

SEPTEMBER 2012

VOL. 84 | NO. 7

NEW YORK STATE BAR ASSOCIATION

# Journal



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*Edited by Gary Munneke*

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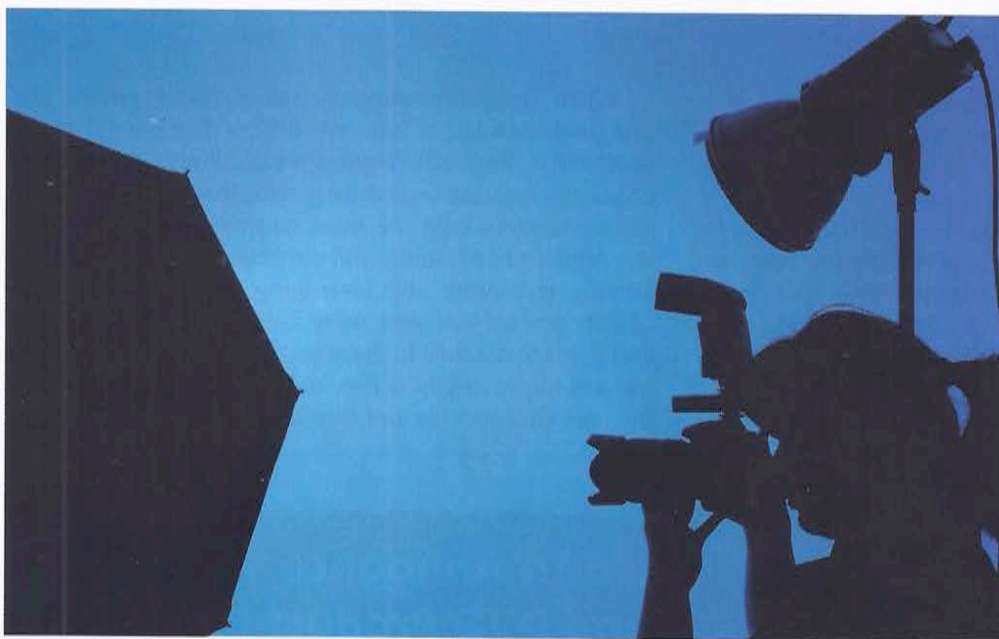
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# Are You Ready for Your Close-Up?

## You May Face Entertainment Law Issues, Regardless of Your Practice Area

By Ethan Bordman

I recently received a phone call from a personal injury attorney whose client found herself on a reality TV show. As the client returned to her parked car, she was surprised – not to mention irritated – to find a parking ticket. Surprise turned to shock when a camera crew from a reality show, which observes parking authority officials and the people they ticket, approached and proceeded to record her explicit statements of frustration and anger upon discovering the ticket. Her attorney wanted to know what, if any, legal action this woman could take against the reality show for recording her without her consent.

A real estate attorney called me to discuss his client, who had been contacted by a production company interested in using the client's home as a movie set. As a result, this attorney – well-versed in terms such as "chain of title" and "amortization" – now found himself confronted with unfamiliar terms such as "back end points" and "below-the-line." He inquired, "Where is this line?"

Hollywood, California, may historically be the epicenter of movie and television production; however, New York is closing in. In March 2012, the *New York Post* declared, "New York is the new Hollywood," explaining that 11 TV pilots – a record number – were filming in

the state.<sup>1</sup> According to a November 2011 report by the Bureau of Labor Statistics, the motion picture and television production industry was responsible for more than 141,000 jobs in New York in 2010.<sup>2</sup> The Mayor's Office of Film, Theatre and Broadcasting in New York City, reported that in 2011 approximately \$5 billion was spent there on production.<sup>3</sup> This figure included 188 films and 140 television shows; of these, 23 were prime-time shows, the most ever in a single year in the city.<sup>4</sup> In New York City it seems that productions are always being filmed in the streets, right in front of offices and homes. As a result, your clients may start asking how they can be a part of this exciting and potentially lucrative business. So read on – and when the time comes, both you and your client will be "ready for your close-up."

### Get It in Writing Anyway

Film producer and studio founder Samuel Goldwyn famously stated, "A verbal contract isn't worth the paper it's written on."<sup>5</sup> In the entertainment business, however, "unsigned" does not necessarily mean "unenforceable." It is always best to have a signed agreement before your client participates in a project. If there is no signed agreement, however, other types of documents may be helpful



to your client in proving the existence of a contract. Deal memos, confirming letters, and short-form agreements have all been found sufficient if they contain material terms of parties, time and place of employment, compensation, and type of employment – all of which help to show the intent of the parties. A “meeting of the minds” can be proven to exist if it can be shown that there was no further negotiation or discussion on any of the essential terms, even if other provisions are open for later negotiation.

In the entertainment industry, tight production timelines often force studios to “lock down” a script, or an actor’s services, quickly. As a result, formal written contracts may not be executed before services are rendered. Academy Award winner Charlton Heston once stated, with regard to the more than 60 films in which he appeared, that he never once signed a contract before production began.<sup>6</sup>

One case that illustrates the existence of a contract – despite the fact that no formal writing was executed – was *Main Line Pictures, Inc. v. Basinger*.<sup>7</sup> In this case, a suit was filed by a production company against the actress Kim Basinger for breach of both oral and written contracts after Basinger reversed her decision to star in the film *Boxing Helena*. After she had agreed to perform in the lead role, attorneys for Basinger and Main Line, through “deal memos,” agreed upon the terms of employment. Soon thereafter, formal agreements, including an “Acting Service Agreement,” were drafted. Following the exchange of numerous drafts between the parties, many ancillary terms were revised and eventually agreed upon. Some time later, after learning of Basinger’s decision not to act in the film, Main Line filed suit. The court noted, “Because timing is critical, film industry contracts are frequently oral agreements based on unsigned ‘deal memos.’”<sup>8</sup> At the time of this suit, Basinger had executed written agreements for only two of her last 12 films. The jury ruled, based on these actions and writings, that Basinger had entered into both oral and written contracts. The case was later settled.

As illustrated in *Main Line*, concepts such as “course of conduct” or “custom of the business or industry” are often used to show past actions. Just as everything is negotiable in a contract, the court’s determination of whether a contract exists, or whether a material term is contained or missing, depends on the facts and circumstances presented. Robert Evans, producer of films including *Chinatown* and *The Godfather*, once stated, “There are three sides to every story: yours . . . mine . . . and the truth. No one is lying. Memories shared serve each differently.”<sup>9</sup> Be sure to get all agreements in writing before your client participates in a project, because a contract is less likely to be called into question than someone’s memory.

### Can Criminal Activity Result in a Financial Windfall?

When the media announces that an alleged or convicted criminal has entered into negotiations for a book or movie deal, people often wonder whether that individual

can keep the advance and/or royalties. Between July 1976 and August 1977, David Berkowitz terrorized New York City, killing six people and injuring numerous others.<sup>10</sup> Berkowitz called himself the “Son of Sam,” explaining that the black Labrador retriever owned by his neighbor, Sam Carr, told him to commit the killings. Once captured, Berkowitz received numerous offers to publish his story. In an effort to thwart criminals’ attempts to profit from their crimes, New York State passed the first “Son of Sam” law, authorizing the state crime board to seize any money earned from entertainment deals to compensate the victims.<sup>11</sup> In 1992, however, the U.S. Supreme Court overturned the 1977 statute in *Simon & Schuster v. Crime Victims Board*, stating it was a violation of free speech.<sup>12</sup> As a result, New York has since amended its law. Interestingly, the law named after him was never applied to David Berkowitz, who was deemed incompetent to stand trial. Berkowitz voluntarily paid his book royalties to the crime board.

Executive Law § 632-a defines “profits from a crime” as “any property obtained through or income generated from the commission of a crime of which the defendant was convicted.”<sup>13</sup> The difficulty in applying the law regards the traceability of what is considered “commission of a crime.” Many times the individual is not compensated to recount his or her criminal act but rather for the notoriety the accusation or conviction has brought to him or her. In 2010, Rod Blagojevich, the former Illinois governor, was removed from office by the state legislature and later convicted of lying to federal authorities amid corruption charges alleging he plotted to sell the U.S. Senate seat vacated by President Barack Obama.<sup>14</sup> His case was international news. While awaiting trial, Blagojevich served as a paid spokesperson for Wonderful Pistachios in the company’s “Get Crackin’” campaign, a move designed to capitalize on his notoriety. A federal law titled “Special Forfeiture of Collateral Profits of Crime”<sup>15</sup> establishes that proceeds “relating to a depiction of such crime” can be forfeited upon a motion by the United States Attorney after the conviction. Although he later was convicted, Blagojevich was permitted to keep the money he earned from the ad campaign, because enjoying pistachios was not considered a “depiction” of the crime of lying to federal authorities.

Son of Sam laws have also been circumvented by following the law to the letter. A prime example is the following New York case, which had an unexpected twist. In January 2011, Brandon Palladino, a 24-year-old New York resident, pleaded guilty to manslaughter for the 2008 killing of his mother-in-law Dianne Edwards.<sup>16</sup> A year after the killing, Palladino’s wife Deanna, the victim’s only child – and the sole beneficiary of her mother’s entire estate – died of a drug overdose. As Palladino and his wife had no children, Palladino stands to inherit the entirety of Edwards’s estate, through his wife. Son of Sam laws do not apply here, because Palladino’s



inheritance will not come directly from his victim or the “commission of the crime” but rather from his wife, who had inherited it from the victim. Moreover, there were no allegations that Deanna Palladino, the victim’s daughter, had anything to do with her mother’s death. According to a source, the Suffolk County District Attorney’s Office asked Palladino to give up the inheritance as part of a plea bargain, but he refused.<sup>17</sup> The value of the estate was estimated at \$241,000 after debts. Furthermore, the victim’s daughter had used an additional \$190,000, which she had inherited from her mother’s savings account, to pay for her husband’s defense. The victim, in effect, paid for her accused killer’s defense.

### Media or Literary Rights as Payment for Legal Services

Discussions of Son of Sam laws often give rise to questions about whether attorneys may receive the client’s media or literary rights as payment for legal services. This issue arose in *State of Florida v. Casey Marie Anthony*, the 2011 case of the Florida mother who was ultimately found not guilty of killing her two-year-old daughter, Caylee. The prosecution was concerned that Anthony’s attorney, Jose Baez, was being compensated with book or movie deals, which could influence his actions in the representation of Anthony.<sup>18</sup> Baez and Anthony filed affidavits with the court stating that there was no agreement for Baez to sell Anthony’s story.

The American Bar Association Rules of Professional Conduct, Rule 1.8(d), states: “Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.”<sup>19</sup> New York Rule 1.8(d)(1), under the Comments section, explains that the lawyer may be tempted to subordinate the client’s best interests – for example, by pursuing “a course of conduct that will enhance the value of the literary or media rights to the prejudice of the client.”<sup>20</sup> One illustration, not provided in the Comments, is that a client’s story is most likely worth more if a verdict occurs, as opposed to a quiet or confidential settlement, even though the latter might be in the client’s best interests. The Comments also state that attorneys *themselves* should not enter into arrangements to sell their stories about the representation until all aspects of the representation have concluded.

### Reality Entertainment: Release Forms Provide a Reality Check

With the proliferation and vast assortment of reality programs, it is possible that a client could – intentionally or unintentionally – become involved in this genre. The comedian Sacha Baron Cohen, star of the 2006 film *Borat*, was the target of numerous lawsuits filed by individuals whose interactions with his title character – a fictional

Kazakh journalist traveling through the United States – were filmed and shown in the movie. Some of these people had signed consent forms; others had not. After the film was released, several of those who had signed consent forms claimed filmmakers misrepresented the project, which was described on the form as a “documentary-style film.” They also raised questions about the amount of information the filmmakers provided to them before they signed. The Second Circuit Court of Appeals decided the information provided was sufficient and the consent forms valid because the participants made no attempt to verify the legitimacy of Borat as a news reporter; instead, they relied solely on the representations provided by the filmmakers.<sup>21</sup> The one-page release stated, in part: “Participant agrees not to bring any claim in connection with the Film or its production . . . .”<sup>22</sup> Moreover, the single-paragraph cover letter accompanying the release concluded: “As the agreement makes clear, you will be waiving all claims in relation to the Film.”<sup>23</sup>

New York resident Jeffrey Lemerond appears in the trailer and in 13 seconds of the film. He is heard screaming “Go away!” and “What are you doing?” when Cohen, as “Borat,” chases him to give him a hug. Lemerond, who did not sign a release, was randomly chosen on a public street (the corner of Fifth Avenue and 57th Street in Manhattan). He later sued for public ridicule, degradation, and humiliation. Judge Loretta Preska, of the Southern District of New York, dismissed the case, finding that limitations on using a person’s name and likeness do not apply to “newsworthy events or matters of public interest,” stating *Borat* “attempts an ironic commentary of ‘modern’ American culture . . . .”<sup>24</sup>

The First Amendment has also been used successfully by reality show producers as a defense for broadcasting an individual’s appearance without that person’s consent. In February 2008, Eran Best was stopped by police in Naperville, Illinois, for driving with expired license plates.<sup>25</sup> The officer smelled alcohol on her breath, and he called for backup in accordance with local procedure, which requires the presence of two officers in administering field sobriety tests. The officer who came to assist was accompanied by a camera crew from the reality show *Female Forces*, which follows female police officers in Naperville. After recording the arrest for driving on a suspended license, the show continued to record the officers’ search of Ms. Best’s car, including their discovery of marijuana. Representatives from the show asked Ms. Best to sign a consent form; she repeatedly refused to do so. *Female Forces* later aired an episode showing the arrest; in it, Ms. Best’s name, date of birth, driver’s license number, and other personal information were revealed. Ms. Best filed suit, alleging violation of her constitutional rights to privacy because the show “staged, sensationalized and/or enhanced” her arrest and use of her identity for commercial purposes without her consent, which violated the state’s Right of Publicity Act.<sup>26</sup> The production company



and A&E Television Networks asserted their rights under the First Amendment, and in 2011, Judge Matthew Kennelly of the U.S. District Court agreed, stating that the show's "depiction of Best's arrest and its surrounding circumstances . . . conveyed truthful information on matters of public concern protected by the First Amendment."<sup>27</sup> He further stated, "The status of *Female Forces* as an entertainment program, as opposed to a pure news broadcast, does not alter the First Amendment analysis."<sup>28</sup> The court noted that criminal charges and facts concerning arrests and citations are legitimate matters of public concern.

Although some individuals may choose not to participate in reality programming, there are many who want to be known internationally – and compensated – regardless of the release's stipulations or an attorney's legal advice. Since most agreements are non-negotiable, the attorney's role is to explain each clause in detail to the client.

### It's Not Child's Play: Minors in Entertainment

In 1919, six-year-old Jackie Coogan was discovered by Charlie Chaplin; Coogan went on to star in films such as *The Kid*,<sup>29</sup> *Oliver Twist*, and *Tom Sawyer*. Coogan earned an estimated \$3 million to \$4 million<sup>30</sup> in the 1920s (about \$40 million to \$50 million in 2012 dollars).<sup>31</sup> On his 21st birthday, Coogan discovered that his parents had squandered his earnings on furs, diamonds, and expensive cars. At the time, earnings of minors belonged solely to their parents. Coogan sued his parents but recovered only \$126,000.<sup>32</sup> As a result of the incident, several states – including New York – passed the "Coogan Law,"<sup>33</sup> under which entertainment contracts require that 15% of a child actor's earnings be placed in a blocked trust account until the performer reaches age 18.<sup>34</sup>

New York's Child Performer Education and Trust Act of 2003 establishes the rules and regulations for performances by individuals under 18 years of age who render creative or artistic services in the state or are residents of the state. Before a minor can be employed, a Certificate of Eligibility to Employ Child Performers must be filed by the employer; an Employment Permit for a Child Performer must also be filed by the parent or guardian.<sup>35</sup> These forms ensure that proper trust accounts are established, academic obligations are met and appropriate insurance coverage is in place before the child begins working. New York requires that all child performers maintain satisfactory academic performance, which is determined by the school in which the child is enrolled.<sup>36</sup> If the child is unable to attend class on a regular schedule, the parent or guardian must make arrangements to (1) ensure that the child receives the required instruction; (2) provide evidence to the school to demonstrate satisfactory academic performance; and (3) ensure that the child is not without instruction for more than 10 days when school is in session.

Moreover, because child performers have the right to disaffirm a contract under the infancy law doctrine,

New York has taken steps to protect them while ensuring that entertainment companies do not suffer – creatively or financially – if a child chooses to not fulfill his or her agreement. New York's Arts and Cultural Affairs Law § 35.03 authorizes courts to approve or disapprove a child's entertainment contract before the performance begins. Under the law, the child appears before a judge who reviews the contract's terms, explains the professional obligations, and determines that the child's decision to perform is made without duress. The judge also explains the personal sacrifices the child will have to make because of his or her work obligations, which may include having less or no free time for personal activities or visits with friends. If the judge is satisfied with the terms of the contract, and the child understands the commitment, the agreement will be confirmed – after which any action by the child that violates the contract is treated the same as a breach by an adult.

### Paying for the Production: Film Incentives in New York

According to a report titled "Tax Incentives in New York Are Working," by the Motion Picture Association of America (MPAA), "[t]he New York state production incentives have been a boon to production since adoption."<sup>37</sup> As the state's financial production incentives account for a large portion of the funding for film and television projects, it is important to understand how New York's tax incentives assist filmmakers. More than 40 states offer some kind of incentive designed to attract movie projects and the economies they create. An entertainment project brings business to a variety of business owners such as hotels, restaurants, catering companies, and office spaces, all of which experience a production-related surge in business. Moreover, local professionals are hired to assist with various aspects of the production. If the experience is successful, the producers may choose to return to the same location for another project.

The New York State Film Production Tax Credit and New York City's "Made in NY"<sup>®</sup> were intended to bring about local expansion of the motion picture industry. In 2009 and 2010, 279 films and 345 television projects were filmed in the state.<sup>38</sup> In 2011, the slate of well-known projects produced in New York continued and included such films as *The Bourne Legacy* and *Men in Black III*, as well as the television series *Blue Bloods*, *Boardwalk Empire*, and *Glee*.<sup>39</sup>

New York State offers a tax credit of 30% for qualified production expenditures.<sup>40</sup> These include costs for tangible property or services that are directly spent on the production, such as technical and crew production, facilities, props, makeup, wardrobe, and set construction. Productions that qualify for the credit include feature films, TV pilots, TV series, and TV miniseries. Certain productions are excluded from the incentive: documen-



taries, news programs, interview or talk shows, reality programs, and commercials.

New York City's "Made in NY"<sup>®</sup> Incentive Program offers opportunities to qualified productions that shoot in the five boroughs, in addition to the state's credit.<sup>41</sup> The Mayor's Office of Film, Theatre and Broadcasting provides marketing credits for film and television productions that complete 75% of their work in the city. Moreover, the mayor's office assists productions with locations and permits and the NYPD Movie/TV Unit helps with traffic and crowd control when filming takes place in public locations on streets, as well as on subways and buses.<sup>42</sup>

**Remember: everything is negotiable, but get it in writing.**

### **Making Your Client's Home a Star**

One way in which some of your clients may choose to become involved in the growing television and film industry – and be compensated – is to offer their home as a production location. Attorneys need to consider several issues when drawing up the contract with a production company. The first is to check whether the client's building or community allows participation in film projects; some bylaws do not allow production crews because of the potential disruption and inconvenience to fellow residents. Another factor is the amount of time involved; although the scene being filmed may be on the screen only for a few minutes, it may take several hours or even days to create. The type of scene and physical change the production will make to the home must also be considered. Is the movie a drama that will feature a family eating dinner in a dining room, or is it an action movie in which two people will be fighting and smashing into walls? There is a big difference between moving a couch and putting a hole in your wall, though (needless to say) the production company will repair it before they leave (although not necessarily always to your client's satisfaction). This should be explicit in any agreement.

It is recommended that you contact the state or city film office to be sure the production company has the appropriate filming permits and insurance forms on file. To obtain a motion picture or television permit in New York City, the Film Office requires a certificate of insurance for at least \$1 million or an equivalent Comprehensive General Liability policy.<sup>43</sup> The agreement should specify which parts of the home are accessible and what changes can be made to the home. It should also provide a few buffer days in case filming is delayed by conflicting production schedules or circumstances beyond human control, like weather.

If the scene involves extensive structural changes to the home, an escrow account can be helpful. The account will hold monies, paid by the production company, which are intended for use in returning the home to its prior

condition. The client is thereby assured that he or she will receive the funds necessary to make repairs to the home.

The fee paid by the production company for use of an individual's home is based on various factors, including the number of days the home is utilized and the degree of change required. The decision to use a particular home involves several visits from production company representatives, including location scouts, location supervisors, and even the director. Consultation with a certified public accountant is also advised, because, depending on certain factors, there may be various tax advantages for your client. The state or city film office can often provide real estate agents who specialize in listing homes for use as locations.

### **What "Options" Does the Client Have?**

One entertainment law scenario you might face occurs when a client informs you he has been writing a book or screenplay in his non-work time, and that a production company is interested in "optioning" the story. An "option" is an exclusive agreement that gives the purchaser the right – not the obligation – to produce or begin production on the purchased story. An option is sometimes contingent upon certain conditions being met, which are agreed to by both the producer and the writer.

Consider the following scenario: a film production company expresses interest in making your client's book into a cable TV movie. Your client is, of course, extremely excited. The production company wants to increase the odds that the story will be produced according to its wishes; it also wants to reduce its financial risk. Instead of buying the exclusive right to make the story into a movie, the production company will instead offer an option. The option gives the producer a period of time, usually one to two years, to decide to purchase the story or to meet certain conditions in the agreement. During this time, the production company can find financing, book certain actors or directors, or find a network that is interested in the story. The producer may then choose to purchase the story. The option is advantageous to the writer because of the time it provides. If the producer chooses not to exercise the option within the agreed-upon time frame, it will expire. Your client is then free to shop the story around to other production companies.

There are several key points to keep in mind in a scenario like this. First, consider the price being offered for the option. It is typically 10% of the underlying purchase price – but everything is negotiable. When negotiating an option, simultaneously agree on the price of the underlying purchase agreement in the event the option is exercised. This is essential because if you fail to do this, you have simply sold the right to negotiate at a later date.

Along with the underlying purchase price, there is another important factor to consider. When negotiating the option contract, you must decide whether the price of the option is applicable or non-applicable to the final purchase price. If applicable, the option price is credited



toward the negotiated purchase price. If the price of the option is non-applicable, the purchase price will be separate, in addition to the option price.

## Speaking the Language of Entertainment Law

The following definitions explain some of the key industry lingo you may encounter in your negotiations.

**Above-the-line:** Describes individuals who guide the creative direction of film, such as screenwriters, directors, producers, and lead actors on the project.

**Advance:** Up-front payment; it is always best to clarify if an advance is recoupable or non-recoupable against expenses, and whether it is refundable or non-refundable in the event that monies from sales are not enough to cover the cost of the advance fee.

**Below-the-line:** Describes individuals who are involved in the technical aspects of the production, such as costume designers, sound engineers, and film editors.

**Completion bond:** Insurance policy that guarantees the film is completed; often required to receive state film incentives.

**Cross-collateralization:** Offsetting expenses in one medium against revenue from another market (e.g., theater ticket sales in the United States offset by DVD sales in Europe).

**Final cut:** The right to decide which scenes are included in the version of the film that is released.

**First monies:** First revenue from the distribution of a movie.

**Negative cost:** The actual cost of production.

**Work-for-hire:** Describes an individual commissioned to create work of a certain type (e.g., production company hires a screenwriter to write the story with the company owning the copyright of the work).

## That's a Wrap

Entertainment opportunities are everywhere. You never know when or how they may make their way into your practice, no matter your specialty. The key is to recognize that an entertainment law matter may arise in any case or with any client. Remember: Everything is negotiable, but get it in writing. Now you are ready for that close-up. ACTION! ■

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