California Lawyers Association • Issue 1 2019

BUSINESS LAW NEWS

Who Is Looking Out For Student-Athletes When Schools Purchase Disability Insurance For Them: A Case Study
Page 7

What's in a Game?
Page 17

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BUSINESS LAW NEWS

Table of Contents

Executive Committee: Message from the Chair 4

BLN Editorial Board: Message from the Editor 6

Who Is Looking Out For Student-Athletes When Schools Purchase Disability Insurance For Them: A Case Study 7
By Richard C. Giller
Author describes ways to protect student-athlete clients through insurance programs. Giller is one of the few attorneys that practices sports insurance.

The Upright Citizens Brigade's Guide To Improv In Litigation 13
By Allen Secretov and Nick Milanes
Authors provide litigation tips through a stand-up comedian's role on stage in terms of preparation and more. Secretov handles entertainment and intellectual property litigation matters.

What's in a Game? 17
By Andrew Schauer
Author details the esports industry players to guide practitioners when representing gamers. Schauer has helped start the Esports Bar Association and represents talent in the space.

The Architecture of Compromise: Constructing the Music Modernization Act 22
By William B. Colitre
Author describes the Music Modernization Act (MMA) and how it changes the music industry, while providing a brief history of the legislative process. Colitre is a recognized authority in the music industry and General Counsel of Music Reports, which operates the largest registry of worldwide music rights and related business information.

The Dos and Don'ts of Workplace Investigations for Sports Industry Employers 29
By Adam F. Sloustcher
Author explains some of the pitfalls and issues in employment law for professional sports franchises. Shoustcher works with employers in the team sports space.

Distribution Deals: License, Monetize, Repeat 33
By Jeremy M. Evans
Author describes the rights to negotiate in an over the top distribution deal in the entertainment, media, and sports space for clients. Evans handles contracts, intellectual property, and dealmaking matters for his entertainment, media, and sports clientele.

BLN Editorial Board: Letter from the Editor

Jeremy M. Evans

As Editor for Issue One, the first of 2019 for *Business Law News*, we are pleased to present some wonderful articles in this themed issue of entertainment, media, and sports law. Six industry professionals write on topics ranging from insurance and loss of value, employment law, litigation, contract drafting, negotiation, and licensing, including, specifics in film, television, music, and professional sports. All of our writers for this issue reside in the heart of the entertainment and sports industry, centered in Los Angeles, and more broadly in Southern California.

Starting off, we have Richard Giller, a partner with ReedSmith LLP in the Los Angeles office. His article discusses the importance of injury, draft, and free agency insurance to cover losses for high school, college, and professional athletes. A topic most people, let alone attorneys, do not have much knowledge.

Next we have Allen Secretov, an associate with Kinsella Weitzman Iser Kump & Aldisert LLP, in Santa Monica. He presents a terrific article, jointly written with Nick Milanes of the Upright Citizens Brigade Theatre, which has locations in Los Angeles and Manhattan, detailing how improv principles and exercises can benefit lawyers and law firms in surprising and immediately impactful ways.

Andrew Schauer, a solo practitioner based in the San Fernando Valley, has written a useful introduction to the ins and outs of esports, a growing industry that is beginning to challenge many traditional, "brick-and-mortar" sports for annual revenue.

Bill Colitre, Vice President & General Counsel at Music Reports, Inc., in Los Angeles, writes about the Music Modernization Act. He covers the basic impacts of the bill, as well as offering some interesting perspectives and anecdotal vignettes about how to construct and then shepherd legislation that can find enough consensus in a fractious industry like music to become law.

Adam Sloustcher, an Associate at Fisher & Phillips LLP, in San Diego, writes about professional sports franchise workplace investigations of harassment complaints.

Finally, this author, the founder and Managing Attorney at California Sports Lawyer®, representing entertainment, media, and sports clientele based in downtown Los Angeles, writes about how to draft and negotiate rights to be included in an over-the-top ("OTT") distribution deal for entertainment, media, and sports companies and interests.

We hope you enjoy this specially-themed issue.

Distribution Deals: License, Monetize, Repeat

Jeremy M. Evans

Jeremy M. Evans is the Founder & Managing Attorney at California Sports Lawyer®, representing entertainment, media, and sports clientele. Evans is an award-winning attorney and community leader based in Los Angeles. He can be reached at Jeremy@CSLlegal.com.

As a general matter, content creators would like to sell rights to distribute their content to multiple parties on multiple platforms, so as to increase revenue from various sales and transactions. On the other side of the negotiation table, licensees, distributors, and the like ("distributors") would prefer to own, license, or control more content for a lesser price, with an opt-out when the content is no longer selling (e.g., fewer eyes viewing content). These principles hold true for both live sports and entertainment content.

The balance between creator and distributor is decided in the negotiation, and the result is a distribution deal. Before we break down the essential elements of a distribution deal for entertainment, media, and sports content, we need to answer two questions: First, what is a distribution right? Second, what is a distribution deal?

Distribution Right

17 U.S. Code § 106, Exclusive rights in copyrighted works, provides that:

> The owner of copyright under this title has the exclusive rights to do and to authorize any of the following:
>
> (1) to reproduce the copyrighted work in copies or phonorecords;
>
> (2) to prepare derivative works based upon the copyrighted work;
>
> **(3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending** [bold emphasis added];
>
> (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
>
> (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and
>
> (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.[1]

In addition to the rights with respect to reproduction, derivative works, performance, display, and digital audio transmissions (e.g., digital music distribution) specifically listed in § 106, the distribution right is an exclusive benefit of copyright owners. Content like sports broadcasts, television shows, films, and other types of media and entertainment is copyrightable, and, therefore, its owners have the exclusive distribution right of that content. Where there is an exclusive distribution right, the content must be licensed to be distributed (e.g., watched) legally. The distribution right therefore finds its strength in its ability to be monetized by contract.

Distribution Deal

Jonathan Perelman, Head of Digital Ventures at ICM Partners, once said, "[C]ontent is king, but distribution is queen and she wears the pants. It's not nearly enough to create a good piece of content. You have to understand how content spreads across the web."[2] That quote is the quintessential reason why content must have a great distribution partner, either through a traditional or an over-the-top model. In the article, "How Movie

Distribution Works," the author[3] provides the following insight to give context to Perelman's quote:

> It has been said that making a movie is not nearly as difficult as getting it distributed. Because of the enormous amount of cost in money and time involved in distributing a movie, a distributor must feel confident that they can make a sufficient return on their investment. Having the backing of a major studio or a well-known director or star can greatly improve the chances of securing a good distribution deal. Independent filmmakers often use film festivals as an opportunity to get the attention of distributors. Once a distributor is interested in a film, the two parties arrive at a distribution agreement based on one of two financial models:
>
> - Leasing
> - Profit sharing

Under the leasing model, there is generally payment of a flat fee. Under the profit-sharing model, the distributor will get a percentage of revenues (10-50%) that is determined by an agreed-upon accounting model. In the movie business, some major studios have their own or preferred distributors. The benefit of an outside distributor is shared cost and, of course, the ability to focus on making content versus distributing content.[4]

Interestingly, on the traditional media side (think news services), creators have broadcasted and distributed content through distributors they own. The internet and YouTube have also helped with their distribution model, if they have been willing to adapt and change. In sports, leagues, conferences, or teams have used outside distributors because it has proven to be very expensive to license (and, therefore, for owners to cash in) when licensing the rights for a period of time. However, recently, some sports teams have thought to become their own distributors.[5] In the entertainment realm, on the other hand, companies have fought at the negotiation table to buy each other to own and control the information distribution highways.[6]

Once the parties have agreed upon the content to be distributed, the method(s) of distribution, and the financial model of distribution, further negotiation and drafting of applicable terms and conditions will follow. Some of the provisions likely to be seen in a distribution deal include:

- terms and conditions of sale;
- term for which the contract is in effect;
- marketing rights [i.e., using trademarks in social media and messaging approvals];
- trademark licensing;
- geographical territory covered by the agreement;
- performance [e.g., definition determined by the parties as to obligations and delivery of content];
- reporting [i.e., including accounting and payment]; and
- circumstances under which the contract may be terminated.[7]

This list is not exhaustive, and distribution deals vary by industry and need. However, below we will dive in deeper into the essential and most common provisions.

Introducing the Parties and the Reason for the Deal

Laying out who the parties are, specifically the parties to the deal, and listing their parent or applicable subsidiary company is important to show who is making the decisions, and, more importantly, who has the authority to contract. The reason for the deal is really as simple as stating what the agreement is and then proceeding to lay out the terms and conditions. For example, labeling an agreement a "Distribution Agreement" would suffice, as long as the terms and conditions are unambiguous.

Linear/Traditional Cable Options/Local Broadcasts

Does the deal include linear or traditional broadcasts (think your grandfather's television with no place or timeshifting options, e.g., saving or viewing your favorite shows whenever)? If the deal does, make sure the relevant option is included. If not, make sure it is specifically excluded. Will some content be blacked out or blocked in certain areas and at certain times? Will local broadcast stations be able to run the content? Do not be ambiguous. Be specific.

Domestic, Worldwide, and Distribution Technology Used

What is the geographic area for the deal? One state, the United States, Europe, the world, the universe, etc.? Similarly, if the deal includes one specific type of platform, make sure that the deal specifically includes or excludes advancements in technology. When going for a broad approach in selling content to a distributor, a commonly-used provision is "all technology now know or later developed."

All Games or Seasons

Sometimes dealmakers will want only one season, or two, three, or other specific number of seasons. In sports, the term of a license is generally three to five years in length, or, possibly, only for certain games (e.g., *Thursday Night Football* via Amazon Prime). It all depends on economic projections of the deal and whether any significant advancements in technology, rights, and rules are expected. If not, the deal is usually longer, to ensure longevity and consistency.

Venue, Law of Contract, and Arbitration

These terms and provisions are often left out or neglected by the unseasoned attorney. Think about this: if your client were to sue or get sued, it would be nice to have home court advantage, right? Well, on-the-field contests and off-the-field disputes and litigation work the same way. It is better to have a home field advantage (knowing where the battle will be) to measure possible expectations and results. Make sure the venue, law, and arbitration or other dispute resolution clauses, and breach/litigation clauses are included and that the client specifically knows what and where they are before signing. Specifically, do not use Vermont law if your client is based in California unless there is some reason and legitimacy for doing so.

On the distributor side, arbitration can be a great way to institute a high threshold to initiating a dispute by having high costs of entry (e.g., arbitrator fees). Furthermore, arbitration is also private, possibly less expensive compared to a lengthy trial, and faster than traditional litigation. Arbitration can also be applied to all disputes, and can be binding on the parties. A court of law can also issue a judgment based on an arbitration decision, and an arbitrator's decision is rarely vacated unless for fraud and other serious issues.[8]

Length

Deals in entertainment, media, and sports are sometimes driven by games or seasons, but they are also based on years of control. Depending on how the deal is structured, the parties can do more than one deal with multiple distributors and platforms in a set time period versus being limited to one distributor. Generally, again, the rights holder or creator will want to hold rights, so that it can sell those rights to other buyers to bring in more revenue and exposure, while the licensee or distributor will want to control more content.

OTT/AVOD/SVOD/FVOD Options[9]

OTT stands for over-the-top. It means the distribution method is over the top of linear or a traditional cable box and DTC, or direct-to-the-consumer. Think Spectrum, Cox, and AT&T versus Netflix, Amazon, or Hulu. Or as described above, linear or traditional distribution is your grandfather's television with no place or timeshifting options, e.g., saving or viewing your favorite shows whenever. OTT/DTC offer viewing options that make it easier for the consumer to consume content. Interestingly, the distinction between traditional or linear and OTT/DTC distribution has blurred because the same aforementioned companies often purchase, license, or utilize both OTT and linear options to reach consumers and expand company profits.

AVOD stands for advertising video on demand. SVOD stands for subscription video on demand. FVOD stands for free video on demand, or free television. AVOD is content that is generally free to watch, but you have to endure the commercials or placement advertisements. SVOD is Netflix, Amazon, and Hulu. VUDU, the Walmart-owned method of streaming distribution, is a mixture, since no subscription (yearly or monthly payment) is required—call it a TVOD (television on demand) model, if you will, but each movie or television show is available for purchase, and sometimes programs are AVOD (free) if you watch the advertisements. FVOD is free-to-watch content, but it includes commercials.

Now that the definitions are out of the way, make sure the deal you are negotiating includes or excludes certain rights to those distribution models. A deal can also restrict the timing of when certain models come into play. For example, the content must be strictly

SVOD for six months before AVOD becomes available. This ensures certain financial models projected in a deal and makes content exclusive. That is why we see the movie *Top Gun* playing on TNT and Netflix, but not in the movie theaters or as paid content.

Streaming and Internet

Yes, there is a difference between streaming rights and internet rights. Streaming is done through a platform and application (app) such as Netflix, Hulu, Amazon, or YouTube TV. Internet television, however, is something accessed through an internet browser (think Google Chrome, Internet Explorer, or Fire Fox), without the help of a platform or application. Whether your deal includes or excludes these rights should be specifically addressed.

Exclusivity

Is your deal exclusive or not? Generally, a distributor will want exclusivity for the rights purchased. If you want or do not want exclusivity, make sure it is included or excluded. Be specific. No ambiguous terms here.

Playback/Replay Rights

The idea here is that content generally becomes more accessible, and therefore less expensive, over time. See the *Top Gun* example above. For example, a movie is exclusive when it hits the theaters, but becomes readily available on free cable television as the content ages. Sports are similar, in that you can generally find a clip (and, sometimes, full games) either on the internet or YouTube after they are played. That being said, you can limit exposure by limiting playback and/or replay rights depending on the content.

Multi-platforms and Providers

When AT&T and Time Warner merged, they had on their minds multi-platform use and technology. Mobile phones, computers, televisions, etc. When a content owner wants to sell/license, it should consider how, where, why, and to whom the content is sold, so that it knows what rights are retained, or not included. Again, content owners licensing to other distributors can be advantageous. Think about where content is best broadcast, distributed, and viewed. Maybe that is everywhere, maybe not. Technology also plays a role here, and an appropriate provision might provide or include “all technology now known or later developed” when going for a broad approach in selling content to a distributor. Nevertheless, a content owner might want less expansive language, so that it is able to resell rights down the road, as technology becomes obsolete.

The foregoing discussion provides only some general guiding principles. No deal should be thought about in a vacuum. Compare deals, compare relationships, and work out what deal is best for the client.

Holdback Rights

Are any rights held back? A licensor/content owner would be wise to hold back some rights it wants to sell, resell, or create to sell. However, maybe the purpose is just to get the content out and project that higher revenues will result from follow-up content after the project has generated audience interest. For example, a studio or professional sports team might want to hold back mobile phone rights in a television distribution deal.

Social Media

Facebook Watch, IGTV (Instagram Television), Snap Chat, and Twitter all have viewing options, and often host television series and sports matches. Does your deal retain or sell these rights? Does your client receive money if the rights are sold to a distributor, but resold by that distributor to a social media platform? Do not leave money or rights (essentially the same thing) on the table. Again, be specific.

Triggering Events/Conditions

If a certain amount of viewership or advertisements is sold, can the licensor receive additional compensation (perhaps a percentage of the distributor’s revenues). If something happens, do certain rights revert, or are certain rights opened up to the distributor? A condition could be as simple as the receipt of (or failure to generate) a specified level of revenue or the passage of a specified amount of time.

Theatrical Rights[10]

When dealing with movie making and distribution, remember that not all films are distributed equally. Namely, some have theatrical windows and some do not. How long is the window? How many theaters? How many screens in each of those theaters?

New Partners[11]

Sometimes relationships do not work out. Dealmakers should consider contingency plans and new partners when things go wrong or a deal cannot be made. These types of contingencies can be acquired through exclusive or non-exclusive negotiating windows, rights of first refusal, and more. Remember to hope for the best, but prepare for the worst.

Rights[12]

What about literary rights (books), ebooks (online/applications), radio, television, film, etc.? Think about how the content might grow or be adapted (e.g., the exclusive right to create derivative works). Make sure your deal includes or excludes specific terms and conditions regarding the actual rights being licensed.

Ancillary Rights

With DVD and CD sales declining significantly, the exclusive rights provided by § 106 of the copyright code revolve around streaming and downloading.[13] Imagine the underlying copyright and what, conceivably, the owner could do to reproduce, create derivative works from, perform, or display their content. As described in more detail above, the deal should include or exclude specific rights and ways of distribution. If the deal is just for *Sunday Night Football* broadcasts or movie theaters, it should state that in detail. Do not neglect home sales, but they are not currently a focus in distribution deals.

Trademarks/Intellectual Property

Especially when it comes to content, trademark law marches in lockstep with copyright. Specifically, trademarks that are the logos of studios, sports leagues, or media companies are practically inseparable from the content they sell. If copyrightable content is being licensed or sold, its trademarks must also be considered and licensed, generally through a limited license. There is also a need for a clause that states that the intellectual property of the parties is owned by the individual parties and is not being sold as part of the deal. Be clear, be concise, and make sure the deal states what the parties understand and want. There is also a practical side to all of this: a distribution deal is only as good as the marks it is licensed to market.

Marketing

Related to the trademarks, marketing will set the parameters of when and where content can be marketed and how it must be portrayed. The idea here is that content owners would like to control the message and branding. Therefore, a proper agreement will include a marketing clause setting the terms and conditions for such use.

Performance, Reporting & Termination

In many agreements, performance is a requirement, because one or both parties will need to do something as part of their contractual obligations. Those obligations may lead to reporting back on progress. Where progress or certain goals are not met, it may be cause for breach and termination of the contract, depending on how the parties drafted those terms and conditions. The effect of termination should also be included, so that the parties know when breach and termination occurs and what the consequences may be. It puts the parties on notice, and could prevent breach by way of consequential fear.

Credits

In film and television, credits are important, because they show involvement and serve as part of the digital resume for all artists and content producers; they are the transportable currency that industry professionals carry with them to land their next gig. Certain credits for producers are so important that they are only given by outside entities, like the Producers Guild of America.[14] Credits—how are they given, when they are given, etc.—should be spelled out clearly in the original talent contracts that may have an effect on a distribution deal, specifically remedies.

Remedies

Sometimes the parties want to limit remedies in equity because, for example, when a movie is released or sports broadcast completed, it would be difficult if not impossible (or very expensive) to recall that movie or content. Class actions are often limited, and arbitration, as discussed above, is preferred and is often required before a lawsuit can be filed. Think about exposure, resources, and, again, hope for the best, but prepare the worst.

In closing, the above is not exhaustive regarding what should be included in a distribution agreement. It

is just a slice of what could be included, based on the client's needs. The entertainment, media, and sports industries have specific terms and uses in their deals, and those customs should be addressed. In all deals, especially in the movie, news, and sports spaces, there are no guarantees of performance, and any contract should reflect and state that specifically. However, a good distribution deal (or more) will help a client license, monetize, and repeat the sale of content.

Endnotes

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