

Ken Hertz

Hollywood Dealmaker

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Welcome to Media Masters, a series of one to one interviews with people at the top of the media game. Today I'm here in Los Angeles and joined by Hollywood dealmaker Ken Hertz. A senior partner in the Century City law firm of Hertz, Lichtenstein and Young, his firm represents talent from Will Smith to will.i.am, from Gwen Stefani to Celine Dion, and from Keith Richards to Tom Morello. As founder of brand agency MemBrain, Ken and his partners also work with global brands including McDonald's, Hasbro, Logitech, Intel and Miller Coors. Ken is also an active angel investor, a frequent speaker and commentator on entertainment and marketing, and the host of TEDx Hollywood.

Ken, thank you for joining me.

Thanks for having me.

So, Ken, you work in the heart of the entertainment industry itself, with creative figures like will.i.am and massive brands like McDonald's. That must be quite exciting.

Sometimes. Sometimes it's not exciting at all, I might as well be doing real estate or tax or litigation or labour law.

So there's some grind to it, then, like any job.

Yes. I mean, a contract is a contract, even if it has famous names on it. And the subject matter might seem sexy to someone on the outside, but when you're negotiating a deal, or you're negotiating the terms of a contract, it's really just about trying to anticipate a possible conflict and figure out how to make sure that the parties get what they want, in the event of a dispute. You know, every contract is really a prenuptial agreement. So, nobody ever looks at it until they're getting a divorce.

So in a sense you've learned from the many divorces you've handled to make sure that when you arrange the corporate marriage, that the same mistakes aren't going to be repeated.

Right. There's a constant sort of tension that exists between what's worth fighting about and what's not worth fighting about. What's likely to happen, and what's not likely to happen. I always find that the best transactional attorneys are also former litigators. And the reason is, because they have a better sense of what the fights look like, and so they have a better sense of what really matters when it comes down to it. And lawyers who are fresh out of law school will fight over every comma, and fight over the spelling of every word. Whereas in real life, that rarely is what the contract boils down to. I mean, one can imagine that you didn't anticipate an eventuality. It's like, "What if the aliens land," you know? That's not a likelihood that's worth wasting everyone's time on. So when you hear the phrase, "He's over-lawyering," that's usually what that refers to, is people spending too much time thinking about eventualities that will never come to be, and fighting over them, and oftentimes missing the forest for the trees. The idea is to make a deal that leaves both sides feeling like they got a little bit less than they expected, and that in the event that things don't work, that no one is surprised by the outcome.

But your job as their lawyer and their advisor is to be a critical friend, isn't it, insofar as you're there to help them make the deal, but you're there to kind of pre-empt any problems. And some of them might be with the principle of the deal. And is your job as their lawyer to challenge them, in their interest?

My job is to understand what my clients will be surprised by, in the event that everything goes wrong. And to try and anticipate that, and try to prevent it from blowing up in their face – and thus, in my face.

So tell us, there must be some glamour to it, though. Let's just deal with the good stuff, then. I mean, if someone read your bio as a Hollywood dealmaker, that sounds pretty glamorous. There must be some upside to this.

Well, I think the thing about it is, is that a lot of what we do these days is media. Just about everything is becoming media. And so, obviously there is something exciting and fun and sexy about going backstage and seeing the work that you do turn into creative output, right? There's nothing like working with a young recording artist who you meet at their first showcase, and having them do an arena show, or having them do, better yet, a stadium show, right? There is something very gratifying about meeting someone when they are largely unknown and then seeing them become part of the popular culture. That's very rewarding, and that's very exciting, and obviously you get a lot of phone calls from people who need help finding good seats. So that part of it is very sexy.

Can I have some good seats, by the way, the next concert?

Right, exactly.

I've got your cell phone number, you've mistakenly given me that.

No, and all of that aside, at the end of the day, it isn't called the music 'business' for nothing. It isn't called the film and television business for nothing. It is a business. And so there's a great deal of money at stake. And because it's so sexy, it attracts a lot of people. And so, sifting through the nonsense, and getting past all of the pretence, and all of the glamour and all of the glitz and all of the promotion and all of the... sort of star-struck wannabe participants can be challenging. And seeing it as a business... these are people's lives. These are people's careers, they've... oftentimes, people who go into the entertainment industry do so because they are so remarkably talented, or so fortunate to be beautiful. Or popular, or whatever is the current currency. And so, oftentimes those people start at a very early age, oftentimes they got there by working very hard at their craft, but not working very hard on all of the other things that people do when they're growing up. Like, taking school seriously. Or going to university. Or doing the kinds of things that will allow you to have options, professional options, in your life. And the thing also is, is that we all look at the success stories. In other words, for every Beyoncé, for every U2, for every Chris Martin, every Ariana Grande, there are thousands, if not tens of thousands, if not hundreds of thousands, of people who aspire to be that person. You know, Ariana Grande has just an extraordinary instrument. She's got a six or seven octave range, and she can do anything with her voice. And she also happens to be remarkably beautiful. And she also comes from an upbringing that allowed her to pursue this career, because her family was well-off, and so she had the freedom to pursue this career, relocate from Florida to Los Angeles, do all of the things that made it possible for her to succeed in the way that someone from a lesser financial background, or with less freedom and less passion and less whatever might not have been able to. There's no shortage of extraordinarily talented people in the world, believe it or not. And there's no shortage of extraordinarily beautiful people in the world. And all of the other things that seem to be associated with success. But we tend to look at the ones that succeed and see them as a road map. In other words, people interview successful stars and say, "How did you do it? Tell me your story!" And then people think that, if they replicate that path, that they'll succeed too. When the truth is, the odds of success in the abstract are very low. I mean, look at American Idol, for example. Millions of contestants, reduced to thousands of auditions, reduced to hundreds of candidates, reduced to dozens of finalists, reduced to handfuls of winners... result in how many careers? Almost none.

Well, even in 10 series of American Idol, you're only going to get three stars, aren't you? Even the winners might not necessarily be guaranteed a career.

A career. Right. I mean, going from there to a career. So in other words, we tend to look at the lottery winners, right? That's really what they are. I mean, if you think about it, what starts with a pool of millions of people that are willing to wait in line for hours to audition. And then, the ones that get to audition are largely the most talented of that crowd. And then the ones that get through the audition process and get in front of the judges is even fewer. And the ones that survive the judges and go to Hollywood is even fewer than that. And the ones that go beyond that, and end up with an awareness in the popular culture, and a following and a success... I mean, Daughtry got thrown off the show, and Jennifer Hudson got thrown off the show. And Kelly Clarkson won the first season. And still appears to be the one with the biggest career – in fact, I think she's now a judge. But in any event, if you look at them, on some level, success in the entertainment business is like winning the lottery. You

have to get everything right, and then you have to get lucky. Looking at those success stories the way we do, and the way the media tends to obsess about them, is that it would be tantamount to asking a lottery winner to explain to us how they chose their numbers. As though there's some formula. And yet, we know there isn't. And yet, we do it again and again. We don't look at the hundreds and thousands of failed attempts where they looked like they got it all right, but they didn't succeed. So, I always say to people, "When you get to my office, you've already won the lottery, because someone I trust, whose judgment I trust, has introduced you to me and convinced me that you have enough traction and enough opportunity to succeed." That it's worth getting involved, because we get involved with people early in their careers, when they often either don't have any money to pay for our services, or they're talented enough and promising enough that we're willing to work with them on a speculative basis. And we invest our time in young artists. We invest our time in young talent. We invest our time in start-up projects – and that's how we operate.

But it's almost like a VC model in that regard, isn't it? That you'll back five talented artists, and as you've said, it's a lottery. One of them might turn out to be Beyoncé, and you'll make billions. And the other four are complete failures, and even though they're nice people, you've completely wasted your time. From a commercial point of view.

Right, and that's a good segue, because a lot of what we do now is, we're getting involved in early stage media and technology ventures, at seed and pre-seed level, because we see entrepreneurs the way we see young artists. What do they need? They need management, they need financing. They need marketing. They need distribution. And we know how to put those teams together and we know how to help them navigate those choppy waters, and ideally, succeed. But I always say to people, "If you want to succeed in venture investing, don't invest in anything and you'll be right more than 95% of time."

Well, a stopped clock is right twice a day, isn't it?

Exactly.

It seems to me that there's a huge amount of systemic heartbreak involved with pursuing a Hollywood career, whether it be as an actor or a music artiste. When I get my Ubers around Los Angeles, half of my drivers are playing their CD saying, "Are you interested, you can buy a copy of my CD," or they're aspiring actors. There seems to be a lot of people trying to do this, that stick at it for decades in the hope that they're going to get noticed.

Right. I mean, that is the nature of the entertainment business, or at least it appears to be the nature of the entertainment business, and certainly in Los Angeles that's the case. Every waiter is an out of work actor – or an aspiring actor, I should say – and every cab driver has a screenplay. Everyone has a side hustle. Because we have been convinced – and this has historically been a uniquely American reality, but I think it's becoming that way globally as the venture world starts to expand, and as the media world starts to expand globally – I think what we're seeing is that everyone seems to be convinced that they can be rich. And that this the route to

wealth, is start a company, right? Used to be that people would have great ideas, and then they would yell at the television set when somebody else monetised that great idea. But nowadays, people believe they have a great idea, and they should do it. That's relatively new. It is part of this new connectivity that anyone can be Perez Hilton, anyone can be Paris Hilton.

Anyone can start a media podcast.

That's exactly right. You're a broadcaster. And you don't need a podcast studio to do it. You choose to, but you don't need to. There's all sorts of software that would allow you to do it on your phone. And you are one click away from everyone who has a smartphone. And there's almost four billion smartphones in circulation at the moment. So, if you imagine that people are connected in a two-way fashion, for the first time in human history, right? The global village is real. And so, even though most of the failures are often based on timing, most of the success stories are also based on timing. In other words, there were no shortage of attempts to create YouTube, either before or after YouTube. There were no shortage of attempts to create Uber, either before or after Uber. And in fairness, there was no shortage of attempts to create a smartphone before or after the iPhone. The ones who succeeded got it right because they created the right combination of elements to engage a critical mass of audience. Or customer, or consumer, or whatever is the metric. But the idea that one of them was better than the other, or one was more right than the other... they'll all tell you what they did wrong, in hindsight. But the fact of the matter is that... Bill Gross, who started Idealab, a few years ago he did a TED talk. And not a formal TED talk, but an audio TED talk, because he goes to TED every year. So, he got up and gave a five minute TED talk, about a five minute TED talk, where he explained an analysis that he had done, where he had compared the 400 or so companies that he invested in over the last 20 years to the 400 most successful start-ups in the start-up world, over the same period of time. And, he said, "Look, I started 400 companies at Idealab, approximately. And only a few of them succeeded, so I was curious to see what was the thing that made them succeed." Was it the team, was it the idea? Was it the defensible nature of the idea? Was it the size of the market? Was it the ease with which the idea could be explained to others? Was it the initial traction that it had garnered, or was it the ability to scale? Was it the financing that they had, or that they needed? Was it the time to exit? What was it? What were the, those are nine or 10 factors that all contributed to the success, or at least, were correlated to the success of the ventures. And he compared his 400 to the 400 most successful. And came up with the following conclusion, which is that the number one reason why they succeeded... do you want to guess?

I've got a drum roll going in here... absolutely fascinating.

I was going to say, you've got an expression on your face like you want to guess.

You tell a really strong tale. Sorry. Just tell me!

Okay, so 57%, I think of the time, *timing* was the reason they succeeded.

So all this agony I'm going through, running my own business, is ultimately, there is... the fate is in the stars.

Well, it's luck, right? I mean, when you think about...

I mean, that was both motivating and demotivating, at the same time.

Well, the truth is, there's that old adage, "The harder I work, the luckier I get."

Exactly, yes.

The truth is that luck is happening all the time. We are constantly bombarded with opportunities that we could take advantage of, but if we're not ready for them it won't matter. That's the other adage, right? "Luck is when preparation meets opportunity." I mean, if you're not ready for it, you won't recognise it. So you have to be in a position where, "Hey, this would be great for me," right? So, the point is, that you have to play heads up ball. So, the people who get lucky are the people who are paying attention and are in a position to take advantage of the opportunity. That's luck. That's the definition of luck, really. And sometimes it hits you over the head, and sometimes you have to find it. Every successful entrepreneur will tell you about the 20 things they tried that didn't work. And sometimes they'll tell you that the first thing they tried was a home run. But that doesn't mean that it wouldn't have taken them 20 mistakes to come up... you know, like Thomas Edison, when he invented the light bulb, he failed a thousand times. But he said, "I succeeded at proving a thousand different ways that a light bulb won't work." So whatever, it's a paraphrase, but whatever he actually said, the point is, it's all in your perspective. But nevertheless, you can't win if you don't play, but at the same time, you can't win the lottery if you don't play. That doesn't mean that playing the lottery for a living would be a good career choice.

So is it ultimately random, then, that Ariana Grande's a global megastar, but might have been waiting tables at the Hollywood Bowl, if it had gone wrong? I mean, is there a kind of formula to a star, though? When you meet someone, a client or a potential client, is it like the X factor? Either they've got it or they haven't?

Well, no, I mean, I think the obvious thing is that she absolutely has it. And she's absolutely remarkable in so many different ways, and she has a family that is extraordinarily supportive, and has helped her kick in doors when they needed to be kicked in. And she's worked with people who have helped her kick in doors when they needed to be kicked in. And she never took no for an answer, and she was relentless in her pursuit of success. And she has worked with a manager who is extraordinarily resourceful. And she has associated with and collaborated with people that are extraordinarily talented. And she's been able to get to those people, and she's not been willing to compromise along the way. And, on top of that, she has dealt deftly with every obstacle that has come her way, and she's very adept at social media. And she has also worked with very talented people in that arena as well. I think the answer is, as I was saying earlier, she got everything right, and let's face it, every audition that she did as a youngster that paid off, was not only because she was super talented, but because she went to those auditions. If she hadn't gone,

she wouldn't have gotten it. If she hadn't gotten the right agent, if she hadn't gotten the right call back, if she hadn't been by the phone when it mattered. I can't point to any specific thing, but the answer to your question is, there is no shortage in the world of people, certainly, as talented in some way as an Ariana Grande. But maybe they live in a town that's got no resources. Maybe they can't even afford a cell phone, right?

Or you're from a family that doesn't encourage them.

Right. Exactly.

And says, "You will work at Walmart for the rest of your life, mate."

Right. Or, you'll sing in choir at the church for the rest of your life. I mean, the truth is, as we all know, there are hundreds if not thousands of super, uber-talented singers in the business who haven't had nearly the success of a Lady Gaga, or Ariana Grande or Beyoncé or what have you. And I've been fortunate enough to work with many of these people, and I can tell you that they pinch themselves every day. But at the same time, the danger is, for both the fans and the talent, is to think that it was easy. Or to think that their success was inevitable. We tend to do that. We don't teach children statistics, but we should, because...

Because there will be one lottery winner every week. But that still means that there'll be 20 million people that won't win the lottery that week.

Well, that's exactly right. In other words, there will always be a lottery winner every day, let alone every week.

Oh yes, this is America. I keep forgetting I'm in America. In England, we do things in a more sedentary pace. We have one lottery, every week.

Yes, it's true. But nevertheless, the idea did start there. And there is a lottery winner every day, but that doesn't make the odds of one in 20 million... if that's the number... any less close to zero.

But even more heartbreakingly in a sense is, you've got to have that momentum, because Lady Gaga, artistes like that, have hit after hit after hit. You look at a star like Robert Redford, for example, who has been around for decades. And then you compare that to someone, for example, I like Hootie and the Blowfish. They had a couple of great albums that were very successful. Now, they're a bit laughed at. They're still going, but they're nowhere near as successful as they once were. You know, there's not only the challenge and the heartbreak of having to get into the industry and get known, but then there's also the separate challenge of maintenance, of keeping that platform going. Because it is quite tragic, when you see formerly big stars that have been laid low.

Agreed. And I would argue that once again, we tend to think that because someone has had success, after success, after success... or at least we perceive it to be

success, after success, after success... we tend to think that they know something we don't know. And it could actually be that they do. Or, it could actually be that it's an anomaly. In other words, when you play roulette, just because the number nine comes up three times in a row, doesn't mean the wheel's leaning toward the nine. It just means the number nine came up three times in a row. When you flip a coin, those are independent events.

But you're where the brutality of talent meets maths, meets statistics, really. That for every Lady Gaga that's there, there's going to be another 20 people that have aspired to that, and that might have had a one in 20 chance of getting to that success, but their odds weren't in their favour.

There was a great article in the New York Times Magazine from a few years ago about a city, I think in Sweden. And I'm going to mess this story up, but I'll give you the essence of it. There was a town in Sweden that had had an unusual number of murders. Or rather, not murders, but abnormal deaths. And scientists flocked to this town to study it and understand what had caused all of these unusual deaths.

Something in the water, a serial killer on the loose, etc?

Correct. And what they concluded was that it was just a statistical anomaly.

An outlier.

It was just simply an outlier.

I still don't want to live there, though.

Right. But if you believe... if you ever saw the film *The World According to Garp*, where they're looking at a house, and a plane flies into the side of it. And Garp says, "We've gotta buy it." And she says, "What are you, mad?" And he says, "No, it's been pre-disasterised. What are the odds of it getting hit by another plane?"

Exactly.

So, I mean, I think we are so ignorant of probability theory, and so ignorant of statistics, as a culture. We believe in miracles. It's just who we are. Fifty percent of Americans believe that angels exist.

But actually, there's this kind, quite a deep spiritual, almost spiritual comfort in this. That part of that culture, of course, is that if you don't make it, that actually you are lacking talent, you are worthless. Whereas, as you're explaining it, it is actually just about statistics. It's not that the other people who aspire to have the career of Lady Gaga are worthless, it's just... it's the lottery.

Oh, just the opposite. I don't think they're worthless at all. I take on clients all the time not just because they're talented, but because I would love to see them succeed.

And do you share in their heartbreak, then, if things don't work out in whatever way?

How can you not? When you work with really talented and really lovely people, then you have no choice but to find yourself emotionally connected to the work. And by the way, as I said at the top of the interview, that's the thing I find most gratifying about my work; the possibility of seeing someone go from a dirty little bar to an arena stage. That's seeing someone fulfil their dream. I am often worried about helping people fulfil their dream, because I've seen the other side of the dream – and oftentimes, their vision is not the same as the outcome. And helping clients and friends and associates keep their head on straight through the process is a big part of my business.

You alluded to it earlier, but is there a toughness to having to get ahead in Hollywood? There is that old cliché that if you want a friend in Hollywood, get a dog. Do you have to have that single mindedness of purpose almost to the point of psychopathy? That you have to be truly committed to success at any cost, to get ahead?

I don't know that you need to be. I know that there are people that have been successful, with that attitude. And I know that the business attracts so many aspiring success stories, if you will, that there are people who will stop at nothing to succeed. And they will show up in your life, and in increasing numbers. And so, I don't believe that you have to be... I mean, the answer is no, I don't believe that you have to be like that to succeed. I do believe that the business has, in many ways, become more toxic than I recall. It seems like every generation says the same stuff, so this is cliché, in a way. But, I think that people are greedy and people are ruthless and people are duplicitous and people are, you know, people are capable of doing horrible things. I'm never surprised by people's willingness to do the wrong thing; nor am I ever surprised by their ability to do the right thing. And I have found, in my career, people have shown up years later and said, "You won't remember me, but I called you one time for some advice and you were very patient, and you gave me advice. And you didn't know me, we had a mutual friend, and I just asked you a question and you were very generous with your time." Or, "You were very generous with the advice." Or, "The advice that you gave me turned out to be really valuable to me, and it changed my life," in this way or that way, and what have you, "And I'm back to repay the favour." And I do believe in that. I do believe that what goes around, comes around. And so, I try to say yes, unless I have to say no, as often as I possibly can. I know I'm going to regret saying that in the context of this interview...

Yes, we'll publish your email address in the transcript!

Yes, you shouldn't... but no, I do jump at... when I get those emails from friends who say, "My daughter's looking for an internship," or when I get an email from someone that says, "Do you have any ideas for this?" When I have an idea, I do try to jump on

it and do it. Because you never know. Those things, those are the most.... those are the best days of my week, are when someone out of the blue shows up to repay a favour. And sometimes, it's not repaying a favour that I did. It's paying forward a favour that someone else did. And I do believe that what goes around, comes around. And so, I can tell you, the worst things that have ever happened to me in my career were always the result of something that I said that I should not have. Or that I did, that I should not have. Or that... and that I didn't have to. So, I believe that gossip is bad. And I believe that cutting corners and being vindictive and being revengeful and being, you know, all those things... that they all come back to bite you. When you don't let things go, and you, out of spite, behave in one way or another, that it always ends up... well, it doesn't always end up coming back to you. But those are the things that will come back and bite you in the ass.

But when they do, you can just react to it with more spite and more vindictiveness, so the system works.

Yes. Yes. I'm sure that's true.

You alluded there to Hollywood potentially being kind of more toxic with this generation, but is that the case? Because if you look at the #MeToo Movement, and the abundance of so many new studios, like Netflix investing hugely in new content, is there an argument that in one way, things are better than they ever have been?

On what basis do you think things are worse? I don't know that Netflix spending lots of money is a sign of less toxicity in the business, I mean, I don't understand the connection there.

In terms of the buoyancy of the industry, there's more opportunities. Like, we had Matt Belloni sitting in that chair recently, the editor of the Hollywood Reporter.

I know Matt.

And he said, "If you're an actor now and you're out of work, then there's obviously something wrong, given just how many things are in production." But, for example take the Me Too Movement...

Oh, I don't know that, I don't know if that's fair. I mean, 99% of the Screen Actors Guild membership are out of work. Maybe more than that. And that's been the case since anyone can remember.

Well, take the #MeToo Movement, then, for example. Is the casting couch a thing of the past, now? Would a Weinstein get away with it, now? I mean...

I don't think it has anything to do with the #MeToo Movement. I think that it has to do with transparency. In other words, Will Smith spoke not too long ago about his, he was talking about his son. And, his son has a girlfriend, and he was saying to his

son, “Look, don’t get locked down, you got to date other people. Don’t lock yourself in.”

Sensible fatherly advice.

Right. And his son said, “There’s no such thing as cheating any more. You can’t cheat. Any of her friends can take a picture of me.” You know, you post on Instagram or you post the pictures, like, everybody knows what everybody else is up to. There’s no secrets. There’s no way to have something on the side, because something on the side is something right out in public. And so, the world has changed. And what #MeToo, I think, is... it’s not so much a change in attitudes as it is a recognition of the fact that we live in a world which is unfortunately governed by a tyranny of transparency. And so there’s this reality now, which is that it is very hard to expect that anything that you do or say is going to remain confidential or private. Which is not to say that it means that people are more truthful, or more honest, or that the narrative is more clear. It is simply that everything is out there, and it can still be manipulated. And it can still be misunderstood, and it can still be misrepresented. And it can still have a negative impact. And so, the point that I was making is that, when I said earlier what goes around comes around, it may in fact be that that’s more true than ever. In other words, if you behave in a toxic way, you will be the victim of your own toxicity much more readily and much more likely than ever before. So the #MeToo Movement is simply an expression, maybe a symptom of a bigger problem, which is that we have no privacy. We have no ability to hide from our public persona. And that our private persona is rapidly becoming our public persona. And yet it is harder to control our private persona and our public persona. It’s funny, because this is sort of the business that you’re in, right? I mean, you’re in the business of reputation management, in your other career. And when you think about it, that is what this kind of media pervasiveness has wrought, is that we now live in public in a way that we theorised about but we never really imagined. I mean, how about this? People don’t send auto-replies, pretty much, any more. The one that says, “I’m out of the office, so I won’t be looking at my email.”

Because even though we are out of the office, we still will be looking at our emails.

I mean, go outside! Every single person that you see walking on the street, sitting in the café, driving in their car, is looking at their device. How often and how aggravating is it, to be waiting to get on an elevator and have somebody walk off the elevator right into you, looking down at their device? It’s one thing to be rude enough to just walk right into someone, but to walk right into someone unintentionally is somehow even ruder. Because nowadays, it’s because you don’t have the respect for the people around you to look up.

You mentioned my career in reputation management, and the biggest thing for me when I’m advising chief executives, is that you can’t segment audiences any more. So in the old days, a chief executive of a business 20 years ago, would write something for the shareholder newsletter, something for the staff newsletter, something different for their customer newsletter, a different submission to the regulator. They were optimising the case, and their words,

for each respective audience. Whereas now, if you run a business and you're on Twitter, everyone's following you. Your own staff, journalists, customers, etc, etc. So you have to be that same authentic one person to everyone. We work for a couple of actors, as you know, in Hollywood. And some of them completely stay off social media, because they say that it compromises their ability to pretend to be someone else. If you know that the real actor is a huge environmentalist, or a feminist activist or whatever, then that compromises their ability to be that chameleon.

There's sort of a theme emerging in this conversation, which is this...

This is a great conversation by the way, I'm really enjoying it.

Well, yes, me too! But you know, that great Groucho Marx joke.

There were so many, which one are you going to quote?

Well, it's so timely. Groucho Marx said that sincerity is everything, because if you can fake that, the rest is easy. I mean, that's the world that we now live in. Which is, when you listen to that... I've been to many of these panels at these various conferences, where they'll put three popular influencers on. And one after another, you know – they've got hundreds of thousands of followers, if not millions of followers – and one after the other, they'll say, "Well, I'm popular because I'm so authentic."

They're not, though.

Well, you're saying that. I'm saying, "What is authenticity anymore?" It is what you, it is the persona that you are successful at creating. And if it is truly who you are, great, and if it's not truly who you are, okay. But to the point that we were making earlier about singers versus actors, you are either able to convince people that if they knew you, they could be your friend, and therefore, they want to... I mean, look, it's only been the last 20 years that we've even had this concept of a virtual friend, right? You friend someone on Facebook. That's not, that was never what becoming a friend was all about. Friendship is truly selflessness. Now friendship is just a click. It's just a click away.

This is almost like a 'philosophy of Hollywood and existential angst of being' podcast now, and I'm hugely enjoying it.

Well, you know, I think that we are in, that we've sort of crossed the Rubicon of media, in that everything is media.

Every individual person thinks of themselves as a brand now.

Well, a media company.

I mean, I have an Instagram following.

Yes. A media company. I mean, everyone is a media company. You know, when it used to be, if you wanted to get a job, you'd make a resume and you would submit it for the job. Now, you create a CV, and you post it on all these different sites. That is your content. So everything is media. You know, getting a job is you putting out your content, hoping to find a fan, who will hire you. And so, the same is true of your Instagram page. People aspire to have followers. People aspire to get likes. People aspire to look better, you know, you have this Facetune. People can't simply post a self-portrait. They have to manipulate it, like giving themselves a virtual face lift or a virtual makeover.

Every time I take a selfie, I diarise in another three hours, so that I can get Facetune right before I publish it.

I don't blame you.

Oh, that was harsh!

You have a... what do they say? You have a face for podcasts.

A face for podcasting, yes. I'll pre-empt that. How did you get into this industry, then? If you can kind of briefly walk me through your career, because clearly you've got incredible insights, but did you always want to do this?

No, I didn't. I didn't ever know what I wanted to do. I'm really the worst possible success story, if you will, because I never knew what I wanted to do. I always just sort of stumbled forward. My father was in the Air Force, and then after the Air Force went to law school at night while he was working at the Patent Office as an examiner, in Washington DC. And a friend of his called and said, "Hey, we're all going to Houston, because we're going to the moon." And so, he went to work at NASA. And we moved to Houston. And I lived in Houston through the Mercury, Gemini and Apollo projects. And then we moved to Los Angeles. And eventually, he became a patent attorney. And I moved from a military-salaried father, living in a suburb of Houston that was populated with astronauts and their families, and was really somewhat idyllic but provincial, to Los Angeles. Which was the heart of the media industries, and seemed like everyone was rich, and if they weren't, they were very good at being "the plumber to the stars", or what have you. And we weren't. And it was a really, kind of an interesting way to grow up. But I very quickly assimilated and learned my way around town, and it was just a very different experience for me. And so, I went to Berkeley. I thought I wanted to be an electrical engineer...

There's still time.

You're not kidding. And... thank you.

You could be. You could be anything you want to be, Ken.

Thanks, Dad. And then, I went from Berkeley, I went to law school. And then I enrolled in the joint degree programme at UCLA, thinking that I wanted to be an MBA and a lawyer, and that there was just no limit to the number of professional degrees I

could get. But eventually, I had to get a job. I got married. I went to work for a small law firm, that represented producers. So, Mel Brooks and Bob Evans and that sort of thing. And I worked as a litigator there, and worked in the transactional group there, representing film producers. And while I was in law school, I'd worked at Capitol Records, and I'd taken a semester and worked at the Writers' Guild. And I got a call from someone who said, "Hey, I'm going to work at Disney, and we're looking for someone to help us in the film production crew, but someone who has music background, because we're going to also need a music lawyer. Would you be interested?"

Because you ultimately became in charge of the music business and legal affairs department at Disney.

And it was an interesting job, because we had five full time marching bands, and we had the largest children's publishing, music publishing, company in the world. And we had the largest children's record company in the world. And music touched everything. I worked as the production lawyer on films for Barry Levinson and Chris Columbus. And you know, Chris Columbus's first movie was a movie called Adventures in Babysitting, which had a great soundtrack.

Elisabeth Shue starred in that, it's one of my favourite films.

Correct. Correct.

Hugely underrated, you know.

And she's an amazing actor. And I fell in love with her in that film, and I became very close with the producers of that film, which included...

You signed the rights for Babysitting Blues, which was the song she sang in the middle.

Yes, I did.

What a great song.

Yes, and again...

I know that film very well.

Well, I did that. It had some great blues music, by the way.

It certainly did.

I mean, some really remarkable stuff. Anyway, but that was Chris's first directing effort. He was the guy that wrote Gremlins. And then, he did a movie called Heartbreak Hotel, which was an imaginary film about Elvis. And, same producers, also Stacey Sher and Debra Hill and Lynda Obst, who I became very close with at

the time. And, I worked on Good Morning Vietnam, and had to clear every single song that was popular during the Vietnam War, because the deal that we had with Barry Levinson and the nature of the way Robin Williams played the role, we didn't know what songs he was going to talk about, we didn't know what songs were going to be played, we didn't know what songs were going to be in the movie. And we had to figure out how to clear them in advance. And so, that was a huge job. Anyway, so I worked at Disney. I got very lucky at Disney. I got there very early, and saw them go from having one and a half movies in production and no television, to having hundreds of hours of television and dozens and dozens of movies in development or production or post-production. And I became close to, and worked closely for, Robin Russell and Helene Hahn and Bernadine Brandis and Jeffrey Katzenberg and Rich Frank, and Frank Wells – who was very, very good to me before he passed away. And Michael Eisner, and Bill Mechanic, and Ann Dailey and... you know, a group of superstar executives who have all gone on to have extraordinary careers. Some of the colleagues that I worked with in the legal department like Cliff Gilbert, who's one of the most important entertainment lawyers in town. And Steve Bardwil, who's still at Disney. And Bernie, Bernadine Brandis, who is still at Disney. And they've become, I think, the best examples of what a studio executive can be. So I was really, really lucky, because I was really young. And when I left there, I was 29 years old. And I joined a small firm that represented exclusively talent. And I did that for a number of years. And then the firm became bigger and bigger and bigger, and so eventually the group that I worked with spun out of the firm, although we continued to share space, we spun out of the firm and started our own firm. And I've been in some configuration of that ever since. And about... I'm going to say 20 years ago, I started getting phone calls from classmates who either ended up in the Silicon Valley, or ended up on Madison Avenue, or ended up on Wall Street, because I had an unusual background. I went to Berkeley, I went to business school, I went to law school, I didn't know what I wanted to do, but many of my classmates did, and they had succeeded in ways that one never would have expected, but for many of them, I was the only person that they knew in the entertainment industry. And so I would get a lot of phone calls from people saying, "Hey, will you talk to our CMO, because we made this deal with so and so, to sponsor his tour," or, "We made the deal with so and so to be in a commercial, and the deal is a mess."

Is this the genesis of MemBrain?

Yes, exactly. And so, "Would you help us?" And so the thing is, a lot of what I was being asked to do was not legal work. And so...

Well, it was legal insofar as it wasn't against the law, I think we should point that out to our listeners.

Oh, thank you. But it wasn't lawyering. And it was advisory, but it put me in an unusual position. The other thing that happened at the same time was that, because I'm curious, I had gotten much more interested and involved in what I'll call the convergence space. In other words, music industry was really a canary in the coal mine for the new digital evolution of content. And as the music industry started to confront file sharing, and MP3s, and digital downloads, and all of the things that were really an existential threat to the traditional music industry, I started to look at that

and people were saying, “We’ve got to put an end to file sharing, it’s so dangerous, because it’s piracy.” And I sort of looked at it and said, “No, you know, piracy is big fat guys at swap meets selling fake CDs. That’s piracy. Piracy is not me sending you a file, so that you can hear a song that I’m excited about, with no expectation that either of us is ripping anyone off. But rather, I’m trying to share something with you that I want you to listen to, right now.” And so, me emailing you a song, or more importantly, you’re at my house and you hear a recording and you say, “What is that?” And I say, “Well, that’s a bootleg that I bought in Berkeley at Rasputin’s Record Store.” You know, I don’t know where you’d find it. Tanks for the Mammaries, or what have you, whatever was the compilation of the moment. But it’s a recording of Jackson Browne live, in a coffee house. And there are no copies of it, and it’s not available commercially. Somehow it seemed to me that, in a free society, if you wanted a copy of that, I should be able to make you a copy of that without that being perceived as a violation of anyone’s rights. The album’s not available, the recording’s not available commercially, why in a free society if it’s not available commercially, should it be illegal for me to share it with you?

I agree. Because I suppose the argument is, if you give me a copy of Lady Gaga’s latest CD, if I would have bought it and then didn’t, but for the fact you’d given it, then she suffered damage. But, is there any damage that, if I was never going to buy it, me having a copy of it?

Okay, so I don’t know what the right ethical or philosophical outcome is. I know what the legal outcome is, right? I mean, when I give you a copy of something I don’t own, then that may be a violation of federal law. We might both be felons. But it doesn’t feel like that. And so there was obviously something wrong with the law versus people’s behaviour. And so, that was my point, was that, we need to figure out how to embrace this phenomenon because this is inevitable.

As an opportunity, rather than something to be regulated out of existence, and would never happen.

Correct. And the entertainment industry always found profit in artificial scarcity. In other words, a limited number of companies or individuals who owned the distribution channel, and it was impossible to put content out without having access to the distribution channel. So in other words, the big studios also owned the movie theatres. And there’s some sensibility to that, I mean, it makes some sense. But what one has to remember is that the Copyright Act – and this is somewhat unique to the US, so bear with me – the Copyright Act and the Patent Clause, right, the Copyright Act is a result of the Copyright and Patent Clause of the Constitution. And it says, in essence, that Congress shall enact laws that will protect the creative output of inventors and creators, for a limited period of time. That’s the essence of the Copyright Clause and Patent Clause of the Constitution. And the Copyright Act is based upon that, as is the Patent Clause. However the First Amendment is a limitation on the Copyright Clause and on the Copyright Act. In other words, First Amendment is an Amendment to the Constitution, so the idea that Congress shall enact no law that limits free expression etc, was a limitation on the Copyright Clause. So you have to read those two together.

Together.

And so, the question is, in a free society, if the Copyright Act limits free expression, that's a no-go. Because the First Amendment is a limitation on the Copyright Act. And people have to understand that, in other words, the Copyright Act give you exclusive rights to your creation. But only to the extent that it doesn't limit free expression. So as a result, I'm allowed to write an article about your song. Freely. I'm allowed to quote lyrics from your song, in order to write my article about your song. I may even be able to include a link to a portion of your song, to make my point. And all of that is protected by the Fair Use Clause in the Copyright Act.

You see it on Wikipedia where there's an article about a specific song, and they'll have a 20 second clip of it, and there'll be a little writing underneath it that says, that this is subject to the Fair Use policy for academic and encyclopaedic use.

Whatever. It's not clear. It's unsettled, because there's a lot of commercial pressure that has resulted in, for example, the Copyright Act being extended to the point where nothing that's created today will go into the public domain before you and I die. I'm not saying that that's good or bad, what I'm saying is that it was inevitable that technology would move faster than the legislature. And that as a result, we have to look at the law as a living, growing thing. Because the Copyright Act was not intended to – and this is a common misunderstanding – it was not intended to promote creation. Creativity happens all by itself. It doesn't need a whole hell of a lot of watering. What the Copyright Act does is, it creates a property right in those creations so that people like you and me, middle men if you will, will be incentivised to build a business around the art, the content, the creativity, in order to promote what the founders described as 'the marketplace of ideas'. And the marketplace is what makes those ideas become available at the lowest possible prices to the largest number of people. Because in the old world, the Church or the Crown owned everything. If you created art, that art was owned by whoever patronised you, which was often the Crown or the Church. That was something that the founders felt was very important, to reject that idea, in order to promote this marketplace of ideas because that's what freedom... that's the foundation of freedom. And so, the tension that exists is that, the moguls who started the movie business found that it was a hell of a lot easier to own the movie theatres, and to put in one movie a week. You know, when I was a kid, there'd be a new movie every Friday night. It was much easier to own the pipe, than it was to fill the pipe with the best things. In fact, as the pipe has gotten bigger and fatter – as we've learned, you know, as Bruce Springsteen said, 500 channels and nothing to watch – as the pipe has gotten bigger and fatter, it's just filled up with crap. And so now, the opportunity is to help people *find* the best stuff. I mean, how often do you find yourself going on a Google search and looking for the best things to watch? Or the best things to binge. Or the best shows on Netflix. Or the best shows on, whatever. And so, to your much earlier point about how there are way more buyers now than there ever were before, that's true, but I don't know that that means that there's more work for actors or for producers. I think what there is, is a lot of, because there's so many more buyers, it's not that there is better content, per capita. There's a lot more content, and as result there's a lot of better content. But it doesn't create upward pressure on prices for actors. You know, in other words it's not creating more jobs for actors, it's creating more jobs for a lot of the same

actors. And it's creating a lot more competition for the best writers. And it's creating a lot higher prices for certain things. But it's actually driving prices down for other things, because it's commoditising a lot of the content. And it's also, as you have all these start-ups, you're also getting a lot more of, as I said, a lot more crap. A lot more stuff that costs very little to make, and fills up the available pipe, because these companies are not spending hundreds of millions of dollars. Netflix is spending hundreds of millions of dollars. Disney will spend hundreds of millions of dollars, because they are trying to monopolise the most profitable end of the market. And they're making their money not from the content itself, they're making their money from the subscriber base. So they are trying to create content that you can only get there so that, in order to get it, you have to have a subscription to their service. Because that's their end game, is that they're driving subscribers. And for the moment, that seems to be how you create this new kind of artificial scarcity.

You've spoken eloquently on quite a number of matters, and I'm going to be reflecting on this on the plane home, but what is it that actually excites you at the moment? What is it that gives you the reason to get out of bed and drive to work on a morning? What is that?

You know, I've talked a lot about how luck is often mistaken for skill. But I do believe that we are at a unique moment in time where anyone can truly be anything. And that the barriers to entry have broken down, and the distribution has been democratized, and that access to consumers has been changed in a fundamental way. What's exciting to me is that you can come up with an idea and commercialise that idea. That the barriers to entry are breaking down, and that there are paths to success for entrepreneurs in this new world. And so what's got me most excited is this idea of treating an entrepreneur like a baby band, right? And so, we've started to incubate some ideas. And in the same way that Jessica Alba is a diaper entrepreneur, and Diddy is a vodka entrepreneur, and Dre is a headphones entrepreneur, and Ashton Kutcher is an angel investor extraordinaire, and a guy who brings real traction to the things that he supports, and has turned that into a business, we like to find ways to leverage celebrity to help bring ideas to life. And that's really our mission, our mission at MemBrain, and our mission at the law firm, is to help great ideas find a life. And so, we're working on a folding bicycle helmet project.

I've seen the prototype actually, I've put it on my head. It's amazing.

Yes. Thank you. So we met with a young industrial designer who... you know, we were trying to figure out how to create a folding bike helmet, and we were working with a couple of companies that had folding bike helmets. One in particular, that was remarkable. But the problem is, is that, folding bike helmets... even the most compact folding bike helmet is really expensive – it's over \$100. And I don't think anyone's going to buy \$100 helmet for a \$2 bike ride. And so these bike share programmes, 95% of the people that ride bikes on public bike shares don't wear helmets, and 95% of the people that die in bicycle accidents were not wearing helmets. And more than half of them would have lived, had they been wearing a helmet. I hope I got those statistics right. So, it's a huge need. And especially with these new scooters, I'm sure everyone is thinking that right now. And so, we're

hoping to create a folding bike helmet that is compact and safe and \$10. And we're working on a really clever luggage start-up that was a huge success story on Kickstarter, and then on Indiegogo, that sold I think five million dollars' worth of suitcases, carry on suitcases, and has a really innovative design, and a strong visual ID which is called G-RO. And it is just a two-wheel bag, but it's got a big wheel and it puts the centre of gravity closer to the rotational axis of the wheel, and actually works better than most traditional two wheel luggage. Like, the difference between pushing a person in a wheelchair, versus pushing a person in a shopping cart. And they've yet to enter what is 80% of the market, which is, upright bags. Bags with more than two wheels. Four wheels, typically. And they have a really innovative design, and they're going to launch that later this year. And we're very optimistic, and we've helped put the management team together, and we've helped raise the money, and we've helped with the marketing strategy, and we've helped with the distribution and the supply chain. And that's been very rewarding. So, we're doing lots of fun things. And in each of those cases, we're identifying opportunities to bring celebrity or content or some other form of marketing strategy, and that's what MemBrain does. MemBrain is a marketing strategy company that tries to bring ideas to life. And I've tried to leverage my access and my network and my experience in working with artists and talent and companies that exploit artists and talent – and I mean that in a positive way, not a negative way – in order to do other things. Because the thing I always used to say about music to people was, “Music is not what you sell. Music is how you sell.” In other words, try buying a car that doesn't come with a radio. But no one will pay extra to get a radio in their car any more. Or try getting a cable subscription that doesn't also come with 50 channels of commercial free music. But try selling, try upselling the commercial free music. It's only been in the last couple of years are willing to pay for streaming services, and the streaming services are yet to be profitable because of all the rights payments and all of the competition. But now, look what's happening. Spotify just bought Gimlet and is now going into the podcasting business. Because they recognize that they need to create original content and they need to own that content some way, or they need to find ways to give themselves a distinction which will cause people to want to subscribe to them. Because they don't want to make money on the content, they need to make money selling subscriptions. You don't make money selling music, you make money selling little plastic discs, until the utility of the little plastic disc goes away. And then you need, as a record company if you will, to go into the business of tickets and T-shirts and vodka.

Ken, it's been a hugely enjoyable conversation, thank you for your time.

Thank you for having me.