be aware of the options and the ways in which they can work for your client.

Typically, there are three ways to avoid a meaningless mandatory bout. First, don't fight it and let the sanctioning body strip your client of his title. If your client is at the mega-fight level, odds are he is bigger and more popular than the belt and can afford to relinquish it without eroding his fan base or popularity. The best fighters are universally recognized by the public and the media, with or without

a belt. Unfortunately, this is not a positive argument for most fighters with a belt. So how do you hold on to the title without forfeiting the mega-fight with the mega-pay day?

Many organizations allow you to petition for what is known as an exception or a one-time exemption of the mandatory requirement. What this essentially means is that the organization will allow your fighter to forgo his mandatory bout to participate in the mega-bout so long as he agrees that the mandatory bout will be his next fight. The sanctioning organizations often don't mind doing this because of the huge sanctioning fees that they will accrue in the mega-bout.

If your client does not wish to give up the title and the sanctioning organization refuses to grant an exception or exemption, an alternative option is to pay the mandatory challenger a fee in consideration of his agreement not to force you to participate in the mandatory bout against him. This is typically called a "step aside fee." Many a fighter has made a substantial amount of money for agreeing not to fight.

Generally, one of those three methods gets the sanctioning obstacle out of the way. Congratulations, you have arranged your first mega-fight!

CONCLUSION

The De La Hoya/Mayweather fight represented a step forward in contemporary boxing. The public enjoyed the match, the fighters were fairly compensated, and the promoter was able to work out satisfactory deals with the networks and the sites. Ultimately, the public got what it deserved—a satisfying boxing match. As professionals, it is up to us to zealously protect and advocate for our clients' interests and, in so doing, we will inevitably resurrect a great sport.

Arnold C. Joseph is a member of Cozen O'Connor and is resident in its Philadelphia office. He has an active practice in athlete and entertainment representation including contract negotiation and formation. He can be reached at ajoseph@cozen.com.

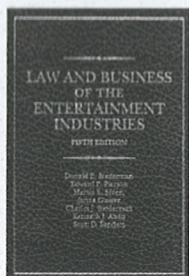
1. NEV. REV. STAT. § 467.0104 (2005).

BOOK REVIEW

Law and Business of the Entertainment Industries Fifth Edition

By Donald E. Biederman, Edward Pierson, Martin E. Silfen, Janna Glasser, Charles J. Biederman, Kenneth J. Abdo, and Scott D. Sanderson.

REVIEWED BY HOWARD SIEGEL AND RALPH DE PALMA



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In an area of law so inextricably linked to business, any book attempting to fully examine what is generically referred to as the "entertainment industries" must explain both the legal concepts and the pragmatic business components of the entertainment practice. *Law and Business of the Entertainment Industries* is one of the few

texts that thoroughly explore both aspects of the various entertainment industries. Now in its fifth edition, *Law and Business of the Entertainment Industries* is authored by a panel of experts who are also among the top lawyers in the field. This lends a certain gravitas both to the theoretical, as well as to the practical, aspects of the work.

This classic tome sets out and examines the various businesses that comprise the entertainment industry in an accessible, interesting, and thoroughly informative manner. The entertainment field as a legal discipline encompasses many areas of intellectual property and contract law. A number of these areas are common to virtually all of the various entertainment businesses. Yet, by contrast, entertainment law as a practice requires an intimate knowledge of the peculiarities of each industry, which is not always easily conveyed. *Law and Business of the Entertainment Industries* is organized in such a way that the reader is presented with and can readily absorb both. The first half of the text addresses many legal concepts applicable to most of the entertainment industries. The second half of the text separately addresses each industry and discusses the specific customs and practices associated with those industries.

The book begins with a chapter on representing talent and details the professional and ethical responsibilities required of lawyers, agents, personal managers, and business managers. Entertainment is indeed a business of intermediaries; and this opening chapter provides the reader with a comprehensive overview of the role these important representatives play in the lives of entertainers. The subsequent chapters contained in the first half of the book detail talent contracts; entertainment-related rights, including the right of publicity, the right of privacy, rights in ideas and expressions, as well as general contract structure; performance obligations; and typical remedies. While this is not a treatise on copyright law, trademark law, or contract law per se, the text generously uses entertainment industry cases and historical examples in order to explain many of the basic principles of these legal specialties. The pleasing result is both a casebook filled with several of the most important decisions affecting the