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A Comparative Analysis of the Uses of Mediation in the Entertainment Industry

Abstract

[Excerpt] This paper will provide a broad, and by no means exhaustive, overview of some of the unique ways that mediation is, or could be, used in some of the principal fields of entertainment while, identifying the similarities among them and also noting how they differ. The primary focus will be on film, television, and commercial theater and how mediation has been or could be used in situations specific to these disciplines.

Keywords

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CORNELL HR REVIEW

A COMPARATIVE ANALYSIS OF THE USES OF MEDIATION IN THE ENTERTAINMENT INDUSTRY

Tim Ostrander

Introduction

A quick perusal of any of the entertainment industry's major trade papers such as *Daily Variety* or *The Hollywood Reporter* reveals the considerable number of pending court cases, arguments, disputes, and the sheer variety of conflicts that arise in the business. Some recent issues include: the cast of the popular television series "Modern Family" suing over failed negotiations to increase the cast's salaries; the government of New Zealand fighting to keep production of "The Hobbit" within its border; turmoil over DISH Network's decision to stop carrying AMC, the network that airs critically acclaimed shows like "Mad Men"; or disputes over writers receiving proper compensation and credit for their work.¹ From these few examples one has to question how many of these disputes will ever make it court and how many will, or could be, resolved through some form of alternative dispute resolution such as mediation?

In many areas of entertainment, such as the industry unions, arbitration clauses are typical components of contracts. But many people connected to the industry, including the American Bar Association, artists, and producers are starting to appreciate mediation, in contrast to traditional litigation or arbitration, as a more appealing approach for settling their disputes.² While litigation is the most familiar means of dispute resolution, it is a costly and time consuming approach for reaching a settlement. Alternative Dispute Resolution (ADR) in the entertainment industry has grown over the past 15 to 20 years, and for good reason – many types of ADR are particularly well suited for use in entertainment environments. Some forms of ADR such as mini-trials, court-annexed ADR, and settlement hearings are not uncommon.³ Yet the most frequently used forms of ADR are arbitration and mediation. Arbitration is a process where the parties' present evidence before an experienced arbitrator who will render a decision that is final and legally binding. There is, however, a growing interest in the use of mediation for settling disputes because it is particularly well suited and compatible with many aspects of entertainment business practices and its ethos. Typical elements of the mediation process such as a focus on confidentiality, its speed and efficiency of implementation, and its ability to solve problems creatively at relatively low cost, while still maintaining relationships, make mediation very appealing.⁴

This paper will provide a broad, and by no means exhaustive, overview of some of the unique ways that mediation is, or could be, used in some of the principal fields of entertainment while, identifying the similarities among them and also noting how they differ. The primary focus will be on film, television, and commercial theater and how mediation has been or could be used in situations specific to these disciplines.

Within each discipline, disputes arise over labor issues involving the actors, craft workers, writers and directors' unions. Many of the players involved are members of unions as well so their

impact plays a significant role in the potential future uses of mediation. The financial and cultural success of American films and other media has long relied on export to international markets. This reality will become more pronounced as the markets for American entertainment media become more sophisticated and globalized.⁵ This development coupled with the emergence of new media is leading to more opportunities, but it is also a source of new and unique conflicts that will require innovative approaches to solving them.

Mediation's Place and Potential Value in the Entertainment Industry

Historically, disputes in many areas of the entertainment industry, especially at the corporate and union levels, have been settled as a result of litigation or strikes. Examples abound of failed negotiations that led to lengthy and damaging strikes and personal or contractual disagreements that resulted in well publicized court cases. However, given the breadth of issues and the variety of parties in the industry, such approaches are not always effective, affordable, or even feasible. The length of time it can take to schedule, research, and conduct a court case is a major factor in discouraging many parties from pursuing this route. The unpredictable nature of a trial in which the parties are at the mercy of a judge and jury, who may know little about how the entertainment industry works, makes litigation a hazardous and expensive process once lawyer's fees and the discovery process are included. One alternative to litigation and strikes is arbitration.

While most of the major industry unions have arbitration clauses in their contracts the process of arbitration can also be less than appealing in some situations. Arbitration is quicker, more efficient, and provides both parties with the opportunity to set the guidelines for their negotiations, participate in the selection of the arbitrator, and provide evidence and witnesses. However, arbitration can still be viewed as an expensive, time consuming, and unpredictable process for resolving disputes. Because the decision is legally binding and ultimately in the hands of the arbitrator, the disputants are limited in the amount of control they have over the process. Given these facts, many in the industry are coming to see mediation as an appealing alternative to these other forms of dispute resolution. Only recently have lawyers, producers, performers, and other interested parties started to appreciate the value of mediation for resolving their disputes. As noted by Charlie Miller, an entertainment lawyer at an ADR in the entertainment industry panel held at the Benjamin N. Cardozo Law School, "It is not unrealistic to think that ADR is here, and that it is expanding – that it is the wave of the future. For one thing, the federal courts have compulsory mediation. . ." ⁶

The Pros of Mediation

There are a number of aspects to mediation that lend themselves to the entertainment world. Despite their size and population, Los Angeles and New York City - the centers of the entertainment business - are thought of as "company towns."⁷ This is because the population of those who work in LA and NYC within the show business community is relatively small. Additionally, the transient, short term nature of the work means there is the potential for working with the same people regularly. For these reasons it is in one's best interest to keep those relationships intact. Once these industry dynamics are understood, the classic threat that "You'll never work in this town again!" has an element of truth behind it. Burning bridges is not only risky for a career, it can also lead to challenging legal or financial issues in the future. Mediation's focus on getting parties to work together cooperatively by taking on the problem, not each other, enhances the workers' ability to maintain relationships.

The confidentiality proscribed by the mediation process is another feature relevant to entertainment. The desire to protect a performer's reputation or maintaining the secrecy of

significant story lines in a TV series are just two of many examples of why confidentiality is so prized in the industry. The loss of confidentiality can have a profound impact on the financial success of an event or on the personal life and career of a performer.

Another appealing aspect of mediation includes the speed and efficiency of its application. Work in the entertainment world is often very short term - lasting months, weeks or sometimes mere days. Schedules for prepping and producing work are often very tight, so when conflicts arise, prompting “time is of the essence” disputes,⁸ the ability to settle them and avoid lengthy negotiations is vital. Given the transient, short term nature of work in the entertainment industry, a lengthy financial dispute can have a profound impact on a party’s income; the impetus for a prompt and efficient resolution is clear.

From the business perspective, entertainment lawyer Robert Friedman favors use of mediation and other ADR tools for addressing issues of credit, such as who should be credited for a script. As this is typically not an issue around money it lends itself to a more affordable process. Disputes over contract language, such as issues of profit participation and contract termination are additional areas where misunderstandings develop. For lawyers skilled in entertainment accounting and contract law, the use of mediation can be very effective in resolving these types of issues.⁹

Who Mediates for the Entertainment Industry?

Despite these positive attributes mediation is only just beginning to make inroads into the industry. The American Arbitration Association (AAA), the Judicial Arbitration & Mediation Service (JAMS,) and the American Film Marketing Association (AFMA) are several organizations that provide mediation services to the entertainment industry.¹⁰ The World Intellectual Property Organization (WIPO) also offers mediation services, dealing mainly with international aspects of the entertainment business often related to cross border disputes. As the markets for entertainment continue to expand this area will only grow and draw more attention and focus on the use of mediation.¹¹

The range of legal resources and knowledge varies widely in the entertainment disciplines. In the United States, organizations offering legal assistance for arts organizations have sprung up all over the country. These are often staffed by lawyers who offer pro bono legal services for arts groups and performers in many areas of entertainment. Such organizations can be found across the country - not only in New York and California - but also Pennsylvania, Florida, North Carolina, and Ohio to name a few.¹² Mediation services and training are several resources provided by these groups as a low cost means of educating the legal and arts communities in the merits of mediation. California Lawyers for the Arts has its own Arts Arbitration and Mediation Service which it started in 1980. Part of their mission is to provide, “preventative education and appropriate means of self-help for artists . . .”¹³

What about using Med-Arb?

According to a Cornell/PERC study that polled lawyers on their preference for mediation or arbitration in dispute resolution, 63% of the lawyers preferred mediation over the 18% who favored arbitration. One person who does not fit neatly into either of these groups is entertainment lawyer and neutral Gerald Phillips. Phillips a proponent of mediation, but he has also found value in the blended form of dispute resolution - med-arb (which combines mediation and arbitration.) For med-arb to work properly he encourages clearly establishing how the process will work at the outset; it will begin as mediation and if the parties reach an impasse it

will change to arbitration, often with the same neutral. While some lawyers take issue with the potential ethical conflicts this raises, Phillips believes that if the ground rules guiding med-arb have been clearly stated and discussed before negotiations begin and the parties are, as he says, “consenting adults”, it can work. His experience has shown that in the cases where parties reach resolution before needing arbitration, it is often due in part because the thought of arbitration is enough to push them to an agreement.¹⁴

The Film Industry: Studios vs. Independents

The impetus for many legal disputes comes from the significant differences between large, corporate studios like 20th Century Fox, Universal, or Paramount that produce big budget, feature films and the smaller, independent film studios, such as Lions Gate or the Weinstein Company. Structurally, studios differ dramatically from independents. Studio films are financed mainly by the studio, with large production and marketing budgets and there is a built in distribution network that determines where, when, and how films will be shown. Independent films are generally defined as those receiving less than 50% of their funding from a major studio. Usually their funding comes from multiple backers and/or the producer or director who created the project. Indy films are shot with small budgets, few resources, and, if the budget is low enough, without a union crew.¹⁵ Independent films tend to be produced without a prior distribution agreement in place so finding a distributor is vital to recouping the investment made by backers. Distributors are responsible for getting the films marketed and in theaters. They give the independent producer an initial fee and will then provide a back-end payment based on the film’s success. As a result of this tenuous relationship between independent film makers and distributors, this is an area where disputes often arise. Mediation and arbitration are often used in resolving these disputes. Given the non-binding nature of mediation and the potential for parties to act in bad faith, arbitration, with its binding outcome, is often the preferred approach.¹⁶

The Film Unions

Other sources of dispute that both large and independent studios must deal with arise from conflicts with the numerous industry unions. The principal union known to those outside the entertainment industry is the Screen Actors Guild (SAG) - which recently merged with the American Federation of Television and Radio Artists (AFTRA.) The performers this union covers include actors, stuntmen, and extras. Other notable unions include the Writer’s Guild of America (WGA), the Director’s Guild of America (DGA), and the International Alliance of Theatrical Stage Employees (IATSE) - which represents crafts people, such as camera operators, scenery and costume designers, and prop people, among many others. The crews who drive the equipment vehicles used for location shooting are represented by the Teamsters. Currently, these unions all have arbitration clauses in their contracts and do not tend to reference the use of mediation.^{17 18}

In stark contrast to other areas of the American labor movement today, the entertainment unions continue to be strong and important players in all facets of the industry. There are numerous examples of disputes, strikes, and actions that many of these unions have taken in recent years to settle issues. The government of New Zealand, desperate to keep production of the big budget movie “The Hobbit” in their country, has requested mediation to solve a dispute between director Peter Jackson and the local actor’s union.¹⁹ High profile cases like this will raise awareness of mediation and, depending on the outcome, have an impact on how it may be used elsewhere in the industry.

The Television Industry: Cheaper & Faster

The television industry shares many similarities with the film industry; however several features set television production apart from film. These features are where conflicts unique to this medium occur. Compared to film, episodic television production operates on much smaller budgets, as there is a need to produce shows quickly and, paradoxically, over a longer period of time. A typical hour-long television series costs around \$1 million per episode to produce with a half-hour sitcom costing more than half of that. Even so, this is still a fraction of what it costs to produce a big budget, action movie which can range from \$100 – 200 million.²⁰

In addition, the turnaround times and season schedules are quite rigid and unforgiving as they are historically dictated by the various networks, and to some extent, by their sponsors. Most TV shows produce 22 - 25 episodes over the course of an 8 - 10 month period. Typical television series have a 7 - 10 day window in which to shoot episodes.²¹ Often while one is in production, other members of the team are working on pre-production and/or post-production of another episode. If disputes arise there is a strong imperative on the part of producers, networks, sponsors, and performers to reach an agreement promptly since delays can put everyone seriously behind schedule. The ability to initiate and conclude mediation quickly would make it an approach worth exploring in these situations.

The 2007-2008 Writer's Strike

The oft referenced axiom that film is the director's medium while television is the writer's medium is still fairly accurate. The 2007-2008 Writer's Guild of America strike demonstrates the impact a work stoppage can have on the entertainment industry and shows how the writer's impact on television production is more profound than in film production. Over a three month period, some 12,000 writers went on strike concerning jurisdictional issues over animation and reality shows, residuals from DVD's and, most significantly, compensation for content created for new media. During that time, production on many television shows, including dramas, sitcoms, soap operas, and late night talk shows slowed or came to a complete standstill. Over the three month strike, negotiations broke down repeatedly over the issues. At one point a number of smaller production companies negotiated side agreements that got some writers back to work, such as those on the "Late Show with David Letterman." Estimates vary as to cost of lost wages and other income, but they range from hundreds of millions to several billion dollars.²² Should similar disputes arise in the future, it is worth considering whether the use of a more interest based approach like mediation might result in a quicker, less contentious conclusion.

The Impact of Reality

The prominence of reality television and many forms of new media have had a substantial impact on the industry. Reality programming conflicts have arisen for which there are no precedents. Issues such as whether the people who appear on them are "actors" and should be paid and represented as such and who has control over how a show's content is edited, and whether embarrassing or inappropriate material should be excluded, are a few examples of sensitive areas prone to dispute. The format itself can be a major source of strife relating to matters of intellectual property. Whether a format is "original" or has been copied is now a current source of disputes. This has taken on an international aspect since many of the shows we take for granted as American in origin are often developed first in other countries. Disputes arise when the new version is modified for the local audience. Is it still the same show? Should the original creators and licensors still receive credit or residuals? This is one of the areas where the WIPO offers mediation services for just such intellectual property disputes. The cross border nature of these disputes makes it difficult, if not impossible, to properly resolve them through traditional legal means.²³ The WIPO offers mediation services focused on overcoming these obstacles with features like a secure online docket where case information is accessible by the parties and they

are alerted as new material is added.²⁴ Such international conflicts over intellectual property will continue to evolve and require innovative solutions as entertainment markets become more globalized.

Contract Conflicts

A common situation that arises in television revolves around renewal of contracts for the stars, writers, or creators of popular series. Currently, the cast of the comedy series “Modern Family” is in the midst of a standoff with producer 20th Century Fox over their desire for increased salaries given the success of the show.²⁵ The creators of “Mad Men” and “Breaking Bad” both went through lengthy, not-so-private negotiations over issues of changing casts, budget reductions, and the number of episodes. Press reports indicated that many of these negotiations tended to be position based, where an absolute condition was set down by one party and the other was expected to accept or refuse. The potential for more effective interest based negotiations would seem preferable in these situations. The results of these impasses are not just jumbled program schedules or angry fans, but often hundreds of actors, crew, and other related workers deprived of income. That fact alone should serve as the impetus for pursuing every avenue possible to find a solution - including the use of mediation.

The Commercial Theater

While Los Angeles is the home of the majority of American film and television production, New York City is the center of live theater production. Certainly, outside of New York there are professional regional and local theaters, as well as touring versions of many Broadway productions, all of which experience conflicts that need to be resolved. But for the purposes of this paper, the focus is on mainstream, commercial theater which is the source for many shows produced elsewhere in the country.

The Theater Unions

Many of the unions associated with theater production are the same as in film and TV, such as IATSE, the WGA and the DGA. An important difference between the theater and film/television unions is that Broadway and regional theater actors are represented by Actor’s Equity or simply Equity instead of SAG. There are also differences between “legitimate” theater which entails straight plays or musicals and the disciplines of dance and opera. Performers, directors, and musicians in opera and dance are represented by the American Guild of Musical Artists (AGMA).²⁶ The musician’s union, the American Federation of Musicians (AFM), represents the pit musicians and orchestras that perform in musicals; this union has played an integral role, unique to the theater.

The 2003 Musician’s Strike

Mediation played an important role on Broadway in March 2003 when the members of the AFM launched a strike over proposed changes to orchestra minimums, which are the standard number of musicians contractually stipulated for a show’s pit orchestra. In an effort to reduce costs, show producers wanted to decrease the number of pit musicians from the longstanding range of 24 to 26 down to 15 players. In anticipation of a strike, the Broadway League of Producers was prepared to continue running shows using pre-recorded music, eliminating live music entirely. The reaction from union members, fellow artists and the public was dramatic. In response, the members of AFM struck and in a show of unity, actors, stagehands, and even customers refused to cross picket lines, effectively shutting down live musical theater production in New York over

a 4 day period with an estimated loss of around 10 million dollars. As the city was still recovering from the impact of the September 11th attacks, this loss and the potential for further economic losses were of great concern for many businesses, workers, and especially for Mayor Mike Bloomberg. After the negotiations broke down, Bloomberg himself arranged to have former New York City Schools chancellor Frank J. Macchiarola, act as mediator, bringing the parties to Gracie Mansion. They were asked to negotiate until a settlement was reached. It was unusual for Bloomberg to take such a public role in a city labor dispute, but his influence and the strike's potential impact on the city's economy and image, helped make clear to all parties that this was a matter that had to be resolved immediately. Ultimately, the union and producers agreed to set the musician minimum at 18 - 19 players. Many union members felt this was still too low a number and that their leaders gave in too easily, leaving many members viewing the mediation as a loss for their side ultimately.²⁷

But why did the musicians feel this way? Union negotiators may not have clearly communicated details of the negotiations adequately to their constituents. This was a relatively brief action, but one that had a significant impact on musicians, actors, patrons, and businesses throughout the city. As a result, there was considerable pressure to reach a settlement. These factors may have played into the willingness of the parties to accept less than they hoped for. This may have been an example of a mediation process where the results were mutually agreed upon, but one side chose to settle for less than they really wanted. Whether this was an authentic mediation in which both party's interests were addressed, remains an outstanding question.

The Poor Theater

Even at the level of Broadway productions, live theater is limited in the number of seats and performances they can sell, thus creating an inherent limit on profits. At the most lucrative levels live theater still pales in comparison to the wealth generated from film and television production. As a result, many who make their living from the theater do not have the resources to pursue significant legal recourse to settle disputes so forms of ADR such as mediation are compelling. As previously noted, there are organizations that provide free legal and other advising services to members of the arts community nationwide. In New York City, Volunteer Lawyers for the Arts (VLA) founded in 1969, provides numerous free and affordable services which are available to all areas of entertainment and the arts. VLA offers services ranging from a legal hotline, assistance for low income artists in accessing pro bono legal aid, and offering in-house meetings with their volunteer attorneys. One VLA program that serves both their arts and legal constituencies is called mediateArt. This service is focused on providing artists and arts organizations mediation services, contract negotiation, and training workshops in these processes.²⁸ The goals of Volunteer Lawyers for the Arts are manifold: advocating on behalf of artists and their issues, fostering a long term interest in aiding the arts within the legal community and serving as a valuable and affordable educational tool for artists and related organizations and businesses. An important feature of this is an effort to increase the awareness and practice of mediation. The affordable nature of their services is critical in a community that is perpetually underfunded and is often in desperate need of low cost assistance. Also this is significant in an era when budgets are being cut or eliminated and support for the arts ranks as a low priority for many organizations and governments.

Conclusions: Mediation in Entertainment Moving Forward

While traditional means of dispute resolution, such as litigation, are still quite prevalent in the entertainment industry, there is a growing movement toward more innovative, interest based solutions. The use of arbitration is an accepted approach as evidenced by the presence of

arbitration clauses in most industry union contracts. In conjunction with the growing prevalence of arbitration, there is a growing opinion among many in the industry that mediation could be an even more valuable method of dispute resolution.

The reasons are numerous. For one – the entertainment industry is built largely on relationships. Because the strength of these relationships is often of greater significance than monetary issues, the structure of mediation - with its focus on mutual gain while seeking to preserve and reinforce those relationships - makes it an obvious choice for conflict resolution. Mediation's flexibility, openness to brain storming, and focus on creative problem solving are parallel to the collaborative nature of many areas of entertainment which work together to reach a common goal, i.e. producing a film, television show, or play. The ability of a mediation process to be arranged, conducted, and concluded in a relatively short time frame also lends itself to the entertainment industry as production schedules are always tight so the ability to act upon and resolve a dispute expediently is a necessity. Since the parties involved can define the ground rules and choose the neutral they can use the many resources available through the AAA, JAMS, or AFMA to find a neutral who is both an experienced mediator and who has knowledge of their field. This is in contrast to litigation where parties can be stuck with a judge and jury who lack any familiarity or understanding of their issues.

As long as the entertainment labor unions remain strong they may become more inclined to experiment with mediation as an effective, participatory, and affordable approach to conflict resolution. Additionally, the continued globalization of entertainment markets will necessitate more expedient methods of dispute resolution that disparate international laws cannot currently accommodate. As practiced by the WIPO, mediation readily lends itself to resolving those situations. Given an economy that continues to be moribund, in which the arts have been particularly hard hit, access to an efficient and affordable means of dispute resolution, like mediation, is crucial. Perhaps through the continued efforts of the legal and entertainment communities to broaden awareness and education, the entertainment industry will soon come to appreciate the many virtues of mediation. ¶

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