



Epilogue

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EPILOGUE

CAMERAS IN THE COURTROOM

In an era of “Court T.V.” and in the aftermath of the O.J. Simpson trial, the existence of cameras in the courtroom is a highly debated issue. On January 8, 1996, a hearing of a California Judicial Council task force was held in San Francisco in which media representatives, California Governor Pete Wilson, and several Los Angeles judges debated the issue. Currently, due to the Judicial Council’s 1984 rule, camera access at trial is allowed according to each judge’s discretion. Specifically, California Court Rule 980 allows a judge to refuse, limit, or terminate film or electronic media coverage in the interests of justice, to protect the rights of the parties and dignity of the court, or to ensure the orderly conduct of proceedings.

However, Governor Pete Wilson has called for a ban on cameras at criminal trials. Wilson’s office argues that the effect of camera access is to transform a trial into a form of entertainment which serves to undermine the solemnity and dignity of the process. A group of Los Angeles Superior Court judges echoed Wilson’s arguments and went even further, calling for a ban on all electronic coverage of court proceedings. A spokesperson for the judges group observed the disadvantages of camera access, including the fact that lawyers played to cameras, witnesses were distracted, potential witnesses were exposed to inadmissible evidence, and jurors become reluctant to testify. However, not all judges agree. In fact, the California Judges Association has not yet taken a formal position on the issue.

Media representatives voiced their concerns about a camera ban. Such organizations as the Radio and Television News Association of Southern California and the California Broadcasters Association based their advocacy of camera access upon the public’s right to view its court system at work. They further argued that there was no evidence that cameras have affected or prolonged trials.

Outside of the hearing, “Court T.V.” founder, Steven Brill, is making his opinion known as well. Brill cautioned against making one aberrant case, the O.J. Simpson trial, the reason to ban camera access in all other cases. Live coverage, argued Brill, is consistent with the Founding Fathers’ principles of democracy and the nation’s deeply rooted tradition of public trials.

On February 22, 1996, the California Judicial Council task force recommended that cameras be banned from all criminal pretrial proceedings and from most sessions where a jury is not present. Furthermore, no photographs will be allowed of sidebar conferences, courtroom spectators, jurors and minors who are suspects, accusers or witnesses. The task force declined to ban cameras at trials because citizens rely heavily on electronic media for information and because physically attending trials is too difficult. The task force presented its recommendation to the state Judicial Council, which is scheduled to take a final vote in

May. Bob Egelko, *Media, Wilson, Judges Wrangle Over Cameras in Courts*, SAN DIEGO UNION & TRIB., Jan. 9, 1996, at B6; Harriet Chiang, *Task Force Debates Merits of Cameras in Court*, S.F. CHRON., Jan. 9, 1996, at A16; Henry Weinstein, *Court TV Founder Defends Live Trial Coverage*; *Media*, L.A. TIMES, Jan. 18, 1996, at 1; *Task Force Recommends Limits on Camera Coverage of Courts*, N.Y. TIMES, Feb. 25, 1996, at 24.

Kathryn Michaelis

THE STATUS OF ENTERTAINMENT LAW ATTORNEYS IN ENTERTAINMENT

The balance of power in Hollywood has changed in the last few decades and the legal profession is one reason why. In the early years of Hollywood contract negotiations, attorneys were accustomed to accepting the authority of “studio moguls.” In the last decade or so, this climate has changed. Part of this change of climate was attributable to the rise of independent production companies and ownership changes in studios. The shift of power went from the buyer to the seller — from the studio to the talent. As the power of talent grew among stars, so did the influence of a group of lawyers who often have long-standing ties to the “A-list” actors and directors.

Major entertainment law firms have not only helped inflate star salaries, but have also played less-traditional legal roles. Examples of this reformed role for the entertainment lawyer include creating movie and television production companies, laying groundwork for satellite television networks, merging entertainment with computer technology, and negotiating contracts when top executives change studios. Some attorneys even prefer to read scripts for their clients.

Some insiders say that attorneys with top clients are becoming as important to deal-making in entertainment as some of the biggest agents. The benefits an entertainment lawyer has over an agent include the confidential nature of their relationship with their client. Another benefit derives from the fact that attorneys are more prone to handle increasingly complex contract deals, such as foreign investment, back-end remuneration, and screen credits. Even many agents now have law degrees, illustrated by an estimated fifteen percent of the two hundred agents at the William Morris agency. Robert W. Welkos, *Starring in the Biggest Deals in Hollywood*, L.A. TIMES, Jan. 12, 1996, at 1.

Kathryn Michaelis

MOTHER’S PHOTOGRAPHS OF SON: ART OR PORNOGRAPHY?

A controversy has arisen over a mother’s photographs of her nude son. Toni Marie Angeli, a Harvard student, photographed her four year-old son for a class project entitled “Innocence in Nudity.” The thirty-three pictures for the project portray her son as either completely nude or semi-nude. The boy’s genitals are visible in at least three pictures, and in a few he is urinating beside a playmate. Another picture was described as a low-angle shot of the naked boy being dragged across the torso of a clothed adult male.

When Angeli took the film to be developed at Zona Photographic Laboratories in East Cambridge, the lab contacted the police. Unlike other states which have had similar incidents, Massachusetts does not have a law requiring photo processing labs to report suspicious photos of minors. Despite this, the lab contacted the police. The police arrived when Angeli arrived to pick up her photographs on November 2, 1995.

Reports of what happened next were disputed, however Angeli was charged with assault and battery, malicious destruction of property and disorderly conduct. Angeli claims to have been the victim of "heavy-handed treatment" during her arrest. In defending her art, Angeli stated, "I think that the beauty of nudity in children is its lack of sexuality." The district attorney's office decided not to press charges on the photographs because no "lascivious intent" was evident. Angeli was sentenced to jail in February for thirty days for disorderly conduct and destruction of property after police threatened to take her child and a scuffle ensued. Brian Macquarrie, *Overexposure: Mother's Nude Photos of Boy Get Negative Reaction*, FT. WORTH STAR-TELEGRAM, Jan. 14, 1996, at 6; *Harvard Student Picks Jail in Dispute Over Nude Photos of Son*, N.Y. TIMES, Feb. 4, 1996, at 29.

Kathryn Michaelis

POP ARTIST UNDER FIRE FROM BIBLE BELT COMMUNITY

Oil and gas heir Stanley Marsh, a pop art icon, has recently come under attack. Marsh is known for such visible works of art as burying ten Cadillacs nose down near the old Route 66 at the angle of Egypt's Great Pyramid. Marsh's ranch has been referenced in Bruce Springsteen songs, by Charles Kuralt and in the Los Angeles Hard Rock Cafe.

However, in December of 1995, Marsh was indicted by a grand jury for felony charges including kidnapping and assault. Marsh is also defending himself in a related civil suit. The lawsuit alleges Marsh deployed some of his art to lure adolescent boys into abusive and sexual confrontations. Marsh created a series of signs with yellow backgrounds and black writing, imitating the authentic government-issued road signs. His signs depicted such messages as "You Will Never Be The Same," "I Love the Touch of Silken Flesh," and "Steal This Sign." The signs attracted several teenagers in the local, conservative town of Amarillo. It had become a common practice for teenagers not only to steal the signs, but to catalog each sign as to where they were taken and when.

The felony charges stemmed from a 1994 incident involving an eighteen year-old high school student whom Marsh allegedly locked in a chicken coop after catching him with a stolen sign. Marsh reportedly decided to remedy the situation himself, allegedly threatening several teenagers with criminal prosecution or public embarrassment if they did not work for him. Police have launched a separate investigation into allegations that Marsh used his collection, the Dynamite Museum, to lure several youths into sexual encounters. Marsh defenders state that the suit is a ploy to get Marsh's money, as well as the result of a feud with

a local, conservative lawyer who is the father of one of the teenagers involved in one of the thefts. Jesse Katz, *A Case of Art Gone Astray?*, L.A. TIMES, Jan. 15, 1996, at 1.

Kathryn Michaelis

NEW RATINGS SYSTEM IN TV INDUSTRY

On February 29, 1996, the television industry voluntarily agreed to devise a new ratings system for its programs. Ted Turner of Turner Broadcasting stated that either the industry needed to do it or it would have been done for them, given the changed political and social climate towards sex and violence on television. Another impetus for the self-imposed rating system was the recently passed Telecommunications Bill, in which the Federal Communications Commission may have imposed a system by next year if it was not done by the industry.

Unlike movie rating systems, a rating system for television may prove to be more challenging. Not only are there more hours of programming, but it is unclear whether a rating would apply to an entire series or to each single episode. Furthermore, Jack Valenti, president of the Motion Picture Association of America, stated that the new rating system will probably have more gradations than the current four for movies: G, PG-13, R, and NC-17.

The industry decided that the networks and stations responsible for putting the programs on the air will be responsible for rating the programs. Some executives acknowledged that allowing the networks and stations to rate the programs may result in inconsistencies. However, Valenti stated that the industry will produce guidelines for the ratings. Concern has also developed over whether the rating system would result in more violent and sexual programming as it did with the movie industry. If such a result does occur, parents may soon have a method to regulate what their children watch. As a result of the Telecommunications Bill, television sets will soon have "V-chips" that allow parents to block out objectionable programs. Because all television programs would be encoded with the new ratings, the V-chip could detect them. The deadline for the new ratings system is January 1, 1997. William Neikirk, *TV Industry to Devise Ratings System*, CHI. TRIB., Mar. 1, 1996, at 8.

Kathryn Michaelis

ABANDONMENT OF A NAME

An advertising agency used an athlete's name in a television commercial for an automobile manufacturer without his consent. The advertisement aired during the 1993 NCAA men's basketball tournament and used the athlete's former name, Lew Alcindor. The athlete, Kareem Abdul-Jabbar, sued the advertising agency and the auto manufacturer under state and common laws protecting rights of publicity. The defendants argued the defense of abandonment for two reasons. First, the athlete had not used his original name since 1971, when he converted

to Islam and began using his Muslim name “Kareem Abdul Jabbar.” Second, he had not used the name “Lew Alcindor” for commercial purposes in over ten years.

The Ninth Circuit held that unlike a trademark, a proper name cannot be abandoned during a person’s life, even absent any continued commercial use of the name. An individual’s decision to use a name other than a birth name, whether the decision is based on religion, marital or personal considerations does not imply an intent to set aside the birth name or the identity associated with that name. The court decided that abandonment was not an available defense, and held that the athlete alleged sufficient facts for a finding of a violation of his right of publicity. *Abdul-Jabbar v. General Motors Corp.*, 75 F.3d 1391 (9th Cir. 1996).

Stacy Pappas

PERSONAL MANAGERS MUST BE LICENSED IF THEY PROCURE EMPLOYMENT FOR ARTIST

Section 1700.5 of the Talent Agencies Act (“Act”) provides that “no person shall engage in or carry on the occupation of a talent agency without first procuring a license therefor from the Labor Commissioner.” A “talent agency” is defined, at section 1700.4(a) of the Act, as “a person or corporation who engages in the occupation of procuring, offering, promising or attempting to procure employment or engagements for an artist or artists.” The Act was designed to protect artists, and a talent agent must abide by certain regulations promulgated by the Labor Commissioner. These regulations include keeping a client trust fund account, keeping client records, refraining from giving the client false information, and avoiding certain payment practices.

Generally, personal managers are not regulated by the Act since their duties deal with both personal and business matters. However, in *Waisbren v. Peppercorn*, 41 Cal. App. 4th 246 (1995), the Court of Appeals of California upheld the lower court’s ruling that personal managers who only occasionally seek to procure employment for artists are subject to the Talent Agencies Act.

In that case, plaintiff Brad Waisbren acted as a personal manager for Peppercorn Productions, Inc. (“Peppercorn”) from 1982-88, pursuant to an oral agreement. Peppercorn specializes in the design and creation of puppets for use in the entertainment industry and advertising media. Waisbren’s duties fell in the areas of project development, management of business affairs, client relations and publicity, and casting duties. Incidental to his duties as a personal manager, Waisbren also procured employment for Peppercorn. After Peppercorn terminated Waisbren, Waisbren filed suit alleging that he had not been paid in accordance with the oral agreement. Peppercorn moved for summary judgment on the ground that the agreement was void because Waisbren performed the functions of a talent agent without first obtaining a license under the Talent Agencies Act. Waisbren argued that a license was unnecessary because procuring employment for Peppercorn was incidental to his duties as a personal manager for the com-

pany. The Superior Court of Los Angeles County considered the issue of whether a personal manager must be licensed under the Talent Agencies Act if he devotes an incidental portion of his business to the function of a talent agent procuring employment for an artist.

The court looked to the plain meaning of the Act to determine whether the Act applies to those who only occasionally procure employment for artists. According to sections 1700.4 and 1700.5 of the Act, if a person engages in the “occupation” of procuring employment for an artist, then that person would fall under the regulations of the Act. Plainly, an individual can be engaged in an “occupation” even if only part-time, and a person can have an “occupation” even if it is not his sole or principal line of work.

In 1985, the California Entertainment Commission (“Commission”) was created to study the laws and practices of several states with regard to licensing of agents and representatives of artists in the entertainment industry. The Commission considered whether personal managers or anyone else should be allowed to procure employment for an artist without registering under the Talent Agencies Act. The Commission concluded that “no person, including personal managers, should be allowed to procure employment for an artist in any manner or under any circumstances without being licensed as a talent agent.” Anyone who performs the same function as a talent agent should be subject to the same regulations. “Exceptions in the nature of incidental, occasional, or infrequent activities relating to procuring employment cannot be permitted.” The Act provides for one exception in that an unlicensed person may participate in negotiating an employment contract as long as he does so “in conjunction with, and at the request of, a licensed talent agency.”

The court held that the contract between the unlicensed agent and the artist was void because the Act’s objective is to prevent improper persons from acting as talent agents and to regulate the talent agents for the protection of the public and the artist. As a general rule, where a statute prohibits one from doing an act, the act is void without regard to whether the statute states the consequences of noncompliance. Furthermore, the appellate court held that it did not matter that Waisbren brought his cause of action in tort rather than contract; the oral contract between Waisbren and Peppercorn was void. *Waisbren v. Peppercorn Productions, Inc.*, 41 Cal. App. 4th 246 (1995), *cert. denied*, 1996 Cal. LEXIS 1553 (Mar. 14, 1996).

Ann Addis Pantoga

DISNEY STILL SINGING “WHEN YOU WISH UPON A STAR”

Beebe Bourne (“Bourne”), successor-in-interest to Irving Berlin, Inc., brought a copyright infringement action against The Walt Disney Company (“Disney”) regarding the use of musical compositions from *Snow White* and *Pinocchio* in the sale of home videos and paid television advertisements. The United States District Court for the Southern District of New York ruled in favor of Disney with

respect to the use of the compositions for the sale of home videos and for Bourne regarding the television advertisements. Bourne appealed and Disney cross-appealed the judgment. The United States Court of Appeals for the Second Circuit affirmed.

Four agreements between Disney and Berlin/Bourne provided the context for Disney's rights in using the musical compositions. In a 1933 agreement ("Shorts Agreement") and its later extensions, Disney assigned to Berlin the copyrights to the "musical compositions written for and used in connection with the synchronized motion picture comic cartoons of Disney," in exchange for a portion of the revenues received by Berlin for the commercial marketing of the music. Disney retained the right to record, perform, license others to perform the music, and to import or export the recordings; but only in connection with Disney's pictures. Disney also reserved television rights to the cartoons.

In 1937, when Disney produced its first full-length film, *Snow White*, it entered into an agreement with Berlin ("*Snow White* Agreement") in which Disney assigned the copyrights to eight of its musical compositions to Berlin, again in exchange for a share of the revenues. Disney did not reserve rights to the compositions, but even without an express license, Disney released *Snow White* to theaters on a number of occasions without complaint from Berlin or Bourne.

In 1939, the parties entered into another agreement ("*Pinocchio* Agreement") in which Disney assigned to Berlin the copyrights to *Pinocchio* and 1939-40 "shorts," in exchange for royalties. Disney retained the non-exclusive right to record the said musical compositions, to export the recordings, and to give public performances of the recordings.

In 1961, Disney sued to reclaim the copyrights to *Snow White*, *Pinocchio* and cartoon compositions. A settlement agreement ("Settlement Agreement") granted Disney a license for performing rights to the compositions in theatrical motion pictures and television, but no express right to synchronize or fix the compositions on videocassette.

The district court found that the *Snow White* agreement was not intended to be a complete integration of the mutual promises made between Disney and Berlin, and therefore, the court allowed extrinsic evidence of an implied grant of a license to be admitted. Bourne was aware, and did not complain, of Disney's theatrical release and re-release of *Snow White* and *Pinocchio*, nor of the theatrical trailers run as "coming attractions" in movie theaters. *When You Wish Upon A Star* from *Pinocchio* was played for almost forty years as the opening and closing to the Disney weekly television show.

Bourne filed suit against Disney when Disney, following a management change in 1984, began producing videocassettes of its theater releases. Although the *Snow White* Agreement did not contain provisions reverting rights to Disney, the court found that, in light of surrounding circumstances, the *Snow White* Agreement was not intended to be a complete integration of the mutual promises between the two parties. If the *Snow White* Agreement was held to its express wording, Disney would have been left without a right to use the compositions in the original release or in any subsequent releases, yet until this litigation Disney continued to use the musical compositions for their original purpose.

Although videocassette technology was unknown at the time of the agreements, the court held that Disney's non-exclusive right to record the compositions provided for in the *Pinocchio* Agreement, as integrated to include the same provision for *Snow White*, gave Disney the right to record such music mechanically in any and all other motion pictures to be produced by Disney. The court believed the term "motion picture" includes a broad genus where the physical form, such as film, tape and discs is irrelevant. Even in the 1930's, Disney made available certain short subject cartoons for home viewing. The court concluded that Disney was licensed by Bourne to exploit the copyrighted compositions in connection with its motion pictures; therefore, Disney should be able to dispose of these lawfully made copies in any manner it wishes.

In addition, Disney used the musical compositions for paid advertising of Disney theme parks and theatrical releases of *Pinocchio* and *Snow White* without obtaining a license from Bourne. The district court, affirmed by the appellate court, found that Disney infringed Bourne's copyrights by using the compositions in television advertising. *Beebe Bourne v. The Walt Disney Co.*, 68 F.3d 621 (2d Cir. 1995).

Ann Addis Pantoga

"FLYING TOASTERS" SUIT DISMISSED

In *Jefferson Airplane v. Berkeley Systems*, 886 F. Supp. 713 (N.D. Cal. 1994), the rock group Jefferson Airplane lost a copyright infringement action involving the copyright to cover artwork on the rock group's 1973 album, *Thirty Seconds Over Winterland*. The cover of that album featured "1950's vintage, two-slice, rounded toasters with white wings and clocks flying in squadron formation across the sky." In 1990, software publisher Berkeley Systems, Inc. created a computer screen saver, *After Dark*, with a similar toaster image.

Thirty Seconds Over Winterland was registered as a sound recording copyright in 1973; however, no separate registration was filed for the artwork on the album cover. Arguing that the artwork had never been registered, Berkeley sought to dismiss the case. The court held that the registration of sound recordings, on Copyright Office "Form N", did not include registration of album cover artwork or liner notes. That form specified that the copyright was for the music alone. The case was dismissed because the artwork had not been registered.

The owner of the artwork copyright may still register the cover artwork and refile this suit. Registration is not a prerequisite to copyright protection but is a prerequisite to initiating a lawsuit. Remedies of actual damages, profits and injunctive relief are still available even when infringement occurs before registration. *Copyright registration for Jefferson Airplane album did not include cover artwork, so federal district court dismisses infringement action against publisher of "Flying Toasters" computer screen saver*, ENT. L. REP., Jan. 1996, Vol. 17, No.8.; *Jefferson Airplane v. Berkeley Systems*, 886 F. Supp. 713 (N.D. Cal. 1994).

Ann Addis Pantoga