Players, income stream changing in industry

Commentary by Richard C. Wolfe

Having practiced entertainment law in Miami for more than 30 years, I have seen metamorphoses in markets and technology change the entertainment industries, and those changes in turn have affected the practice of law.

The term "entertainment law" covers and involves media of all types — TV, film, music, publishing (music and book), advertising, Internet, news media, gaming, videos, etc. — and encompasses a host of legal fields. These include but are not limited to corporate, finance, intellectual property, trademark, copyright, rights of publicity and privacy, contracts, business, employment/labor, securities, international, taxation, immigration and First Amendment protection.

Entertainment lawyers do not just represent celebrities, performers and producers. The practice also covers issues involving agents, managers, business advisers and what we now call content providers. Despite the lack of a universally accepted definition of what entertainment lawyers do, the practice of entertainment law is clearly distinct from other areas of law.

No body of case law per se constitutes entertainment law. Further, certain states have specific statutes pertaining to the entertainment industry, and many entertainment contracts negotiated today, especially those by the major players, adopt the laws of either New York or California, because courts in those states have likely seen more entertainment cases than the rest of the 48 U.S. states combined.

Because the entertainment industries are so firmly entrenched in New York and California, extensive regulation exists in those jurisdictions that is not nearly as prevalent in satellite states, such as Florida, Georgia, Louisiana and Tennessee, where significant entertainment production takes place. The choice of state law can create significantly different outcomes with respect to the interpretation and enforceability of a contract. Thus, a working knowledge of the entertainment-related regulations in New York and California is essential for entertainment lawyers, even if an attorney does not intend to practice in those states. Likewise, an attorney interested in the practice of "entertainment law" must actively identify and learn the entertainment-related statutes and regulations affecting clients in other states.

INTERNET IMPACT

Certain music practitioners and commentators have asked whether the Internet has killed the music industry. Certainly, it has affected sales (and hence standard deal points), and it has made practicing in this area far more challenging. Most record retailers have disappeared, and consumers have embraced the business model of paying 99 cents to $1.29 for a single as opposed to paying $12.98 or more for an entire 12-cut album. This affects the entire business model upon which traditional record industry contracts were based.

Recording business revenues are down nearly 75 percent since 2000, and revenues from sales continue to drop. The percentage of sales from hard CDs is shrinking, while the portion of digital sales as an overall percentage continues to rise. According to a year-in-review report from Nielsen Soundscan and Billboard, total music purchases in 2012 reached an all-time high of 1.65 billion units, but sales of CDs dropped 13 percent from 2011. Meanwhile, digital sales rose 9.1 percent year-to-year. So the following must be asked: Is a music-subscription economy with companies such as Spotify and Pandora possible, and how will entertainment lawyers draft contracts that make economic and market sense?

Entertainment lawyer Richard Wolfe says it is vital that clients seek out experienced and knowledgeable entertainment lawyers, and that entertainment lawyers stay up to speed with the latest developments.

The practice of representing music producers, music publishers and songwriters is likewise affected by digital sales. This is especially true when major record companies rely more and more upon name producers with established track records to find, develop and deliver new artists.

Once populated by five major publishing companies and numerous independents of various shapes and sizes, the music-publishing landscape is now dominated by only three players and supplemented by a handful of smaller boutique publishing companies. The shape of the industry has changed not only in terms of the players but also the income-stream allocation.

Entertainment projects often have an inverse relationship between the amount of work a transactional entertainment lawyer must complete and the money available to pay that lawyer. For example, a basic musical performance group may need a shareholders/partnership/band member agreement, trademark registration, producer agreement and work-for-hire agreements, before the band earns its first dollar. Filmed projects also need rights clearances before investment agreements can be considered.

All too often, projects start with a lawyer who is a friend to the client or with a lawyer who may be new to the entertainment business. If the lawyer is looking to start or create an entertainment practice, typically he or she will have clients who cannot pay the bills but will still give the lawyer an opportunity to obtain valuable experience and perhaps give the lawyer a piece of the deal or participation in a revenue stream.

Entertainment clients can and do shop and compare lawyers. Often, entertainment clients move on from the lawyers they use early in their careers, when their perception of their needs pushes out the lawyer who may have been a loyal confidant and who worked on an uncompensated basis.

LIABILITY INSURANCE

Lawyers who begin to represent clients in the entertainment industry should not assume their current professional liability insurance will cover claims made against them for entertainment-related legal work. Most malpractice insurance applications require a rider describing one's practice, and the failure to include this information may preclude coverage. It is critically important to engage an insurance broker early on to learn what guidelines he or she uses to provide coverage in this area.

Individuals interested in representing entertainment clients may find themselves drawn to their clients' artistic activities by serving as an agent, a manager, or an investment adviser. This may prove hazardous for lawyers. For example, statutes such as Florida's Section 468.401 may define a lawyer as a "talent agent," requiring a license if the lawyer has procured or is seeking to procure engagements for that client in his or her artistic capacity. The problems associated with these non-legal activities should be avoided.

When dealing with entertainment clients, the lawyer must make it clear what can and cannot be done for the client. This is best accomplished through a clearly drafted engagement letter that states the scope and limitation of the lawyer's activities for the client.

In sum, with an ever-changing entertainment law landscape, it is vital that clients seek out experienced and knowledgeable entertainment lawyers, and that entertainment lawyers stay up to speed with the latest developments in the entertainment industries. The changing revenue models and the ways individuals and companies in the entertainment industries attempt to modernize their practices present challenges for lawyers that only the well-versed are adept at handling.

It is certainly a challenging field, and in many ways more challenging than it's ever been. But it's also a field that is ripe for the intelligent and entrepreneurial lawyer to thrive in.

Attorney Richard C. Wolfe, who spent 10 years as a certified public accountant, is managing partner of Miami-based Wolfe Law Miami, specializing in entertainment, sports and business law. The firm's website is wolfelawmiami.com.