

Understanding the Business of Media Entertainment

This revised edition of *Understanding the Business of Media Entertainment* is an indispensable guide to the business aspects of the entertainment industry, providing the information you need to break in and to succeed.

Written in a clear and engaging tone, the second edition of this book covers the essential topics in a thorough but reader-friendly manner and includes plenty of real-world examples that bring business and legal concepts to life, such as the growing clout of digital companies and the rise of streaming providers like Netflix and Amazon, the transformation of independent film development and distribution, and changes to the media ownership landscape. Award-winning screenwriter and entertainment attorney Gregory Bernstein gives an insider's look at the filmmaking business, from copyright law and government media regulation to development, distribution, revenue, the role of agents, managers, and unions, entertainment contracts, and more.

Other topics covered include:

- Hollywood's growth and the current conglomerates that own most of the traditional media.
- How specific entertainment companies operate, including facts about particular studios and employee tasks.
- How studios develop projects and engage in marketing and distribution.
- The kinds of revenues studios earn and how they account for these revenues.

Gregory Bernstein has worked in the entertainment business for more than 35 years from both the business and creative sides – as an entertainment attorney, studio business affairs executive, WGA union senior executive, and award-winning screenwriter. After graduating from the UCLA Law School in 1980, Bernstein practiced entertainment law for two years at O’Melveny & Myers, an international law firm. He then worked for six years as vice-president of business affairs at Columbia and Tri-Star Pictures, negotiating more than a hundred acting, directing, producing, writing, rights, financing, and distribution agreements. Following his studio executive years, Bernstein enrolled in the film directing program at the American Film Institute where he earned an MFA degree. Since leaving AFI, he has received writing credit on four films: *Official Secrets*, which premiered at the 2019 Sundance Film Festival; the film stars Keira Knightley, Ralph Fiennes, Matt Smith, Matthew Goode, and Rhys Ifans; *The Conspirator*, which was released in 2011 and directed by Robert Redford, and for which Bernstein was awarded the Humanitas Prize; *Trial and Error*, which starred Charlize Theron, Jeff Daniels, and Michael Richards; and *Call Me Claus*, which starred Whoopi Goldberg. He has also sold scripts to Disney and DreamWorks. In 2003, Bernstein took a sabbatical from writing and entered the Kennedy School of Government at Harvard University where he received a master’s degree in public administration. Upon returning to Los Angeles, he served as the assistant executive director of the Writers Guild of America, West from 2004 until 2006. Since 2012, along with screenwriting, he has taught film at Arizona State University.

PRAISE FOR *UNDERSTANDING THE BUSINESS OF MEDIA ENTERTAINMENT*

“Whether you’re already in the business, or on the outside and looking in trying to make sense of the dizzying elements, this is an easy to read and comprehensive book from an expert who masterfully illuminates the fundamentals. As a screenwriter himself, Greg has now completed the task of weaving together the story of production as a business with the enabling elements that come before and after the cameras roll.”

Jeffrey Ulin, Author, *The Business of Media Distribution: Monetizing Film, TV and Video Content in an Online World*

Understanding the Business of Media Entertainment

The Legal and Business Essentials
All Filmmakers Should Know

Second Edition

Gregory Bernstein

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*To my wife, Sara, whose love and support has made everything possible.
To my daughter, Katherine, who every day proves that computer science, saxophones,
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To my mother, Pearl, who always guided me forward and showed me the way.*



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I have done my best to make sure all of the information in this book is accurate – however, if there are errors the fault is entirely mine.



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Introduction to the Second Edition

FIRST THINGS FIRST – A FEW WORDS ABOUT THIS SECOND EDITION

I wrote the first edition of this book in 2014. Since then, the entertainment business has undergone substantial change.

Back in 2014, a handful of multi-national media conglomerates produced and distributed the vast majority of filmed entertainment. This is still true in 2019. But, unlike five years ago, the media conglomerates are now being impacted by the exponential growth of internet companies like Netflix, Hulu, and Amazon. The growing number of original productions these internet companies produce and distribute, the huge audience they maintain, the distribution advantages they enjoy, and the great wealth they've accumulated, have all helped change the media landscape as never before. Nowhere is this change more evident than in the massive growth of streaming as a means of distributing films and TV shows.

Then there is YouTube. Though it has been around since 2005, the way it has democratized filmmaking, and the impact this has had, is clear for all to see. Now, anyone with a dream and a camera has the chance to reach a massive audience and, in the process, perhaps jumpstart a career and make some money.

This edition of the book discusses all this, but attempts to do so while also covering a large number of different topics, each of which is important to understand. While I have done my best to incorporate discussions about the digital revolution, I would refer anyone with a keen interest in this topic to the many books that solely focus on it.

My hope is that this book, even during our current period of rapid change, will help you better understand many important aspects of the entertainment business. Now, on with the introduction!

* * *

Back in the nineteenth century, when a handful of scientists were quietly discovering something they called electricity, the world's storytellers were doing pretty much what they had been doing for centuries. Talented people wrote plays or books or musical compositions, or entertained by telling stories at public gatherings. Entertainment was, for the most part, produced and consumed within narrow geographical boundaries. There was no television, no radio, no broadcasting of any kind. There were no movies, no DVDS, no records, no CDs, no internet, no computers.

There was no mass entertainment business.

At the dawn of the twentieth century, things rapidly changed. New technologies radically affected how content could be created and sent out into the world. A series of images could suddenly be filmed and projected, and the film industry was born. The record industry was also born thanks to the invention of mechanically reproduced sound. At precisely the same time, scientists were discovering that electromagnetic waves could transport sound over long distances, and so the birth of radio was fast approaching. Soon someone sitting in a radio studio in New York could entertain millions of people simultaneously across America; this was the stuff of fantasy for the previous century and the uncounted centuries before that.

These new forms of entertainment immediately attracted enormously creative people, geniuses like Charlie Chaplan and soon-to-be stars like John Barrymore and Gloria Swanson. But they also drew the interest of other people, business people, who loved entertainment but whose talents lay off-screen. These people could see there was money to be made doing what for them was new and exciting, and they had the tenacity, zeal, and toughness to succeed. They would provide the financing and business infrastructure necessary to help creative people practice their art in return for a share of the profits. A *large* share of the profits.

The business infrastructure these people created eventually turned flickering images on a wall, or small images on a tube inside a box, into the multi-billion-dollar global business we have today, with its tremendous social, cultural, and political impact.

* * *

This book seeks to tell you about legal and business issues that govern the entertainment business. Though international aspects of the modern entertainment industry will be discussed, the book primarily adopts a United States perspective; the impact and nuances of other countries' business and legal practices are well beyond the scope of this volume. Furthermore, no single book could describe the business of entertainment with encyclopedic detail. Instead, the goal is to give you a working knowledge of important topics that people who want to work in the industry, or who already do, ought to know. If what's written here also encourages you to think, question, and wonder about some of these subjects, so much the better.

The approach is to start with the widest possible focus and look at critical issues that impact the business, and then narrow our focus as we go along. We therefore start by looking at copyright law and First Amendment law. Nothing in America has had a more profound effect on the entertainment business than these laws, yet both were conceived long before anyone figured out how to make a movie or broadcast a TV show.

Interestingly, America's Founding Fathers included the notion of copyright in the U.S. Constitution. Why? Because they believed people should have an incentive to invent and create as this would benefit society as a whole. Today, copyright has become a complex group of laws that give creators, and sometimes the people who pay them, a number of exclusive ownership rights. Anyone who creates, produces, or distributes entertainment ought to know copyright fundamentals.

Most books that discuss copyright either spend the entire volume doing so, and these books are usually meant for lawyers or law students, or else spend a small amount of time examining the topic in the most general terms. This book seeks a Goldilocks middle ground. The copyright discussion here

can't possibly make you competent to handle copyright problems without an attorney, but it will give you a fundamental understanding of copyright's most important rules.

Next, we'll turn to copyright issues and business practices that apply to the music industry. Ask anyone who has put music into a film or TV project, and you'll hear this can be a complex and confounding task. I will try to make the rules and business practices understandable.

Another major copyright issue these days involves piracy, otherwise known as copyright infringement. This is an issue very much on the industry's collective mind. To those outside the business, pirating a show may seem like the digital equivalent of pilfering a grain of sand from the beach. To those working inside the business, all that pilfering has led to lost jobs, lost revenue, and many sleepless nights. We will therefore discuss the current legal precedents and impact of piracy, along with why people feel so free to pirate in the first place.

We'll next turn to the First Amendment. I think we can all agree that James Madison and his friends didn't have movies, television, or radio in mind when they drafted the First Amendment's free speech provision. Porn, edgy lyrics, and performers swearing on live TV were not high on their list of concerns. Nevertheless, modern courts have had to address these issues, and if you think courts have always said the First Amendment protects filmmakers, you're wrong. Indeed, for more than half of the twentieth century, the U.S. Supreme Court said the First Amendment did not protect movies at all. Though that's changed, there are still some things that writers, producers, directors, actors, and studios can't say without legal repercussion, and so we'll discuss these issues as well.

With that legal background in mind, we'll narrow our focus and look at how the entertainment industry is organized. We'll specifically look at the growth of the modern entertainment business, examining its rise from the early twentieth century to the international media conglomerates that now create and own so much of the entertainment we consume.

Once again, laws and regulations have played a large part in the industry's growth, organization, and current operations. We'll examine how government regulation of the business, as implemented by the Federal Communications Commission, has played an enormous role in creating the current shape of the entertainment industry.

From there we'll look at the media conglomerates themselves, examine which companies own what media assets, discuss the impact of the large internet companies, and ask if our current media landscape is a good or not-so-good thing for society. We'll also discuss other organizations that impact the entertainment business, including entertainment unions and talent agencies.

We'll then narrow our focus again and look specifically at what film and TV companies do. For those readers who want to be filmmakers, I can assure you that understanding how these companies operate will ultimately help you practice your craft. I would never suggest you *must* think like a studio, but I will suggest it sometimes helps.

We'll primarily examine three major areas of studio operations; development, marketing, and distribution, because these are the areas where important business decisions are made every day. Once production starts, the artists take over, but prior to production, and after it concludes, business concerns dominate what happens.

Next, we'll narrow our focus yet again, and discuss money and contracts. Artists and studios both want as much of the money pie as possible, and contracts are the mechanism by which the pie is apportioned. Therefore, we'll examine studio accounting and carefully look at standard contracts for writers, producers, directors, and actors and for rights acquisition. We'll discuss what filmmakers normally get paid as well as other terms commonly negotiated in their deals. We'll also discuss the often confusing and elusive issue of gross and net profits. This entire discussion is supplemented by template contracts you can read online at (focalpress.com/cw/bernstein). These templates are based on actual studio contracts and therefore reflect current industry standards. We'll then conclude this section by going over many previously discussed topics, including development, financing, distribution, and contracts, in the context of independent filmmaking. Hopefully, this will give those of you interested in independent film a little more information at your fingertips.

The book concludes with a series of interviews in Chapter 14. These interviews are meant for film students and other non-industry professionals who might like to work in the entertainment business. Some of the people I interviewed are successful studio executives and some are successful filmmakers. Though one of the interviewees has been the showrunner of a hit TV series, none are famous in the traditional sense of the word. They are all "normal" people who found their way into the business. The goal here is to give you a sense of how they succeeded and what they do every day.

* * *

On a far more mundane note, one difficulty posed by writing this book has to do with word choice. For example, how does one succinctly refer to production or distribution companies that do similar things but in different media? For example, Warner Bros., NBC, the A&E cable channel, and Netflix all produce and distribute content, but they are hardly the same kinds of companies doing exactly the same things. Warner Bros. is commonly referred to as a "studio," but the others are not, and NBC is commonly referred to as a "network," but the others are not. Some sharp-eyed readers might object if I refer to Netflix or NBC as a "studio" or "production company," because they're not precisely those things.

Often, this leaves a choice. Either I write with great specificity, delineating companies' differences each time the occasion requires it, or I use fairly broad terms meant to refer to these companies collectively. For the sake of brevity, I have opted for the latter. This means that, sometimes, when talking about media companies, I refer to them collectively as "studios" or "production companies," even if those terms do not truly fit one of the collective companies mentioned. Is Netflix a studio? Is it a "television" company? It's certainly an internet company that produces and distributes movies and TV-like material. But, when discussing Netflix collectively with companies like Disney and Warner Bros., I may refer to all of them as "studios," and when discussing Netflix along with TV networks and cable TV channels, I may refer to all of them as "television" companies, or "producers."

On the other hand, there are times when I seek to differentiate the decades-old studios from the very modern internet companies like Netflix. In these cases, I sometimes use the term "traditional studios" to refer to companies that have been around for decades, companies like Disney, Universal, Paramount, NBC, and CBS. I realize that use of the word "traditional" can be criticized, but it's the best I can do.

Another issue arises when discussing the artists who make entertainment. I use the term “filmmaker” throughout this book to refer to anyone, be they writer, producer, actor, editor, cinematographer, or other kind of artist, who helps create a film, television show, or internet production.

Hopefully, the context will make the meaning of the words I choose clear, and I apologize in advance for the occasional lack of precision.

Then there is the issue of using masculine and feminine pronouns. I have opted not to use “him” or “his” when referring to a generic person, but instead to randomly switch between masculine and feminine pronouns.

Finally, two disclaimers: Though this book discusses various legal issues, it is neither my intention to practice law by writing this book nor my intention in any way whatsoever to provide legal advice to the reader on which the reader can rely. As I say throughout the book, readers facing entertainment legal issues must consult a licensed and knowledgeable attorney familiar with the issues faced by the reader. Also, though I occasionally discuss companies or other service providers in this book, I want to make clear that I do not endorse these entities or their services; my mention of a service provider or company cannot be relied upon by the reader as a legal basis for employing or otherwise doing business with that company or service provider.



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SECTION

Law and Entertainment

We begin by examining the two most important areas of law that govern the entertainment industry – copyright and First Amendment law. Without both there would be no entertainment business as we know it.

Copyright gives creators and entertainment businesses exclusive ownership rights in the screenplays, books, films, TV shows, songs, games, and other forms of entertainment they create. The First Amendment gives us all tremendous freedom to create just about anything we want, though not *everything* we want.

These two areas of law are the foundation on which the entertainment industry rests, and should be understood by all who work in this business.



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Copyright Law

INTRODUCTION

What is copyright? It's a set of laws that give authors of certain kinds of creative works the right to *exclusively* own and control their work for a period of time. Copyright actually gives authors several rights, and we'll discuss them later in this chapter, but for now what's important to know is that copyright gives authors and other creators the *sole* right to exploit the copyrighted work.

Any person or company that spends time and money creating something valuable wants to legally own that thing, whether what's created is a movie, video game, electric car, or disposable diaper. As we'll see, copyright law grants ownership rights to only certain kinds of "things" – generally speaking, artistic and cultural works.

It's impossible to overemphasize the importance of copyright when it comes to the entertainment business. The fact is, copyright is the lifeblood of the entertainment industry. Its grant of *exclusive* ownership rights allows individual creators to have professional careers as authors of creative works, and it also allows entertainment companies to make billions of dollars annually from movies, television shows, video games, songs, plays, and other forms of entertainment.

Without copyright, the entertainment business in all its forms would simply not exist, which means copyright law has had an incalculable impact on American society and culture.

IN THE BEGINNING

Back before the invention of the printing press, storytellers never had to worry about people stealing their work. For example, one of the world's first great storytellers, Homer, who probably lived sometime between 800 BC and 700 BC, almost certainly told his stories orally, and since the tape recorder wouldn't be invented for another 2,600 years, intellectual property theft was not high on his list of daily concerns. When the great Athenian playwright Sophocles (496–406 BC) actually did write the text of *Oedipus Rex*, he didn't have to worry about unauthorized copying because only a handful of people could write, let alone read.

Fast-forward nearly 2,000 years and nothing at all had changed. Authors such as Dante Alighieri (1265–1321), who wrote *The Divine Comedy*, and Geoffrey Chaucer (1343–1400), who wrote *The Canterbury Tales*, never worried about intellectual property theft as there was no way for people to effectively copy and distribute their work.

Then, around AD 1450, Johannes Gutenberg invented the printing press and book publishing was born. For the first time, an author's work could be copied with relative ease, and so for the first