BOOK REVIEW

ENTERTAINMENT LAW. By Thomas D. Selz* and Melvin Simensky.** New York: Shepard's-McGraw Hill, Inc., 1983. Three Volumes, pp. 1988. $150.00.

REVIEWED BY ROBERT C. BERRY***

A curious process has emerged these past few years. The old legal classifications of contracts, torts, property and the like, long accepted as logical, almost conclusive, compartmentalizations of the law, have been subtly challenged. This has not been a frontal assault. Obeisance to the established has continued. But the signs have been there. Legal scholars started talking about "law and . . .," such as law and medicine, law and the arts, and even more grandly, law and the social sciences. At length, more boldly came those who seemingly claimed new legal classifications, such as construction law, health law, air and space law, sports law and, to the point for this inquiry, entertainment law.

This has been a curious process because it has moved definitions of law from a supposed internally consistent conceptual basis to one that focuses on transactions and situational circumstances. To be sure, the old concepts are still there. Contracts and torts and property are still discussed, analyzed and dissected. Indeed, they and their traditional counterparts are the bases for the new transactional legal fields. But a shift in emphasis is taking place. The question is whether this is more than window-dressing. The proof is in how the fields have been addressed through scholarly thought and writing.

With entertainment law occupying the glamour position it does, it was only a matter of time before someone would attempt to harness the field by subjecting it to a treatise. That someone has proven to be a duo, Thomas Selz and Melvin Simensky. Theirs has been the unenviable task of tackling the broad-gauged, elusive, intractable field popularly called entertainment law, but perhaps better described as legal and business aspects of the entertainment industries.[1] Selz and

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[1] The authors insist on describing entertainment as a single industry. T. SELZ & M. SIMENSKY, ENTERTAINMENT LAW § 1.02, at 1-5 (1983). This seems to be counter to popular definitions of industry as being one that uses labor and capital to engage in a distinct branch of

Simensky assumed a notable undertaking, attempting to bring order out of multiple occurrences, variant business situations and attendant legal problems. Their results should be judged in the context of what they had to work with when they started and how far they have advanced our knowledge about a diverse field that demands some type of unity, when it is somewhat doubtful whether such unity in fact exists.

The single most difficult task faced by the authors was pulling together disparate threads from seemingly congruent circumstances and building the conceptual framework to make the whole be a sum of its parts. This is never easy. There seem always to be loose ends dangling, patches overlooked, and interweavings that, on reflection, simply do not match. What seemed to be reasonable relationships, easily explained and demonstrated, turn out to contain balky mutations. The patterns converge when they should emerge; and, despite this, the disparities become even more pronounced. It is a frustrating, enervating undertaking. What results may be worthwhile, even noteworthy, but it is not what was initially envisioned. It is not the final word.

Selz and Simensky have gone beyond what any one else has attempted.[2] They have produced a full treatise, putting flesh on the

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trade. Depending on how one regards it, the authors are either over or under inclusive. If it is a single industry, there are surely other types of entertainment that can hardly be logically distinguished so as to isolate the five which the authors so categorically say comprise the industry. They assert the five are television, motion pictures, live theatre, music and print publishing. *Id.* They specifically reject radio as a sixth "branch," *id.*, despite its revenues in excess of five billion dollars per year. For unexplained reasons, the non-performing arts, such as pictoral, graphic, photographic and sculptural, sports and video games are not included. While one could argue for separate treatment of at least some of these areas because of differing business and legal problems, to ignore them completely seems arbitrary and short-sighted. What seems a more justifiable approach is to regard entertainment as a number of industries, with different ones producing quite distinct products. The question then becomes which of the industries are most interrelated and demand combined scrutiny. This might lead one to reach the same conclusion as the authors, but it would require substantial analysis before one should be comfortable with drawing the lines as tightly and narrowly as the authors have done.

[2] This is not to say there were no models. For example, there exist fairly comprehensive works on the music industry. In many ways, the coverage by subject matter is superior to that of Selz and Simensky. *See* S. SHEMEL & M. KRASILOVSKY, MORE ABOUT THIS BUSINESS OF MUSIC (3d ed. 1982); S. SHEMEL & M. KRASILOVSKY, THIS BUSINESS OF MUSIC (4th ed. 1979). There also exist treatises on the laws pertaining to sports. *See* L. SOBEL, PROFESSIONAL SPORTS AND THE LAW (1977); J. WEISTART & C. LOWELL, THE LAW OF SPORTS (1979). Both works suffer from a lack of discussion of business background but are more comprehensive in their coverage of the legal problems in the sports area than Selz and Simensky's entertainment counterparts. Finally, one should also note those works delving into the art world. *See* L. DUBOFF, THE DESKBOOK OF ART LAW (1977); J. MERRYMAN & A. ELSEN, LAW, ETHICS AND THE VISUAL ARTS (1979).

skeletal outlines proferred by such as Lindey[3] and Taubman,[4] who contented themselves with a proliferation of forms and sparse, often elemental, commentary. Selz and Simensky have set out to harness the disparate threads and fit them into a usable framework deemed to be entertainment law. Their attempt is certainly praiseworthy. But ultimately, entertainment law, if there is such a beast, is not broken to saddle.

There is an old axiom, or if there is not, there should be, that goes something like this: "Promise (within 20% or so) what you can deliver." The only real problem with Selz and Simensky, ENTERTAINMENT LAW, is that it does not heed the warning implicit in the saying. By its very title, expectations are raised too high. This leaves one, in the end, exclaiming that too much was ignored, eviscerated or undersold. This criticism is, at the same time, both justified and unfair. It is this dichotomy that needs exploration to understand just what is right with what Selz and Simensky have accomplished (and one must surely acknowledge there was a great deal), as opposed to what is unfulfilled and thus unrealized.

ENTERTAINMENT LAW is a three volume work, consisting of two volumes of treatise and one of forms. Volume three, the forms, is largely a throw-in. The forms are reproduced without commentary. While they may be of some use to the novice first contemplating the field, they are of little aid to the seasoned practitioner. Indeed, the forms should be approached with caution. As with most emanating from the various entertainment businesses, they tend to be slanted towards particular sides and are hardly recommended as models seeking the best for all parties. For comparative purposes, they can be thrown into the general milieu of forms available from a variety of sources, but the hard work of deciding what best fits the individual situation still has to be done. And there is no guidance from the authors as to what is right or wrong with the forms presented.

It is thus the first two volumes that comprise the heart of this work and on which one decides to what extent help is there or not. As can be deduced from foregoing comments, it depends on what one happens to be investigating. The work may be a quite valuable research source, or it may be barren. By and large, what it tackles it does very well. But the holes in the overall coverage are substantial and must be recognized.

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[3] A. LINDEY, LINDEY ON ENTERTAINMENT, PUBLISHING AND THE ARTS: AGREEMENTS AND THE LAW (2d ed. 1980).

[4] J. TAUBMAN, PERFORMING ARTS, MANAGEMENT AND THE LAW (1973-1980).

The work is basically a two-track effort. The first is to cast business questions, with a smidgen of economics, into general legal molds. The emphasis, however, is on the business and not the law. It is a background exploration of some of the overriding themes within the entertainment field. It gets into such problems as large investments and attending high risks, the consequences of doing business in this type of atmosphere and how certain risks can be reduced or shifted. One compelling problem in the industries has to do with anticompetitive practices. Although a separate chapter focuses on these, it hardly scratches the surface of what is endemic and overriding in the area. Finally, attention is riveted on the distribution problems in entertainment and attempted curtailments of the powers of distributors. What comprises the first half of volume one is a solid, though hardly surprising, investigation of at least parts of the business sectors within the entertainment industries. It deals but little with retailing (or exhibition) and thus undersells some of the most substantial anticompetitive practices. But in general the discussion is on point and instructive.

The second track stands in contrast to the first and exemplifies a dilemma faced when one attempts what these authors have undertaken. The dilemma is a pervasive one. It poses whether one should be theoretical or practical, whether one should talk *about* something (and thus conceptualize) or whether one should be explicit and tell how one *does* something. In theory, it is easy to say that both should be explored. In the actual writing, this is not simple.

In essence, the business examination of the first half of volume one is a discussion *about* the field. It contains little hard information that would help someone tackling a specific situation. At best, it would suggest where one might look for assistance. It talks about the industries and their legal problems. It does not analyze the law for purposes of actual guidance and usage.

The second track, the latter half of volume one and all of volume two, is more the practical, a "this-is-the-law" approach. The curious point is that the analysis here is really not dependent on the more general business discussion of the first half of volume one. The business context of the legal problems is not the same context as examined earlier. What is explored, by a variety of methods, is the protection of the individual entertainer's name and image. This is done by extensive analysis of the means by which one receives proper credit, largely through contractual guarantees, and of the protection of one's name and image through the employment of such legal concepts as unfair competition, privacy, publicity, and libel. Volume two then con-

cludes with a look at remedies, a treatment that is instructive but not particularly thorough in its coverage.

The two volumes, taken together, do not really address a central, perhaps *the* central, issue in the entertainment business—the protection of the creative work product. Except for cursory treatment in the chapter on unfair competition, as it deals with additions or deletions to one's creative work, the two volumes concentrate on the rights of individuals, and not on what they produce. Any discussion of copyright is buried in footnotes and is inferential at best. There is not even treatment as to how one preserves one's rights in a creative work by contract, except again by inference as it is touched upon in the many chapters on credit and protecting one's name and image.

The failure to deal with this area has to have been a deliberate one by the authors. But nowhere is it explained why this crucial area was ignored. It is quite true that to have covered the protection of the work in anything more than passing fancy would have required another volume—but these volumes are advertised, after all, as ENTERTAINMENT LAW. And central and inseparable from the world of entertainment is the product: the films, the records, the scripts, the books, what has come to be called the software. Without those, "we ain't got nothin'."

While this substantial omission is being noted, the list of those others among the missing must be catalogued. As mentioned above, antitrust is treated only fleetingly. Some of the major antitrust problems are discussed, but not analyzed. Antitrust is used more to explain the background of the industries than to demonstrate how it is a living organism in the life of entertainment law. It talks about antitrust problems; it does not get into what makes them tick.

Problems in labor law and labor relations are virtually ignored. There is mention of some of the unions in entertainment, but the law pertaining to them and to those with whom they deal is not a subject of this treatise. The same is true as to tax laws. The Internal Revenue Code, in practice a central part of the business, is hardly mentioned in this work.[5] The ways in which deals are put together or individuals incorporate to obtain maximum tax advantages are obviously beyond its scope. Thus, while there is extensive coverage of the protection of the individual in certain situations, putting that same individual in the most advantageous position by the proper business arrangement is not covered.

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[5] There is a brief discussion of possible capital gains treatment of the publicity value in billing. *See* T. SELZ & M. SIMENSKY, *supra* note 1, § 9.23, at 9-37 to 9-43.

The contractual relationships between the acting parties in the entertainment field is largely omitted, except for the chapters on credit. For example, the many relationships that the entertainer may have with a personal manager, business manager, booker, lawyer and others are not discussed. Ignored are such important considerations as the California Labor Code[6] and the New York General Business Law.[7] Surely, these are entertainment law if anything is. The *raison d'etre* for central sections of these statutes is the regulation of the entertainment business.

The point, therefore, is surely made. Selz and Simensky fall short where they promise too much by producing a treatise that calls itself ENTERTAINMENT LAW. It is not. It is a background discussion of certain, but not all, important aspects of the entertainment industries; and it is a thorough dissection of the laws relating to the protection of the name and image of those in the entertainment and other publically exposed fields. It covers important areas, but there are many more left unexplored.

Returning to a look at where we were before Selz and Simensky started, however, lends perspective to their undertaking. They advanced the ball. They took it and moved it beyond any other endeavor. They at least gave us something by which to gauge whether we can at length put a handle on the entire area known as entertainment law. The optimistic conclusion, judging by their efforts, is that it can be done. For this alone, much is owed the authors.

To conclude on an upbeat, one must underscore the strengths of what is contained in the volumes. There is valuable reading about the industries. There is a first-rate scholarly treatment of some difficult legal areas, those of unfair competition, privacy, publicity and libel. And there is an unparalleled dissection of the many facets of billing and credit. Each is done meticulously, with substantial scholarship and considerable erudition.

Should the lawyer or business-person in entertainment have copies of these volumes on the office shelves? There can be only one answer—absolutely. The coverage may not be complete, but where it is, there is the substance to back it up. For essential areas, it is a

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[6] CAL. LAB. CODE §§ 1700-1700.46 (West 1971 & Supp. 1984).
[7] N.Y.GEN. BUS. LAW §§ 170-192 (Consol. 1980 & Supp. 1983).

valuable working tool, and not a simple attractive adornment to the office.

Beyond that, one can only hope this is the beginning of exploration in the vast catacombs of entertainment law. These volumes themselves, by being published in loose-leaf binders with pre-announced sections for supplementation, may be the answer to future needs. This depends on the willingness of the authors to dig in and be in for another four or so years of time-consuming research and writing. Their talent to do so is unquestioned after examining what they have already produced. But it is no small task that is still faced. As noted, the beast is still not broken to saddle.