

# Lawyers For The Talent

Entertainment Law

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## Introduction

“Art is making something out of nothing and selling it.”

–Frank Zappa

## What is Entertainment Law?

The leading Entertainment Law textbook begins with a Prologue entitled “Speech For Fun And Profit,” in which the authors observe:

Entertainment is a human activity and economic venture. Its internal relationships and products are, of course, shaped by contract, as well as constitutional, copyright, labor, antitrust, and trade law. Yet every one of those branches of the law applies as well to other industries, such as auto manufacturing. Professors do not, however, teach and write books about “automobile law.”<sup>1</sup>

With the notable exceptions of insurance law and agricultural law and some others—health law?—most industries do not call for their own law school courses. Maybe Hollywood lawsuits are just more fun to read about than the law of nondurable manufacturing? Maybe, but that’s not the whole story. The entertainment industry doesn’t sell insurance or soybeans or widgets or health care. It sells speech (movies, music, art, TV shows, video games, books, poems, essays, and YouTube videos), which means the First Amendment looms over every attempt to punish, tax, censor, ban, regulate, buy, sell, license or commodify the speech of artists and entertainers and their names, images, and likenesses.

## First Things First

“The First Amendment reads more like a dream than a law.”

–Kurt Vonnegut

## A Giant Speech Factory

The First Amendment to the U.S. Constitution provides that: “Congress shall make no law ... abridging the freedom of speech.” Sounds great, especially when we think of “speech” as Patrick Henry crying, “Give me liberty, or give me death!” at the Second Virginia Convention, or Thomas Paine standing on a soapbox reading aloud from “Common Sense.”

Here in the 21st Century, after nearly 100 years of modern First Amendment jurisprudence, “speech” means a lot more than just political speech, and includes violent video games, rap music, the paintings of Jackson Pollock, pornography that is not “obscene,” profanity, and so-called “hate speech.” It’s easy to think of the entire entertainment industry as a giant speech factory churning out everything from greeting cards to Cardi B’s latest to tent-pole superhero movies. But the First Amendment obviously does not protect *all* speech. So what speech

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<sup>1</sup>*Entertainment, Media, and the Law: Text, Cases, and Problems*, 5th Edition, by Paul C. Weiler, Gary Myers & William W. Berry III.

does it protect? Any behaviors meant to convey a message? Flag burning? Nude dancing? Child pornography? Writing a book called: *How To Make A Suitcase Nuke*?

What about libel or slander? Aren't they speech? Or fraud, or hiring somebody to murder your spouse, or lying to an IRS agent, or soliciting a prostitute? When courts try to decide whether speech is protected or unprotected they naturally wonder: Is this the sort of speech the Founders had in mind when they wrote the First Amendment? As far as we know, no framer of the Constitution said, "Yay, free speech, but what *is* speech?" Did the Founders mean to say that public nudity, live sex acts, and bestiality are all speech, and therefore Congress had no power to pass laws against such "expressive conduct"? Probably not, but *should* the First Amendment protect such "speech"?

First Amendment questions never seem to go away in the entertainment and publishing industries. Even when an artist exercises her First Amendment right to create protected speech, what happens if her right to tell a story or write a song or make a movie collides with somebody else's right to be protected from defamatory speech? Or their right to privacy, trademark, copyright, or contract rights? What if a client's movie dramatizes a sexual relationship between underage children? (*Romeo and Juliet*). Or what if the client's rap song arguably inspires others to attack police officers? Or what if the client is an ex-CIA agent, and her book spills state secrets protected by the Espionage Act? Or what if the client is a criminal who gets a million-dollar advance to write a book about his life, when the families of the victims are still uncompensated?

Is it easier to ask what speech is *not* protected by the First Amendment? Either way, an entertainment lawyer is also a First Amendment lawyer.

## **Art v. Commerce**

"Nobody but a blockhead ever wrote except for money."

—Samuel Johnson

If filmmakers or philosophers want only to make art, if the poet wants only to pen a sonnet to a sparrow and is not interested in publishing his work, no lawyer is required, except perhaps to suggest registering copyright in the work to prevent another artist from pilfering.

Many artists start out making art for art's sake, and working without pay, but the hard labor of creation often inspires a different sentiment. Writing is work and so is filmmaking and making music and all the other arts that require

composition, performance, or creation. Billy Wilder, director of a string of Hollywood classics from *Sunset Blvd* to *Some Like It Hot* and *Double Indemnity* was once asked in all seriousness if would make movies, even if he wasn't paid to do so. Wilder's reply: "What do you think, I'm a sucker?"

Whether artists make music, art, and letters for fun is nobody's business but the artists. However, when artists want to turn their art into a trade or a professional business, all the rules of the marketplace and the courts apply.

## The Talent

The entertainment industries run on art created by artists, sometimes called "the talent." People who can make or do something that others want to read, see, hear, watch, *share* or *like* are "the talent," the natural resources of the entertainment industry, human oil wells gushing potentially valuable [intellectual property](#).

As Orson Welles once put it, a writer needs a pen, an artist needs a brush, and a filmmaker needs an army. The average big budget Hollywood feature probably boasts a crew of at least five hundred people. For special-effects-driven tent-pole spectacles, crew numbers climb into the thousands – *Iron Man 3*, for example, credited a staggering total of 3,310 people. That's an army.

Modern information technologies make it easy for hundreds, even thousands, of musicians, visual and graphics artists, programmers, technicians, writers, producers, and editors (sometimes working on different continents) to collaborate on mega entertainment franchises, *Lord of the Rings* or *Avatar* or *Pirates of the Caribbean*, which generate billions in profits for their global corporate owners.

At the other extreme, anybody with a computer can write and publish books, or even make like Dave Eggers and start your own Internet publishing house ([McSweeney's](#)). The *50 Shades of Grey* empire (90 million sold and counting) began on a *Twilight* fan-fiction website. Anybody with a decent video camera can ring the bell with a 100 million *YouTube* views. Young artists now often have the tools of production in their basements and lofts.

## Technology and Intellectual Property

Thanks to Moore's Law and the relentless advance of information technologies, "the talent" is producing more intellectual property than ever before. The global nervous system called the Internet makes that property rise and fall and sometimes explode in value when it goes viral.

Mark Twain once said that we should buy land because they stopped making it, but unlike real property, the supply of intellectual property is potentially infinite, bound only by the limits of the human imagination. The modern entertainment industry runs on technology and intellectual property. The songs, movies, books, and TV shows are easier to create and disseminate (a good thing), but also easier to copy and pirate (a bad thing). Again, more copyright, trademark, licensing and contract issues come into play.

### **Contracts, contracts, and more contracts**

Because entertainment industry thrives on collaboration, many different companies and artists come together, make oral or written agreements to create and distribute works of art, and then disperse, often leaving questions about who is owed what for personal services, and who owns what rights in the final product. Oral contracts, handshake deals, and “napkin agreements” are quite common, even though there may be tens of millions of dollars at stake. The *Godfather* movies were handshake deals with their director, Francis Ford Coppola.

Finally, the economics and indeed the international economics of the industry quickly lead to complicated deals where everybody at the table has specialized legal needs. A lawyerless artist dealing with sharkish producers and media companies will quickly learn the old adage about the [patsy at the poker table](#) the hard way: “If after ten minutes at the poker table you do not know who the patsy is—you are the patsy.”

### **Entertainment Categories**

Entertainment used to mean “show business,” or the business of creating shows for film, television, radio and theaters. Nowadays, thanks to the Internet, “entertainment” can happen anywhere you have an Internet connection, so the “entertainment industry” arguably embraces almost all artistic endeavors from publishing to video games, to the visual arts, fine arts, dance, making [vines](#), [mashups](#), music (all kinds!), as well as the usual feature films, television, and radio (Pandora, Spotify, and your local AM station). Many giant entertainment industry conglomerates are losing money in their film divisions, but making it back with video games. *See, e.g.,* [Warner Loses at Box Office, but Its Videogames Score Big: Most of studio’s high-profile movies fall flat, while its big investment in games is paying off](#)

Wikipedia breaks the industry down into the following categories, most of which come with their own issues, specific trade unions, production techniques, rules, customs, case law, and negotiation strategies:

- **film** - covering option agreements, finance, chain of title issues, talent agreements (screenwriters, film directors, actors, composers, production designers), production and post production and trade union issues, distribution issues, motion picture industry negotiations distribution, and general intellectual property issues especially relating to copyright and, to a lesser extent, trademarks;
- **multimedia** - including software licensing issues, video game development and production, information technology law, and general intellectual property issues;
- **music** - including talent agreements (musicians, composers), producer agreements, and synchronization rights, music industry negotiation and general intellectual property issues, especially relating to copyright (see music law);
- **publishing and print media issues** - including advertising, models, author agreements and general intellectual property issues, especially relating to copyright;
- **television and radio** - including broadcast licensing and regulatory issues, mechanical licenses, and general intellectual property issues, especially relating to copyright;
- **theater** - including rental agreements and co-production agreements, and other performance oriented legal issues;
- **visual arts and design** - including fine arts, issues of consignment of artworks to art dealers, moral rights of sculptors regarding works in public places; and industrial design, issues related to the protection of graphic design elements in products.

[Wikipedia: Entertainment Law Categories.](#)

No way can we cover all industries, but I have worked in several of them, and they tend to have common denominators of intellectual property, representation, contracts, taxes, satisfactory work product, guilds and unions, and more.

Contracts, including personal service contracts, govern these relationships, but often the industries move too fast for the talent to sit around waiting for the lawyers to finish poring over long-form agreements.

## Intellectual Property

If you are brand new to intellectual property and copyright, please peruse:

- [Introduction to Intellectual Property: Crash Course IP 1](#)
- [Copyright Basics: Crash Course Intellectual Property 2](#)
- [Copyright, Exceptions, and Fair Use: Crash Course Intellectual Property 3](#)
- [Forever Less One Day: Meet Copyright!](#)

And just skim these:

- [Intellectual Property.](#)
- [Copyright.](#)

## Talent Representatives

Depending on which entertainment industry category the talent works in, they may be represented by one or more of the following.

- A [talent agent](#) or [literary agent](#) - a person or company who finds work, field offers of employment, supports and promotes the interests of their clients. A finder and maker of deals. Notable examples: [Creative Artists Agency \(CAA\)](#), [William Morris Endeavor \(WME\)](#), and [Paradigm](#).
- A [talent manager](#) - a person or company who guides the professional career of artists in the entertainment industry. Notable examples: [Brillstein Entertainment Partners](#), [Untitled Entertainment](#), and [Anonymous Content](#).
- A business manager (typically manages the talent's money).
- An [entertainment lawyer](#). For notable examples see [The Hollywood Reporter's Power Lawyers 2018: The Talent Lawyers](#)
- A [talent guild](#). Notable examples: [The Writers Guild Of America](#), [The Screen Actors Guild of America](#), and [The Directors Guild of America](#).

Each of these representatives will have oral or written contracts with the talent. They are agents and fiduciaries to their clients. If all goes well they do deals on behalf of their clients and are usually paid commissions for their work. Agents, managers, and even entertainment lawyers don't make money unless their clients do, meaning everybody is in the talent-spotting business, because the talent lays the golden eggs of rights and personal services.

Entertainment lawyers want to represent talented professionals who are likely to succeed, because then the lawyer's investment of time and attention in their client pays off.

Some typical commissions:

Talent Rep	Commission
talent managers	15-25%
talent agents	10%
literary agents	15%
entertainment lawyers	5%
business managers	5%
talent guilds	2%

(Artists don't pay "commissions" to the talent guilds, but they do pay dues, usually 2%.)

With all of their representatives taking percentages of their earnings off the top, it may seem that precious little cash is left for the talent, but if the representatives are doing their jobs they contribute services worth at least the commissions they are paid. In an ideal world, all the talent has to do is show up and act, sing, direct, write, produce, or create more intellectual property.

### Lawyers For The Talent

Lawyers play big roles in the entertainment industry because, like agents and managers, they are often paid on commission, are part of the team responsible for getting entertainment products made, and are key to protecting rights and getting people paid. What do entertainment lawyers do? No easy answer will suffice, only a bland one, namely, they provide legal services to those who work in the entertainment industry.

A lawyer drafting or editing a contract for a poet whose works will soon appear in a free literary rag or on a poetry website, and the lawyers responsible for drafting [Beyonce's \\$50 million deal](#) with Pepsi are all working in the entertainment industry, because after all: What is entertainment?

Entertainment lawyers often help clients "do deals" for professional artistic services or for "rights" (intellectual property). Lawyers may work with talent agents or managers from the beginning to help negotiate terms, or they may be called in only afterwards to "paper" an agreement that is already memorialized in a deal memo. When deals fall apart, the parties may end up in litigation or arbitration.

Along the way, entertainment lawyers practice any and all of the following: employment law, contract law, torts, labor law, bankruptcy law, immigration, securities law, security interests, agency, intellectual property (especially



copyright and trademark), the right of privacy (especially the so-called “Right of Publicity”), defamation, clearance of rights, product placement, advertising, criminal law, tax law, international law, and insurance law.

[Wikipedia: Entertainment Law](#).

**Power Lawyers** Maybe the easiest way to get an idea of what entertainment lawyers actually do is to read the thumbnail bios of [The Hollywood Reporter’s Power Lawyers 2018: The Talent Lawyers](#) or [Power Lawyers 2017: Hollywood’s Top 100 Attorneys Revealed](#).

## Entertainment Law Resources

You should spend time getting to know the following resources.

- [The Hollywood Reporter, Esq.](#). I often wonder about teaching an entire Entertainment Law course just by following the day’s stories in [THR Esquire](#).
- [Deadline](#), currently the website of choice for industry news and gossip.
- [Publishers Weekly](#).
- [IMDB](#). At some point during the course, you may wish to play with the IMDB-Pro subscription (which often provides contact information and identifies agents, managers, and lawyers for each artist). There is a two-week trial offer but you must remember to cancel after two weeks to avoid being charged. No worries if you don’t want to indulge, we’ll be perusing IMDB Pro live in class.
- [AllMusic.com](#). The near-equivalent to IMDB in the music world. Like IMDB it lists credits, albums, and songs of all musicians. But to my knowledge there is no “Pro” feature providing information about representation. The American Society of Composers, Authors and Publishers ([ASCAP](#)) and Broadcast Music, Inc. ([BMI](#)) also provide databases where you can search for music by title or by artist and discover the publisher for each song:
- [ASCAP title search](#)
- [BMI repertoire search](#)