

By Arnold P. Peter

Is the Law Irrelevant in the Convergence Era?

Old labor formulas need to be revised to recognize the realities of new business models

The last decade has brought tremendous change to the entertainment industry. While the traditional media of filmed entertainment and recorded music remain dominant forces, new methods for distributing content and connecting with the consumer have created dynamic economic opportunities. Today, entertainment covers a broad spectrum of media that include film, broadcast and cable, recorded music, publishing, radio, theme parks and location-based entertainment, hospitality, sports, and Internet/new media.

In this new economy, it is not uncommon for several forms of media to come together at a single distribution point. This is known as convergence. Already the entertainment industry has developed many new varieties of convergence:

- The merging of technologies such as television and the Internet to create a single distribution channel.
- The vertical integration of content creators and content distributors, for example, when a company produces a television program for its own network.
- The “repurposing” of intellectual property, such as basing a theme park attraction on a popular motion picture.

Traditional business models and legal arrangements have little application to this new economy. Unfortunately, entertainment companies and artists continue to look to the courts and Congress—the very institutions least equipped to address the complex business relationships engendered by the convergence economy—for guidance. Take the Napster case: True, the industry was successful in shutting it down, but not its “evil quint”: Morpheus, Kazaa, audio-galaxy, Winmx, and MusicCity.

The problem is that artists and distributors continue to base their actions on traditional business models and formulas. Producers insist that they retain the right to use and reuse content in any permutation once they have paid for its creation. Entertainment conglomerates believe that every consumer transaction must somehow be monetized. Artists still rely on now-disproved residual formulas for all negotiations. Examples illustrating how traditional business models and negotiation strategies have little application to the convergence economy are legion. Consider the following:

User manipulation of copyrighted works. If an actor appears as Britney Spears’s boyfriend in a music video, he receives his payment up front and is not entitled to residuals. Enter www.getmusic.com, which allows users to mix and match visual elements from any video available on the site, as well as to add graphics from the user’s own collection. Now suppose footage of that same actor is cut and pasted into another artist’s clip and the doctored video goes on to receive national exposure with an economic impact. What are the actor’s rights? The Screen Actors Guild prohibits the reuse of an

actor’s image if it substitutes for the hiring of the actor, but it is an open question whether this would qualify as a substitute for hiring.

Movie-based theme park attractions. The Writers Guild of America and Universal Studios have been fighting about feature films that become the basis of park attractions. The guild claims these attractions constitute exploitations of dramatic rights guaranteed to the writer under the WGA Agreement. An arbitrator held that the Waterworld Live Action Stunt Show was an exploitation of dramatic rights under the agreement’s separation of rights provisions. This triggered guaranteed minimum payments to the writer. But that hardly settled the matter because visitors do not visit a theme park for just one attraction. Should compensation be based on a one-time fee or a percentage of the gate based on some allocation to a particular attraction?

Creative rights for computer generated images. If a virtual Tom Cruise told you, “Show me the money!” would you write the check to the superstar or to the special effects wizard who developed the computer-generated image? The answer might be both.

The difference between placing a digitally created dinosaur on a fictitious island and using a digitally manipulated John Wayne in *City Slickers II* is that the brontosaurus will not sue but the Duke’s estate will. Whether either is entitled to compensation or credit is unclear. In a 1997 ruling, *Astaire v. Best Film and Video Corp.*,¹ the Ninth Circuit permitted the inclusion of film clips of Fred Astaire dancing in an instructional videotape produced without the permission of Astaire’s widow. The billion dollar question is: “How will this all be valued?”

What these examples indicate is that those representing artists and entertainment companies must abandon obsolete formulas. Entertainment companies must respect and compensate artists for their creative efforts, and artists must recognize that a fledging Internet start-up is not like a well-financed, fully integrated entertainment company. So long as industry lawyers and executives continue to apply old models to these current issues, the fruits of their effort may well be irrelevant. As the Napster case shows, the biggest legal victories will simply be ignored by the marketplace. ■



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¹ *Astaire v. Best Film and Video Corp.*, 116 F. 1297 (9th Cir. 1997).