47th ANNUAL ENTERTAINMENT SYMPOSIUM

2023 HYBRID SERIES

THE DISRUPTERS, THE DISRUPTED, AND THE DISRUPTED DISRUPTERS

DAY 3 SYLLABUS

June 9, 2023

UCLA Ziffren Institute for Media, Entertainment, **Technology & Sports Law**

The Disrupters, the Disrupted, and the Disrupted Disrupters 47th Annual Entertainment Symposium

Wednesday May 31 | Wednesday June 7 | Friday June 9



Keynote Speaker

Bela Bajaria, Chief Content Officer, Netflix

For a decade or more, one of the dominant narratives in the entertainment industry has been the disruption of the legacy players and their businesses by the arrival of deep-pocketed, norm-breaking tech companies. But in the last few

years, even these giants have weathered stock price plunges, endured labor conflict as the sequel to a global pandemic and faced the transformative potential of artificial intelligence. This year's Entertainment Symposium will explore how these disruptions have led to an ongoing transformation in traditional business models, production methods, and labor markets, while also highlighting key areas of law. Over the course of the program, an array of distinguished executives, entrepreneurs, attorneys and academics will examine how the entertainment industry's major players have adapted (or failed to adapt) to this challenging and rapidly changing business environment and consider what upstarts will thrive – and what legacy players will survive – in the industry's next phase.

Wednesday, May 31, 2023

5:00 - 5:05 pm (PDT)

Dean's Remarks

PRESENTER:

Dean Russell Korobkin

Interim Dean and Richard C. Maxwell Distinguished Professor of Law, UCLA School of Law

5:05 - 5:50 pm (PDT)

After Covid: The Industry Resets

Three and a half years after Covid's arrival, the industry works to find its footing again. This year's opening session sets the stage with the Symposium's annual status report exploring box office recovery, streaming, and digitally driven advertising. This presentation will explore how streaming maturity and higher interest rates are leading to an end of the "golden age of production," previously fueled by capital and emphasis on growth over profits. It will consider the evolving role theatricals can play in support of streaming, along with a study of the increased divergence between box office success and best picture honorees. It will also explore the many varied definitions of new...and not so new...FAST services. And it will consider these as factors contributing to today's extremely difficult labor environment.

PRESENTER:

Tom Wolzien

Chairman, Wolzien LLC

6:00 - 7:00 pm (PDT)

Dearly Departed: A Review of the Legal and Industry Implications of the Entertainment Job Market

With the widely publicized entertainment layoffs and changing job market, attorneys and executives are faced navigating issues including severance, high level employment agreements and compliance with labor laws. The navigation of these issues within the entertainment industry – from recruitment to termination – also requires a nuanced understanding of industry norms. This panel of experts will help deconstruct the legal and market realities of the dearly departed while also considering how bias can impact the process of hiring, firing and retaining a diverse pool of employees.

MODERATOR

Azi Amirteymoori

Owner/Employment Attorney/Senior HR Consultant, 403 Ops Consulting

PANELISTS:

Connie L. Chen *Principal,* Jackson Lewis P.C.

Amanda N. Luftman

Managing Partner, Boren, Osher & Luftman, LLP

Joanna Sucherman

Owner, JLS Media

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Wednesday, June 7, 2023

5:00 - 6:00 pm (PDT)

Representing Everyone, Everywhere, All at Once: Entertainment Industry Conflicts and How to Navigate Them

The John H. Mitchell Panel on Ethics and Entertainment

Attorneys that practice in entertainment can be a relatively small and insular group, negotiating with the same people and companies deal after deal. Attorneys may represent multiple parties on the same side of a transaction including the writer, director, showrunner; and/or cast members on a particular film or television project. These types of repeated and intertwined representations often raise ethical issues. This panel will focus on providing guidance to attorneys in the entertainment industry on complying with their obligations pursuant to the California Rules of Professional Conduct, including advice when an attorney is faced with representing two or more clients on a deal, when clients' interests are ostensibly aligned but become adverse, and the pitfalls of representing various clients in repeated transactions with the same party. It will offer advice on how to avoid stepping over the line and when it may be time to withdraw. Finally, it will look at what happens and explore what to do if faced with a malpractice suit or disciplinary proceedings in this area.

MODERATOR:

Scott L. Cummings

Professor of Law and Robert Henigson Professor of Legal Ethics, UCLA School of Law

PANELISTS:

Amy L. Bomse Shareholder, Rogers Joseph O'Donnell

Jeffrey M. Davidson Partner, Covington & Burling LLP

Sally C. James Partner, Greenberg Glusker LLP

6:10 - 7:10 pm (PDT)

New Frontiers: How Artificial Intelligence Presents New Opportunities (and Risks) for the Entertainment Industry

Artificial Intelligence and machine learning has had a swift impact on society and more particularly, the entertainment industry. Increasingly powerful and sophisticated generative AI presents new opportunities for creators, talent, and studios but also numerous risks for these stakeholders. From copyright questions to labor rights, from virtual production spaces to posthumous deepfakes, it is a time of excitement and trepidation. This panel will discuss these issues from a variety of perspectives, staying abreast of the most recent technological and legal developments in this fast-moving space.

MODERATOR:

Nathaniel Bach

Partner, Manatt, Phelps & Phillips, LLP

PANELISTS:

Travis Cloyd

CEO, WorldwideXR, Global Futurist, Thunderbird School of Global Management

Ted Schilowitz

Futurist-in-Residence, Paramount

P.J. Shapiro

Founding Partner, Johnson Shapiro Slewett & Kole LLP

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Friday, June 9, 2023

2:00 - 2:05 pm (PDT) **Welcome**

2:05 - 2:20 pm (PDT)

Chairpersons Emeriti Recognition: Matthew C. Thompson & Lawrence Ulman

PRESENTERS:

Elsa Ramo

Co-Chair, UCLA Entertainment Symposium Advisory Committee; Managing Partner & Founder, Ramo Law PC

Craig Wagner

Co-Chair, UCLA Entertainment Symposium Advisory Committee; Executive Vice President, Business Affairs & General Counsel, Paradigm Talent Agency

Christa Zofcin Workman

Co-Chair, UCLA Entertainment Symposium Advisory Committee; Co-President & COO, River Road Entertainment

2:20 - 3:10 pm (PDT)

The Price of a Name: Navigating the World of Fictionalized True Stories and Celebrity Endorsements

Film and television are so often based on the stories of actual people and real-life events. A few recent examples include the films TILL and AIR and the limited series DOPESICK, PAM & TOMMY and THE DROPOUT. Studios and production companies frequently go out of their way to acquire an individual's "life rights" or partner with celebrities to tell their stories. What is the price of a celebrity's name, likeness and life rights? Are life rights necessary to tell someone's story? This panel will explore financial and other issues surrounding the production of fictionalized true stories and content inspired by true events. The panel will also examine the world of celebrity endorsements, the inherent risks in talent lending their names to promote products or services, and how to avoid costly mistakes that can damage a celebrity's reputation or brand in the market.

MODERATOR:

Hillary Bibicoff Of Counsel, Pierce Law Group LLP

PANELISTS: Lisa Callif Founding Partner, Donaldson Callif Perez, LLP

Ann Brigid Clark Shareholder, Greenberg Traurig

Kevin Vick Partner, Jassy Vick Carolan LLP

3:10 - 3:30 pm (PDT)

Networking Break

3:30 - 4:20 pm (PDT) Whose IP Is It Anyway? Source Material and Underlying Rights in Film and TV

So many film and television shows today are based on underlying material. Whether a novel, blog, videogame or television format, literary and underlying rights deals are common in nearly every aspect of filmmaking and television production. This panel will examine issues surrounding source material agreements including granting and reserving rights, reversions when things don't go as planned, copyright termination and the management of a deceased author's estate that controls valuable copyright libraries.

MODERATOR:

Matt Belloni Founding Partner, Puck

PANELISTS:

Michael Grizzi Executive Vice President, Motion Picture Legal, Paramount Pictures

Michael Sherman

Partner, Reed Smith

Michelle Weiner

Co-Head of Books Department, Creative Artists Agency

4:20 - 4:30 pm (PDT)

On Popcorn and Purpose: When We Do More Than Entertain

PRESENTER:

Douglas Lichtman

Professor of Law and Faculty Director, Ziffren Institute for Media, Entertainment, Technology & Sports Law, UCLA School of Law

4:30 - 4:45 pm (PDT) Networking Break

4:45 – 5:45 pm (PDT)

Keynote

Bela Bajaria Chief Content Officer, Netflix

Ken Ziffren

Partner & Co-Founder, Ziffren Brittenham LLP

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47th Annual UCLA Entertainment Symposium The Disrupters, the Disrupted, and the Disrupted Disrupters



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Thank you for your 45 years of service on the Entertainment Symposium Advisory Committee.

You were truly one of a kind and will be greatly missed.

ACKNOWLEDGEMENTS

The Symposium Advisory Committee and Editors would like to thank the following VOLUNTEERS FOR THEIR ASSISTANCE IN THE PREPARATION OF THIS SYLLABUS: LINDEN BIERMAN-LYTLE, Derrick Davis, Matthew Dresden, Stefan Malkoun, Michael Moskowitz, Nicolas Jampol AND SAM TURNER. AS WELL AS THE UCLA SCHOOL OF LAW STUDENT VOLUNTEERS. THE SYMPOSIUM Advisory Committee and the Editors also would like to express their gratitude for the ASSISTANCE AND SUPPORT GIVEN BY THE UCLA SCHOOL OF LAW AND ITS STAFF, AND ESPECIALLY DEAN RUSSELL KOROBKIN, DOUG LICHTMAN (FACULTY DIRECTOR, ZIFFREN INSTITUTE), CINDY X. LIN (Executive Director, Ziffren Institute), Annabel Adams (Assistant Dean of COMMUNICATIONS), PATRICIA BIGGI (SENIOR DIRECTOR OF DEVELOPMENT, EXTERNAL AFFAIRS), CALLIE BRAZIL (DIRECTOR OF DIGITAL MARKETING & STORYTELLING, COMMUNICATIONS), TRINH BUI (EVENT MANAGER), DAVID CAPPOLI (DIRECTOR OF WEB OPERATIONS), ADAM CROWLEY (SENIOR Director of External Relations, External Affairs), Zach Dai (Student Worker, Ziffren INSTITUTE), HARLISHA HAMM (SENIOR DIRECTOR, EXTERNAL AFFAIRS, EVENTS & PROGRAMMING), TOBI KAUFMAN (MAJOR GIFT ANALYST), LAUREN KIM (ASSISTANT DEAN OF ADMINISTRATIVE SERVICES & SPECIAL PROJECTS), FRANCISCO LOPEZ (MANAGER OF PUBLICATIONS AND GRAPHICS DESIGN), VINCE MALLARI (ASSISTANT DIRECTOR OF ALUMNI AND DONOR ENGAGEMENT, EXTERNAL AFFAIRS), ANTHONY SKULICK (DIRECTOR OF ANNUAL GIVING, EXTERNAL AFFAIRS), NENA SOSA (DEVELOPMENT ASSISTANT & EXECUTIVE BOARD LIAISON), GEOFFREY WONG (DIRECTOR OF Events), Kristen Wong (Program Coordinator, Ziffren Institute) and Eden Yeh (Student WORKER, ZIFFREN INSTITUTE).

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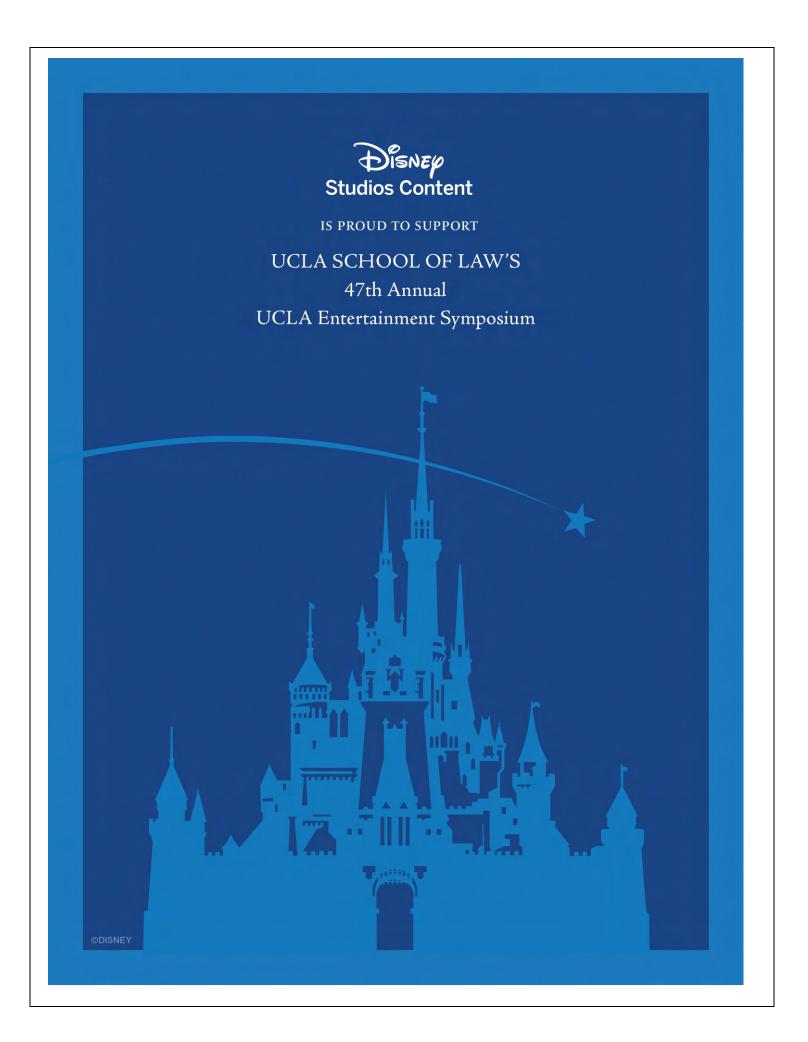
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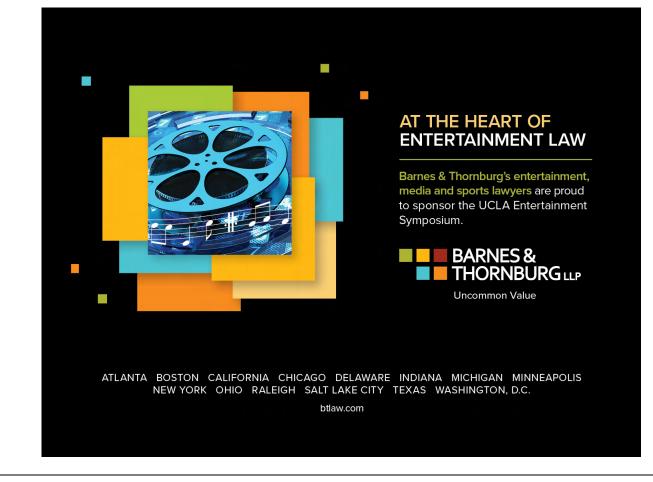
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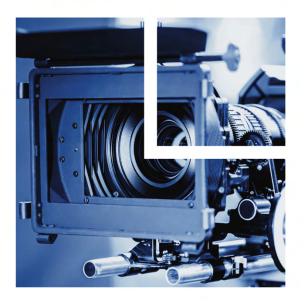


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47th Annual Entertainment Symposium The Disrupters, the Disrupted, and the Disrupted Disrupters

May 31 | June 7 | June 9

For a decade or more, one of the dominant narratives in the entertainment industry has been the disruption of the legacy players and their businesses by the arrival of deep-pocketed, norm-breaking tech companies. But in the last few years, even these giants have weathered stock price plunges, endured labor conflict as the sequel to a global pandemic and faced the transformative potential of artificial intelligence. This year's Entertainment Symposium will explore how these disruptions have led to an ongoing transformation in traditional business models, production methods, and labor markets, while also highlighting key areas of law. Over the course of the program, an array of distinguished executives, entrepreneurs, attorneys and academics will examine how the entertainment industry's major players have adapted (or failed to adapt) to this challenging and rapidly changing business environment and consider what upstarts will thrive – and what legacy players will survive – in the industry's next phase.



KEYNOTE

BELA BAJARIA

Chief Content Officer, Netflix

Bela Bajaria was named Chief Content Officer in 2023. Bela was named Head of Global TV in 2020, overseeing English language and local language scripted and unscripted series around the world. Previously, she oversaw local language originals, original series across Europe, the Middle East, Türkiye, Africa, India, Asia, and Latin America. In this role, she managed the teams behind shows such as La Casa de Papel (Spain), The Witcher (Poland), Sacred Games (India), Squid Game (Korea), Blood & Water (South Africa), and Sintonia (Brazil). Bela joined Netflix in 2016 to lead

Netflix's push into unscripted programming including the critically acclaimed Queer Eye, Nailed It! and Tidying Up with Marie Kondo. She was previously President of Universal Television. Bajaria has been honored by THR's Women in Entertainment list, Variety's LA Women's Impact Report, named one of TIME's 100 Most Influential People of 2022, and named one of Fortune's Most Powerful Women in 2020, 2021 and 2022. She currently serves on the LA Board of Governors for the Paley Center, the Board of LA's Saban Community Clinic and the Board of Trustees for Meridian International Center.



AZI AMIRTEYMOORI

Owner/Employment Attorney/Senior HR Consultant, 403 Ops Consulting

Graduating from Western Michigan University, Cooley Law School, with a Juris Doctor, Azi was initiated to the HR field in both the legal and insurance industries handling primarily workers compensation cases. She then started her professional career in the public sector with the Los Angeles County Fire Department (LACoFD), Employee Relations Division as a Departmental Civil Service Representative. There she appeared before the Los Angeles County Civil Service Commission Board and represented the Department in all employment matters.

Azi expanded her career in the employee and labor relations field by joining the health care industry, where she was an employee relations manager at UCLA Health and later for the City of Hope (COH), advising and consulting her clients on various employment law matters which included investigations, EEO claims and providing training & development to leadership, all while consulting on business and organizational development.

Experienced in both union and non-union environments, Azi's legal background awarded her the opportunity to successfully negotiate numerous labor-management agreements, and represented her clients in a number of EEO matters.

Owner of 403 Ops Consulting, Azi can help any company, of any size remain in compliance with employment law, and provide the legal & HR expertise needed to keep her clients safe.

Azi is an active member of the California Bar Association and is bilingual in English and Farsi.



NATHANIEL BACH

Partner, Manatt, Phelps & Phillips, LLP

A Los Angeles-based Manatt partner, Nathaniel Bach represents prominent clients in the media, entertainment and technology industries, including film and television studios and networks, artists, brands, retailers, music publishers, producers, entrepreneurs and journalists.

Nat's broad practice spans copyright, trademark, right of publicity, First Amendment, contract, fashion, brand-protection, telecommunications, class action, intellectual property, and cuttingedge artificial intelligence, metaverse, digital assets, cryptocurrency and blockchain matters. In

addition to his trial work, he maintains an active counseling practice, working with clients in pre-litigation and other riskmanagement matters. He has also represented clients in the financial industry in global regulatory and governmental investigations, and has played key roles in various other high-profile transactions and disputes.

Nat maintains an active pro bono practice. He successfully represented Dreamers to obtain a first-in-the-nation injunction blocking the Trump administration's unlawful revocation of the DACA program. Nat also represented one of the first Dreamers unlawfully targeted by the Trump administration, obtaining (after arguing) an unprecedented preliminary injunction that barred ICE and USCIS from falsely calling his client a gang member. He has partnered with diverse legal services organizations including the ACLU of Southern California, Public Counsel, Bet Tzedek, Lawyers Without Borders and the Equal Justice Initiative.



MATT BELLONI

Founding Partner, Puck

Matthew Belloni is an experienced content executive and entrepreneur who has successfully managed large teams of creators, serving as the top editor of a leading entertainment publication and appearing frequently as an analyst on television, as well as practicing law as an attorney in the entertainment industry.

Belloni is currently Founding Partner of Puck, a next-generation digital media company covering the power centers of Hollywood, Silicon Valley, Washington and New York. He joined Puck in May 2021 and writes a twice-weekly newsletter called What I'm Hearing about the entertainment industry.

As editorial director of *The Hollywood Reporter* from 2016 to 2020, Belloni was responsible for editorial content and initiatives at the iconic entertainment media outlet. Belloni oversaw all of *THR*'s editorial properties, including its weekly print magazine; THR.com and its digital verticals; on- and off-platform video content, podcasts and live events.

Over the course of 14 years with *THR*, Belloni served in a number of senior editorial positions, managing a staff of 100 journalists and playing a significant role in the outlet's heralded transformation from a trade newspaper into the entertainment industry's flagship media brand. During this time, THR took home many of publishing's most prestigious honors, including a National Magazine Award for General Excellence by the American Society of Magazine Editors and more than 100 National Arts and Entertainment Journalism awards.

Belloni spearheaded *THR*'s move into audio and video with its roundtable series, Close Up With *The Hollywood Reporter*, which was nominated for a Daytime Emmy Award, and Angelyne, a scripted adaptation of a *THR* article. Belloni also appears regularly as an analyst on NBC Nightly News, CBS This Morning, CNN, CNBC, NPR's The Business and The Bill Simmons Podcast.

Before joining *THR*, Belloni was an attorney at an entertainment law firm in Los Angeles, representing actors, filmmakers and media companies in disputes and litigation. He is an expert on the inner workings of the entertainment industry, and taught a course on Entertainment Journalism at the USC Annenberg School.

Belloni graduated from the University of California, Berkeley with a bachelor's degree in political science and obtained a law degree from the University of Southern California School of Law, where he was a member of the USC Law Review.



HILLARY BIBICOFF

of Counsel, Pierce Law Group LLP

Hillary Bibicoff is a transactional entertainment attorney at Pierce Law Group LLP, where she specializes in talent deals. She represents actors, hosts, writers, directors, authors, cartoonists, publishers, financiers, independent producers, and independent production companies.

Hillary's clients have included James Cameron, Alfonso Cuaron, Mike Nichols, Robert Towne, How I Met Your Mother and Mom producer-director Pam Fryman, and The Power of the Dog and Cold War producer Tanya Seghatchian, among many others. She also handles production legal for live events, which have included the last two Democratic National Conventions and the most recent Presidential Inaugural Events, as well as seven Super Bowl pre-game and half-time shows.

In addition to writer, director, producer, actor, and host deals, she negotiates book, screenplay, and life story agreements, as well as various film finance, production, and distribution deals, and studio term deals. She also handles licensing, merchandising, endorsement, sponsorship, and spokesperson deals for talent as well as both traditional entertainment companies and those whose main business is outside of the entertainment industry. She has been involved with audits of major studios conducted on behalf of talent with profit participations.

Hillary began her career at Cooper, Epstein & Hurewitz. Later, she was an equity partner at Greenberg Glusker for twelve years. Between those positions, her years as an executive at motion picture production and distribution companies gave her a practical business perspective that provides a strategic advantage in negotiations. Before joining Pierce Law Group, Hillary most recently spent a decade as of counsel for Holmes Weinberg, a boutique entertainment firm.

Bibicoff is currently named as one of America's Most Honored Lawyers by the American Registry, an honor granted to the top 1% of lawyers. These honors include current selection as a "Best Lawyer in America in the field of Entertainment Law" by U.S. News & World Report and inclusion in Who's Who Legal – Telecoms, Media & Entertainment 2023. She has been named a "Southern California Super Lawyer" for the past fifteen plus years and has received a Woman of Achievement Award from the Women's Business Council.

Among other honors, Hillary was chosen as one of Hollywood's "top new generation deal makers" by the Los Angeles Business Journal, has received a Woman of Achievement Award from the Women's Business Counsel, and has been profiled in various publications including the Los Angeles Daily Journal and The Angelos.

Hillary currently serves on the Advisory Committee for the UCLA Entertainment Law Symposium and the Advisory Board of the Alliance of Women Directors. She is a Governor of the Television Academy. She is a past Board Member of Women in Film and Co-Chair Emeritus of the Women's Entertainment Network. She has authored articles on acquisition of rights for film and television and profit participations, and often gives lectures or serves as a panelist regarding various aspects of entertainment law.

Hillary received her undergraduate degree from UCLA and her law degree from Loyola Law School, which she attended as the Burns Scholar, Loyola's highest academic scholarship. She received the National Association of Women Lawyers Award as the outstanding female graduate and went on to serve on Loyola Law School's Board of Governors for many years.



AMY L. BOMSE

Shareholder, Rogers Joseph O'Donnell PC

Ms. Bomse is co-chair of the Attorney Liability and Conduct Practice Group, and a member of the Complex Commercial Litigation Practice Group. She is also adjunct faculty at the Berkeley School of Law where she teaches legal ethics and the law of lawyering. Her practice focuses on the law of lawyering. She represents lawyer, law firms and clients in a wide variety of disputes involving professional negligence, fiduciary duties, breach of contract. She also counsels and advises lawyer and law firms concerning risk management and legal ethics.



LISA CALLIF

Partner, Donaldson Callif Perez, LLP

As a Founding Partner of Donaldson Callif Perez, Lisa Callif is the go-to attorney for all things clearance. Lisa specializes in representing independent producers and production companies in all aspects of content creation, including equity financing, production and distribution with extensive experience in fair use, copyright and personal rights issues. Lisa is the recipient of numerous prestigious awards – among her many accolades are recognition as a *Hollywood Reporter* Power Lawyer and a *Daily Journal* Top Entertainment Lawyer, as well as her recognition by Variety on the Women's Impact

Report and the Best and the Brightest list. Lisa cuts through red tape for her clients and works tirelessly to preserve artists' voices so that they can shine a light on stories that otherwise might not be told.

Along with Partner Michael Donaldson, Lisa has co-written three books: *The American Bar Association's Legal Guide to Independent Filmmaking, Clearance and Copyright,* 4th Edition, and *Clearance and Copyright,* 5th Edition. She regularly publishes articles about emerging issues in entertainment and copyright law, and is often quoted in publications such as the *Wall Street Journal, Variety, Intellectual Property Magazine* and more. Lisa and Michael were featured on the cover of *LA Lawyer Magazine,* for which they co-authored an article about fair use and its application in documentary films.



CONNIE L. CHEN

Principal, Jackson Lewis P.C.

Connie L. Chen is a principal in the Los Angeles, California, office of Jackson Lewis P.C. Connie's practice focuses on representing employers in all types of employment-related litigation in state and federal courts and in arbitration.

Connie has broad experience litigating single plaintiff and class/representative action cases involving wage and hour, discrimination, harassment, retaliation, wrongful termination, and related claims.

She assists employers in a variety of industries, including restaurant, hospitality, retail, logistics, manufacturing, construction, and entertainment.

In addition, Connie defends employers against wage and hour claims before the Division of Labor Standards Enforcement (DLSE), and charges of discrimination before the Workers' Compensation Appeals Board (WCAB), the Department of Fair Employment and Housing (DFEH), and the Equal Employment Opportunity Commission (EEOC). She also routinely provides preventative counseling to employers on policies and practices governing day-to-day workplace issues, including wage and hour compliance, employee handbooks, requests for leave, disability accommodation, employee discipline, layoffs, and terminations.

Connie is admitted in California and New York state and federal courts. While attending law school, she served as production editor of the Cardozo Arts and Entertainment Law Journal.



ANN BRIGID CLARK

Shareholder, Greenberg Traurig

Ann Brigid Clark focuses her practice on transactional entertainment, media and intellectual property matters, including the representation of independent motion picture and scripted and unscripted television production companies, digital media companies, financiers, independent producers, showrunners, writers, directors, artists, musicians and on-screen talent in connection with all aspects of development, production, distribution, promotion and exploitation of motion

picture, television, new media, print and music projects.

Ann brings a unique and comprehensive perspective to her practice, having begun her career as an entertainment litigator, and, later, as production counsel for motion picture studios. She often acts in the capacity of an outside business affairs advisor for her clients, structuring and negotiating motion picture finance agreements, the acquisition of rights, first look agreements, merchandising, music licensing, and book publishing agreements.

Ann counsels clients on union and guild matters, licensing, intellectual property rights, and clearance issues. She also counsels sports and entertainment clients with respect to Internet, new media and other promotional, marketing and branding activities. In addition, she has deep experience as production counsel for numerous independent motion pictures with budgets ranging from \$2 million to \$200 million, and for scripted and unscripted television projects including game shows, competition-based shows and dramatic series, having drafted and negotiated hundreds of agreements with above and below-the-line talent, financiers, bond companies, unions and guilds.



TRAVIS CLOYD

CEO, WorldwideXR, Global Futurist, Thunderbird School of Global Management

Travis Cloyd is a seasoned leader and CEO of WorldwideXR (WXR), a cutting-edge technology company based in Beverly Hills. He is also the VP and CTO of CMG (Celebrity Management Group) which for the last 42 years has represented hundreds of historical iconic estates such as UCLA legends Jackie Robinson and James Dean.

He has a proven track record of innovation, entrepreneurship, and strategic management, with a focus on creating and financing immersive state-of-the-art technology companies. As an award-winning producer, XR visionary, and Metaverse educator, he has operated a portfolio of trendsetting businesses, positioning himself as a leading expert in the field. Recently recognized by Forbes as a top 'Next Entrepreneur,' he has also served as the Arts, Music, and Entertainment Ambassador to the GBBC (Global Blockchain Business Council). Plus, a member of the PGA (Producers Guild of America) and the new media council, serving on the education and international committees.

Cloyd is also the Global Futurist at Thunderbird School of Global Business Management, the #1 Masters in Management program in the world, and Senior Advisor to the Dean and Professor of Practice on Global Creative Industries. He was recently awarded the FIU Medallion, the highest honor at Florida International University, for his outstanding contributions to the institution.

Cloyd has produced next-level digital content for government agencies, professional sports leagues, major international studios, iconic brands, legendary actors, global musicians, top athletes, and historical figures throughout his career. He has produced feature films, virtual reality experiences, augmented reality content, and NFT collection drops, and continues to break new ground within the entertainment industry, creating and protecting virtual human IP content based on historical figures for all facets of the diverse XR, Metaverse, and AI ecosystem.



SCOTT L. CUMMINGS

Professor of Law and Robert Henigson Professor of Legal Ethics, UCLA School of Law

Scott L. Cummings is Robert Henigson Professor of Legal Ethics at the UCLA School of Law, where he teaches and writes about the legal profession, legal ethics, access to justice, and local government law. A recipient of the UCLA Distinguished Teaching Award, Professor Cummings is the founding faculty director of the UCLA Program on Legal Ethics and the Profession, which promotes empirical research and innovative programming on the challenges facing lawyers in the twenty-first century, and a long-time member of the UCLA David J. Epstein Program in Public Interest Law and Policy. In

2021, Professor Cummings was selected as the Fulbright Distinguished Chair at the European University Institute and a fellow at the Stanford Center for the Advanced Study in the Behavioral Sciences to study the role of lawyers in strengthening the rule of law. He was awarded a 2023 Guggenheim Fellowship to study the role of lawyers in democratic backsliding.



JEFFREY M. DAVIDSON

Partner, Covington & Burling

Jeffrey Davidson is a trial and appellate lawyer focusing on high-stakes commercial matters. Clients have called on him to deliver results in some of their most important disputes. Jeff also serves as a general counsel to Covington and advises on professional responsibility issues

In a recent trade secret arbitration with \$1.8 billion at stake, he obtained a complete defense win on behalf of a major pharmaceutical company. In a recent insurance coverage matter on behalf of

a leading corporation, he obtained a \$25 million recovery after a contested arbitration hearing. In a third recent matter, he obtained summary adjudication against four insurance companies in a \$100-million coverage dispute. Jeff also litigated one of the foundational cases on the foreign application of U.S. antitrust law, obtaining a ruling eliminating a \$3.5 billion claim shortly before trial.

Jeff also led a cross-office Covington team representing the University of California in its landmark challenge to the government's rescission of the Deferred Action for Childhood Arrivals (DACA) program, obtained a nationwide injunction reinstating DACA, and successfully defended the injunction on appeal. In Regents of the University of California v. Department of Homeland Security, the Supreme Court agreed that the rescission was improper and set it aside.



MICHAEL GRIZZI

Executive Vice President, Motion Picture Legal, Paramount Pictures

Michael Grizzi is Executive Vice President, Motion Picture Legal, Paramount Pictures, where he leads the team of attorneys in the negotiation and documentation of high-level talent employment, rights acquisition, term deal and related agreements for Paramount's live action and animated features, a role he has held since 2015. Michael received a Bachelor of Science in Speech from Northwestern University, and is an alum of the UCLA School of Law, where he was an editor of the UCLA Law Review and graduated Order of the Coif. Following law school, he practiced with Irell and Manella in

Los Angeles, where he handled corporate legal matters for a number of public companies. He also served as Vice President of Business and Legal Affairs for New Line Cinema.

Prior to his law career, Michael worked in television production, including on the series "Cheers". He is a lecturer in law at the USC Gould School of Law, where he has taught various Entertainment Law classes since 2008. His professional highlight as an attorney working in features would have to be a toss-up between handling the legal work for the film "Snakes On A Plane" and for the "Jackass" film franchise.



SALLY C. JAMES

Partner, Greenberg Glusker

Sally James, a partner in Greenberg Glusker's Entertainment and Corporate Departments, handles high-level corporate financing transactions alongside deals for A-list talent.

She represents actors, writers, and producers, as well as production companies, talent managers, business managers, and investors. She handles film finance and M&A transactions for established brands and also negotiates deals for entertainment start-ups.

Among her other deals, Sally has represented Chris Hemsworth (HighPost Capital's acquisition of Centr); The Russo Brothers ("The Electric State"); Scriber (launch and talent deals); Ubisoft Entertainment (Netflix's "Assassin's Creed" and "Beyond Good and Evil"); Alice Braga ("Hypnotic," "Dark Matter"); Adewale Akinnuoye-Agbaje ("His Dark Materials," "Our Man From Jersey"); and Silent House Productions ("Carol Burnett: 90 Years of Laughter + Love").

Sally has been recognized in *Variety's* annual "Dealmakers Impact Report" and "Legal Impact Report," National Law Journal's "Sports and Entertainment Trailblazers list, *Los Angeles Business Journal's* "Women of Influence: Attorneys" list, The Best

Lawyers in America in the practice area of Entertainment Law – Motion Pictures and Television, and Southern California Super Lawyers Rising Stars.

She received her J.D. fromUniversity of California, Los Angeles School of Law, Order of the Coif, and her B.A., summa cum *laude*, from the University of Richmond with a major in Theatre Arts.



RUSSELL KOROBKIN

Interim Dean and Richard C. Maxwell Distinguished Professor of Law, UCLA School of Law

Russell Korobkin is the Interim Dean and Richard C. Maxwell Distinguished Professor of Law at the UCLA School of Law. He has been a member of the UCLA Law faculty since 2001, and he served as Vice Dean for Academic and Institutional Affairs from 2015-2019 and Vice Dean for Graduate and Professional Education from 2019-2022. He is the author *The Five Tool Negotiator: The Complete Guide to Bargaining Success* (Liveright, 2021), *Stem Cell Century: Law and Policy for a Breakthrough Technology* (Yale, 2008), two textbooks -- *Negotiation Theory and Strategy* (Aspen, 3d ed., 2014)

and *K*: A Common Law Approach to Contracts (Aspen 3d. ed., 2022) -- and more than 50 journal articles on behavioral law and economics, negotiation, contracts, and health care law. A former San Francisco management consultant and Washington D.C. lawyer, Professor Korobkin earned his undergraduate and law degrees from Stanford University. In addition to UCLA, he has taught full time at the University of Illinois, University of Texas, and Harvard University Law Schools, and he has taught intensive negotiation courses to undergraduates, MBA students and law students at 10 universities on four continents.



DOUGLAS LICHTMAN

Professor of Law and Faculty Director of Ziffren Institute for Media, Entertainment, Technology & Sports Law, UCLA School of Law

Doug Lichtman focuses his teaching and research on topics relating to law and technology. His areas of specialty include patent and copyright law, telecommunications regulation, and information strategy and economics.

Professor Lichtman joined the faculty at UCLA School of Law in 2007 after a tenured teaching career at the University of Chicago. His work has been featured in numerous journals including the *Journal of Law & Economics*, the *Journal of Legal Studies*, the *Yale Law Journal*, and the *Harvard Business*

Review. He co-authored *Telecommunications Law and Policy,* a textbook that investigates the federal regulatory regime applicable to broadcast television, cable television, radio, telephony, and the Internet. He also regularly writes in the popular press, with recent pieces appearing in the Los Angeles Times and the policy magazine Regulation.



AMANDA N. LUFTMAN

Partner, Boren, Osher & Luftman, LLP

Amanda N. Luftman represents both employers and employees on a wide range of labor and employment issues. Because Amanda is familiar with and continuously argues opposing perspectives of the same issues, she brings unique value to her clients, whether they are prosecuting or defending employment-related claims.

Amanda's philosophy is "knowledge is power". She routinely educates and counsels employers regarding best practices to comply with California's ever-changing landscape of labor and employment law. She is passionate about providing the most practical business solutions for her clients to achieve compliance with current laws – because Amanda believes in, and actually likes, compliance. Amanda, together with the BOL Employment Team, also drafts and negotiates employment agreements, company policies, and employee handbooks for employers.

When companies fail to "get it right", Amanda represents former employees in their efforts to achieve more favorable separation terms and current employees to assist in the resolution of their differences with their employers. Amanda strives to achieve a speedy and amicable resolution for her clients but will not hesitate to file a lawsuit when necessary. Amanda also assists employees in their negotiations for new employment; reviews and revises employment agreements; and negotiates best employment terms.

Following the first few years of her legal career with Robins, Kaplan, Miller & Ciresi, LLP in Los Angeles, Amanda accepted a position as a Senior Human Resources Consultant with The Walt Disney Company. She thoroughly enjoyed serving in a Human Resources role, as it gave her a very different perspective than her usual viewpoint as the attorney. Ultimately, she returned to her first love, the practice of law. At BOL, Amanda practices what she preaches, as the Managing Partner of the firm.

Ms. Luftman is a committed foodie who loves to stay abreast of the latest additions to the Los Angeles restaurant scene: good food and good live theater makes for a perfect outing. She also enjoys traveling and spending time with family, friends, and yes, her clients, too.



TED SCHILOWITZ

Futurist-in-Residence, Paramount

Ted works across leadership and tech teams at Paramount Global, including CBS, CBS Sports, Paramount Pictures, Paramount Plus, MTV, Nickelodeon, BET, PlutoTV and Comedy Central, exploring emerging tech for new forms of entertainment.

Prior to joining Paramount, Ted was the Futurist at 20th Century Fox, where he worked on the evolving art, science and technology of advanced interactive visual storytelling.

Ted was part of the founding product development team at Red Digital Cinema as the company's first employee. Red cameras have won both scientific/technical Oscar and Emmy. Many of the world's biggest movies and TV shows are shot with these ultra high resolution digital movie cameras.

Ted is co-founder of the G-Tech product line of advanced hard drive storage products, the leading brand in that industry. They are implemented worldwide at the highest levels on cinema, television, sports and news production.

Ted has been featured in publications such as *Wired, Fast Company, The New York Times, Variety, Hollywood Reporter* and *The Wall Street Journal.* In 2019, Ted was honored at the Variety Hall of Fame event with the Variety Innovation Award.



P.J. SHAPIRO

Partner, Johnson Shapiro Slewett & Kole LLP

P.J. Shapiro is a Founding Partner of Johnson Shapiro Slewett & Kole LLP. He has an extensive film and television practice, representing some of today's most successful on-camera talent as well as many acclaimed film and television producers, directors, writers and content creators. He also represents some of the most celebrated artists in the world of music through a myriad of ventures and business transactions.

P.J. has structured and negotiated groundbreaking transactions in the media and entertainment industries – resulting in both lucrative financial benefits and unprecedented creative control for his clients. He has worked with clients to identify and exploit important and novel ancillary revenue sources, generating lucrative publishing, endorsement, licensing and merchandising deals. P.J. has also helped his clients establish significant commercial ventures across the beauty, apparel, fragrance, automotive, technology and wellness industries. P.J. supports his clients' civic and philanthropic passions by assisting in the creation and execution of foundations devoted to causes including domestic violence education and prevention, mental health advocacy and cancer awareness and treatment.



MICHAEL S. SHERMAN

Partner, Reed Smith LLP

Michael is a partner in Reed Smith's Entertainment and Media Industry Group and leads the firm's motion picture, television and publishing industry group. His practice emphasizes high level transactions focused on these segments of the entertainment and media industries including representation of a diverse group of individual and institutional clients across the motion picture, television, publishing, digital, music, theatre, sports and other related industries.



JOANNA SUCHERMAN

Owner, JLS Media

As a highly visible and seasoned media executive with diverse experience, Joanna Sucherman has simultaneously excelled in both the creative and business ends of the entertainment world. She has spent her career analyzing consumer and industry trends and is respected by clients as both a strategic and innovative thinker.

Sucherman is the Owner of JLS Media, a full-service media consulting agency, where she specializes in high-end executive placement and executive coaching. Through the explosive growth of JLS

Media, Joanna has placed senior executives in multiple sectors, specifically focusing on entertainment. Her clients have included global media companies, including Disney, FOX, A&E, Lionsgate, Starz, Blumhouse, NBC, Fremantle, BBC Studios, MarVista Entertainment, 72andSunny, ITV Studios, HRTS, and River Road Entertainment.

Prior to launching her own company, Joanna was an SVP at Sucherman Group, a leading adviser for media organizations. While there, Joanna worked closely with companies on organizational design and development of programming functions within broadcast and cable news organizations.

Prior to joining SG, Joanna spent over a decade in the television broadcast and cable industry, producing a variety of cable television shows. Most notably, Joanna served as Executive Producer on several series at E! Entertainment.

Joanna launched JLS Media in 2015 with the goal of creating a synergistic company that offers both executive placement and executive coaching. She feels that coaching allows her to work closely with her clients, utilizing experience from her previous roles, thus helping clients to shape their careers and focus on long term goals.

Sucherman and her husband Scott Saltzburg live in Los Angeles.



KEVIN VICK

Partner, Jassy Vick Carolan LLP

Kevin Vick is a litigator with more than two decades' experience representing clients in the entertainment, media, technology, sports fashion and other industries. His trial and arbitration experience includes successfully defending motion picture companies and talent agencies in jury and bench trials. Kevin also has represented Broadway producers and sports agencies in arbitration on both the plaintiff's and defense sides. His appellate experience includes successful representations of major internet, media and entertainment clients, as well as individuals. He

litigates defamation, copyright, trademark, Section 230, publicity rights, idea submission, invasion of privacy, and anti-SLAPP matters, as well as business disputes involving breach of contract, trade secrets and partnerships. Kevin graduated with honors from Stanford University and Harvard Law School, and clerked for the Honorable Florence-Marie Cooper of the United States District Court for the Central District of California. He has been named a Super Lawyer in Intellectual Property Litigation by *Super Lawyers* magazine since 2015. Kevin speaks Spanish, having lived and worked in Barcelona, Spain for three years between college and law school, and has represented Spanish-language media clients in litigation.



MICHELLE WEINER

Co-Head of Books Department, Creative Artists Agency

Michelle Weiner is Co-Head of the Books Department at leading entertainment and sports agency Creative Artists Agency (CAA). Weiner is based in the Los Angeles office and represents many of the world's leading authors, writers, journalists, bloggers, and podcast creators, including Jenny Han (TO ALL THE BOYS I'VE LOVED), Hillary Jordan (MUDBOUND), Nathan Hill (THE NIX), Garrard Conley (BOY ERASED), Stephanie Danler (SWEETBITTER), Matthew Desmond (EVICTED), Jeffrey Eugenides (MIDDLESEX, VIRGIN SUICIDES, THE MARRIAGE PLOT), Ken Armstrong and T. Christian Miller

(ProPublica's AN UNBELIEVEABLE STORY OF RAPE), Maggie Shipstead (SEATING ARRANGEMENTS, ASTONISH ME, GREAT CIRCLE), Jennifer Weiner, Nana Kwame Adjei-Brenyah (FRIDAY BLACK), Flynn Berry (NORTHERN SPY), Ann Napolitano (DEAR EDWARD), and Kathleen Barber (TRUTH BE TOLD), among others.

Weiner began her career as an attorney at Hamrick and Evans. She joined CAA in 2006.

Weiner graduated from Colgate University with a Bachelor of Arts in English and Political Science, and the USC Gould School of Law with a J.D.



TOM WOLZIEN

Chairman, Wolzien LLC

Tom Wolzien is an inventor, analyst, and media executive. He created Wolzien LLC In 2005, after 14 years as a high profile sell-side analyst covering large publicly traded media and cable companies for the Wall Street research firm of Sanford C. Bernstein & Co, more than 15 years at NBC, and early years at local television stations and running an Army combat photography operation in Vietnam.

Since 2005 Wolzien has served as a consultant to senior managers at the largest media and technical organizations, including Warner Bros./Discovery (separately and together), Microsoft, CBS, Sony,

and The Directors Guild of America (DGA). At the DGA Wolzien provided industrial research for the Guild's "Forecast Project", setting research groundwork used in four negotiating cycles.

Wolzien holds more than two dozen patents in 16 countries, initially for methods linking mass media and the web ("go" or click to buy button on many cable remotes), and more recently covering management systems to put large numbers of IP video (smartphone) callers on television, and for caller management use in other industries. The global patent portfolio is managed by wholly owned Video River Group LLC.

During 14 years at Bernstein, Wolzien was internationally recognized for ground breaking research on the impact of industrial trends on media and communications companies. In 1995 he was the first on Wall Street to identify the potential of the cable modem and, later, cable telephony. In 2004 he was first to identify the potential what he then called the "internet bypass" or streaming delivery of entertainment video to consumers via broadband connection--the basis of all streaming video content today.

From 1976 to 1991 Wolzien was at NBC in news production and executive management. His positions ranged from White House field producer to an executive producer of scheduled and prime time programs. Beyond presidential campaigns, he led coverage of the nuclear incident at Three Mile Island and historic Began-Sadat Mideast visits. He helped start CNBC as Senior Vice President of Cable and Business Development.



KEN ZIFFREN

Partner & Co-Founder, Ziffren Brittenham LLP

Ken Ziffren is Co-Founder and Partner of Ziffren Brittenham LLP (1979-present), and was a partner at the predecessor law firm of Ziffren & Ziffren from 1966 to 1978.

As part of an extensive transactional practice in the entertainment and media industries, Ziffren served as a neutral mediator in resolving the Writer's Guild strike in 1988, acted on behalf of Starz in establishing a premium pay television service in 1994, and served as special outside counsel to

the NFL in negotiating contracts with the networks. He also provided counsel to Microsoft in forming MSNBC in 1996, and negotiated for DirecTV with studios on domestic and international pay-per-view agreements. In 2003, 2011 and 2018, Ziffren represented the TV Academy in negotiating the deals for the Emmys to be telecast over the four Networks, and in 2016 he represented the Motion Picture Academy (AMPAS) in implementing a long term extension deal with ABC.

Ziffren is a lecturer and writer on media and entertainment law. He is an Adjunct Professor at UCLA School of Law, teaching seminar courses in Network Television (1998-2004), Motion Picture Distribution (1998-present), and Special Television Issues SVOD/AVOD (2018-present). He also gives an annual presentation to Beverly Hills Bar Association, speaking every year since 2008.

Since 2014, Ziffren has been the "Film Czar" (Senior Advisor to the L.A. Mayor's Office of Motion Picture and TV Production) for the Mayor of Los Angeles, previously serving in this role with Mayor Eric Garcetti and currently serving in this role with Mayor Karen Bass. He is the Founder of the Ziffren Institute for Media, Entertainment, Technology & Sports Law at UCLA School of Law (established in 2016), and is a member of UCLA School of Law's Advisory Board, of which he formerly served as Chairman. He is also a member of the UCLA Campaign Cabinet.

Ziffren obtained his B.A. from Northwestern University, and J.D. from UCLA School of Law (Order of the Coif), where he was editor in chief of the UCLA Law Review. After graduation, he clerked for U.S. Supreme Court Chief Justice Earl Warren.

Chairpersons Emeriti Recognition



MATTHEW C. THOMPSON

Partner, Entertainment, Sports and Media, Sidley Austin LLP

Matthew Thompson is co-leader of the Entertainment, Sports and Media group firmwide. He represents entertainment companies and sources of capital in complex M&A and financing transactions, as well as general corporate matters. He also represents entertainment companies and other similar parties in a wide variety of industry-focused commercial transactions.

Matt currently serves as a member of the UCLA Entertainment Symposium Advisory Committee, is a member of the Ziffren Institute for Media, Entertainment, Technology and Sports Law Advisory Board, and is a member of the USC-BHBA Entertainment Institute Advisory Board. He holds a number of leadership positions at Sidley including serving on the Greater Los Angeles Practice Development Committee; SidleyWomen; and the Greater Los Angeles Finance Committee.

Matt is a Band 1 ranked Chambers USA (California Media & Entertainment: Transactional) lawyer (2023). Client feedback from the 2023 guide includes:

"Matthew Thompson has a thriving transactional practice, with particular expertise handling mergers and acquisitions. His client list includes prominent names in the TV and film industry."

"Matt is fantastic and has a vast understanding of the entertainment industry. On top of that, he is good to work with. He is realistic, efficient and drives great results."

"He calibrates resources appropriately, is a terrifically clear and concise communicator."

"He has a really great demeanor. Even in difficult situations, he manages to find a way through and is unflappable. Having Matt at the helm makes us confident."

Experience

Representative Media and Entertainment Matters Include:

- The Gersh Agency (the only remaining major talent agency without outside investment) and the Gersh family members, in a strategic partnership with private equity firm Crestview Partners, to support the agency's next phase of growth.
- Ben Affleck and Matt Damon in launching independent production company Artists Equity with a minimum US\$100 million investment from private equity firm RedBird Capital Partners, and in connection with Artists Equity's first project, "Air," which received a unique theatrical release in advance of its Amazon Prime debut.
- Warner Music Group and its affiliates in various media and entertainment transactions including:
 - The acquisition of 300 Entertainment and its roster of artists including Megan Thee Stallion, Young Thug, and Gunna.
 - The acquisition of Artist Partner Group and its roster of artists.
 - The acquisition of the entire recorded-music catalogue of iconic rock band Yes including albums such as Fragile, Close to the Edge, and 90125
- Universal Music Group in various media and entertainment transactions.
- Kapital Entertainment and its founder Aaron Kaplan (Million Little Things, The Neighborhood, The Chi, Women of the Movement, Black Cake, Housebroken, Delhi Crime, Santa Clarita Diet, Life in Pieces, etc.) in a nine figure, multi-year joint venture with Viacom/CBS.
- Connor Schell (longtime chief creative officer at ESPN and driving force behind 30 for 30, O.J.: Made in America, and The Last Dance) in the formation and financing of a joint venture known as Words + Pictures with Chernin Entertainment, to produce high-end unscripted audio-visual content.
- Connor Schell of Words + Pictures, and the co-founders and minority equity holders of 44 Blue Productions and Dorsey Pictures, in the formation of The North Road Company, to produce scripted and non-scripted film and TV content across the U.S. and international markets, with debt financing provided by Apollo and equity financing provided by Providence, including the merger of Words + Pictures into North Road, the elevation of Connor Schell to President and the acquisition of Red Arrow Studios' U.S. assets including 44 Blue and Dorsey Pictures.

- The Raine Group and several of its affiliates in the formation of Thrill One Sports & Entertainment, including:
 - The disposition of Thrill One Sports & Entertainment, encompassing brands Superjacket Productions (producers of the long-running Ridiculousness franchise), Nitro Circus, Street League Skateboarding, Nitro Rallycross, and Thrill One Media, to Fertitta Capital, and certain related transactions.
 - The acquisition of SuperJacket Productions (Ridiculousness, The Dude Perfect Show, Rob & Big, and Rob Dydrek's Fantasy Factory, etc.).
 - The acquisition of Street League Skateboarding, one of the world's premier street skateboarding competition leagues.
 - The merger into the group of Nitro Circus, one of the leading action sports live event producers in the world.
 - An equity raise led by Causeway Media Partners, a leading growth venture firm.
 - A debt raise led by MidCap Financial, an Apollo affiliate.
 - A long-term employment arrangement with new group CEO Joe Carr, former senior executive at UFC and the World Surf League.
- Dwayne Johnson, Dany Garcia and certain of their affiliates in connection with various corporate transactions including:
 - The launch of Teremana tequila through an industry unique global partnership and strategic alliance with Mast-Jägermeister, giving Teremana immediate access to its global network of retail, bar, and hospitality distributors.
 - The launch of ZOA, an energy drink, and its deals with financial backer Juggernaut Capital and distribution partner Molson Coors.
 - The acquisition of the XFL out of bankruptcy in partnership with RedBird Capital, and various ongoing matters including merger discussions with the CFL.
 - A joint venture with IMG to launch Athleticon, a multi-day live event focused on athletics, wellness and entertainment.
- Partners Rian Johnson and Ram Bergman (the team behind Star Wars: The Last Jedi and Knives Out) in launching film and television production company T-Street, and entering into a joint venture and first look arrangement with Valence Media's MRC Studio to fund T-Street's operations.
- The founders of NEON in the formation of NEON (Best Picture Winner Parasite; I, Tonya; amongst others) including an eight figure equity raise led by 30West, an eight figure revolving credit facility led by MUFG Union Bank and several significant corporate transactions including joint ventures.
- NEON in the formation of DECAL, a joint venture with Bleecker Street, launched to be leading provider of digital distribution solutions to independent film producers and distributors.
- ITV plc and ITV America in various media and entertainment transactions including:
 - The acquisition from Leslie Greif of the minority interest in Thinkfactory Media not previously owned by ITV.
 - The acquisition from the founders of High Noon Entertainment of the minority interest in High Noon Entertainment not previously owned by ITV.
 - The acquisition from the founder of Loud Television of the minority interest in Loud Television not previously owned by ITV.
 - The acquisition from the founder of Outpost Entertainment of the minority interest in Outpost Entertainment not previously owned by ITV.
- IPC Television, its equity holders, and its founder Eli Holzman in various entertainment transactions including:
 - The sale of IPC to Core Media (American Idol, So You Think You Can Dance, 90 Day Fiancé) and the relaunch of the combined entities as Industrial Media with Holzman as CEO.
 - The sale of Industrial Media to Sony and the elevation of Holzman to President of Sony Non-Fiction with responsibly for all of Sony's non-fiction television operations.
- PSP Investments, together with Investcorp, in making a significant minority investment in United Talent Agency.
- Access Industries and its affiliate, Access Entertainment, in various media and entertainment transactions.
- Shamrock Capital Advisors and certain of its affiliates in various media and entertainment acquisitions and dispositions.
- Conan O'Brien, Jeff Ross, Team Coco, and certain related entities in various entertainment transactions including:
 - The sale of Team Coco, Conan O'Brien's podcast network and digital media business, to SiriusXM. Team Coco includes O'Brien's award-winning podcast, "Conan O'Brien Needs a Friend," along with a variety of other podcasts.

Under the new agreement, Team Coco will continue to produce the network's slate of podcasts and collaborate with SiriusXM to produce an original Team Coco comedy channel. The deal also includes a five-year talent agreement for O'Brien to remain host of his namesake podcast.

- A high-value transaction with TBS, including the multi-year renewal of the late-night talk show Conan and the establishment of a global partnership with TBS spanning television, digital media, branded content, podcasting, mobile gaming, pay TV, social, and live events.
- TPG Growth and its affiliates in various media and entertainment transactions.
- A private equity sponsor with 11 figures under management in various media and entertainment transactions including the disposition of its interests in two separate slates of studio-produced films to other private equity sponsors.
- A family office with 11 figures in assets in various media, entertainment and sports-related transactions.
- Entertainment One Limited in numerous transactions including:
 - Key management, including CEO Darren Throop, in connection with Hasbro's US\$4 billion acquisition of Entertainment One, including the negotiation of long-term, post-acquisition employment arrangements.
 - The acquisition of unscripted television production company Blackfin and the negotiation of a long-term employment arrangement with Blackfin's founder, Geno McDermott, whereby he was appointed eOne's President, US Alternative Programming.
 - The nine-figure acquisition of an initial 51 percent interest in The Mark Gordon Company in 2015, the follow-on acquisition of the remaining 49 percent interest in The Mark Gordon Company in 2018 and the consummation of a multi-year exclusive producer arrangement with Mark Gordon in 2019.
 - The acquisition of a controlling interest in Sierra Pictures in 2015, the follow-on acquisition of the unowned portion of Sierra Pictures in 2018 and the entering into of long-term employment agreements with Nick Meyer and Marc \ Schaberg.
 - The eight-figure minority investment in Steven Spielberg's Amblin Partners.
 - The 2016 eight-figure acquisition of a controlling interest in Renegade83 (Naked and Afraid) and the 2022 follow-acquisition of remaining interest in Renegade83 not acquired as part of the initial transaction.
 - The significant minority investment in, and strategic partnership with, Canvas Media Studios.
 - Several long-term distribution arrangements including, with Renegade83, Sierra Affinity, Amblin Partners and The Mark Gordon Company.
 - The eight-figure investment in startup studio, Creative Labs, an affiliate of Creative Arts Agency.
 - A joint venture with Round Room Entertainment to create Round Room Live, a live touring business.
 - The acquisition of 100 percent of Dualtone Music Group.
- Mark Burnett, Roma Downey, and affiliated entities in numerous transactions including:
 - Sale of MGM to Amazon for US\$8.45 billion.
 - Formation of One Three Media, a joint venture with Hearst Entertainment, resulting in shows including Are You Smarter Than a 5th Grader?, Shark Tank, and The Voice.
 - The nine-figure sale of a controlling interest in One Three Media, Mark Burnett Productions, and Lightworkers Media (a joint venture between Mark Burnett and Roma Downey) to MGM and the launch of United Artists Media Group.
 - The nine-figure sale of Mark Burnett, Roma Downey, and Heart Entertainment's retained equity in UAMG to MGM and Mark Burnett's elevation to President of Television at MGM.
 - One Three Media in the acquisition of a minority interest in Lucha Libre FMV.
 - One Three Media in a multi-property distribution arrangement with Netflix.
 - One Three Media in a multi-year arrangement with Procter & Gamble to produce and exploit the People's Choice Awards.
 - One Three Media in a straight-to-series long-term licensing arrangement with NBCU for the financing, production and exploitation of A.D.
 - One Three Media in a long-term distribution arrangement with MGM.
 - Lightworkers Media in an eight-figure P&A arrangement with Fox.
- W.K. Kellogg Foundation in making a significant investment in Charles King's multicultural media company, Macro Entertainment, alongside other investors, including the Emerson Collective (Laurene Powell's investment vehicle), the Ford Foundation, and The Libra Foundation.

- Pilgrim Studios and its principals in a nine-figure strategic transaction and long-term distribution arrangement with Lionsgate together with a follow-on transaction whereby Craig Piligian entered into a multi-year employment extension with Lionsgate pursuant to which he was elevated to Chairman of Pilgrim and President of Non-Fiction at Lionsgate.
- Alliance Holdings in various transactions including:
 - The acquisition of a significant interest in a portfolio of media and entertainment assets, including interests in prominent films and television shows.
 - The acquisition financing in connection with its acquisition of a significant interest in a portfolio of media and entertainment assets, including interests in prominent films and television shows.
- Orion Entertainment and its principals in an eight-figure disposition of a controlling interest to Red Arrow Entertainment (a ProSiebenSat.l holding company) and in connection with a long-term distribution arrangement with Red Arrow Entertainment.
- 44 Blue Productions and its principals in an eight-figure disposition of a controlling interest to Red Arrow Entertainment (a ProSiebenSat.1 holding company) and in connection with a long-term distribution arrangement with Red Arrow Entertainment.
- Leftfield Entertainment and its principals in numerous transactions including:
 - Nine-figure disposition of an 80 percent interest to ITV plc and the follow-on disposition of the remaining 20 percent.
 - The eight-figure acquisition of a controlling interest in Sirens Media.
 - An eight-figure syndicated acquisition facility led by SunTrust.
 - A long-term distribution arrangement with ITV plc.
 - Establishment of joint ventures with production companies and producers.
- Bunim/Murray Productions and its principal in the nine-figure disposition of a controlling interest to Banijay Entertainment.
- AwesomenessTV (a Dreamworks Animation, Hearst Entertainment and Verizon company) in a complex, multijurisdictional joint venture with Endemol Shine Group (a joint venture of Apollo and Fox).
- Relativity Media in numerous transactions including:
 - Multiple nine-figure syndicated P&A credit facilities.
 - A nine-figure syndicated Ultimate's credit facility.
 - A nine-figure corporate reorganization/recapitalization including syndicated senior and mezzanine credit facilities.
- Comerica in connection with several syndicated senior credit facilities and numerous single-picture loan agreements.

*Some of the above matters were handled prior to joining Sidley.

Awards and Recognitions:

- Named a "Top Music Lawyer" by Billboard Magazine (2023)
- Named a "Top 100 Lawyer" by the Daily Journal in a list recognizing the top 100 California lawyers for cutting-edge legal work (2019)
- Named in Variety's "Variety500", an annual collection of the world's most impactful people working in media and entertainment (2019–2022)
- Named an honoree in Variety's "Legal Impact Report" (2012–2013, 2016–2023)
- Named a "Top 100 Power Lawyer" by The Hollywood Reporter (2012–2023)
- Ranked for California Media & Entertainment: Transactional by Chambers USA (2016–2022)
- Featured in Variety's "Dealmakers Impact Report" (2011, 2013–2022)
- Named among The Hollywood Reporter's "Top Dealmakers" in a list recognizing those behind Hollywood's most significant deals of the year (2017–2022)
- Named a "Sports/Gaming/Entertainment Law Trailblazer" by The National Law Journal (2021)
- Shortlisted for "Most Outstanding Deal of the Year" by The Deal for his work on the MGM sale to Amazon for US\$8.45 billion, recognizing the leading lawyers driving the market forward (2022)
- Shortlisted for "Entertainment & Media Dealmaker of the Year" by The Deal, recognizing the leading lawyers in middlemarket transactions (2019)
- Named to The Best Lawyers in America for Entertainment Law Motion Pictures and Television by Best Lawyers (2016–2022)
- Named to The Best Lawyers in America for Media Law by Best Lawyers (2016–2022)
- Recommended for M&A by International Financial Law Review (IFLR) 1000 (2017)
- Named a "Leading Lawyer" by The Legal 500 US for Media, Technology and Telecoms: Media and Entertainment (2017)
- Named one of the "Top Dealmakers" by Broadcasting & Cable (2015)
- Named one of California's "Top 50 Entertainment Lawyers" by the Daily Journal (2014)

Publications

- Quoted in, "Attorneys Oversee Celebrity Clients' Jump into Business Ventures," Daily Journal, January 3, 2017.
- Featured in, "Making Waves in Hollywood," UC Hastings Law Magazine, Spring 2016.
- Quoted in, "Century City Welcomes Back Sidley," Century City News, March 8, 2016.
- Quoted in, "Mergers, Chinese investment highlight 2015," Daily Journal, January 4, 2016.
- Quoted in, "Hollywood Dealmakers Say Uncertainty is Boosting Business," Daily Journal, November 25, 2015.
- Quoted in, "Digital Marketplace Creates Boundless Distribution Opportunities for Indie Films," Daily Journal, August 20, 2015.

Events

- Moderator, "TV M&A: Forget Binge Viewing, How About Binge Buying!" 39th Annual UCLA Entertainment Symposium, Westwood, CA, March 13, 2015.
- Speaker, "Enter the Mega-Indie: The New Face of M&A," Realscreen West, Santa Monica, CA, 2014.
- Speaker, Beverly Hills Bar Association 2012 Year in Review, Beverly Hills, CA, 2012.
- Speaker, Film, Television and New Media Law Conference, Los Angeles, CA, January 27–28, 2011.

Admissions & Certifications

• California

Education

- University of California, Hastings College of the Law (J.D., 1991)
- University of California, Berkeley (B.A., 1988)



LAWRENCE ULMAN

Retired Partner, Gibson Dunn & Crutcher LLP

Lawrence Ulman is an industry leader in media finance and has been instrumental in shaping the areas of slate financings, international tax advantaged film financings, and innovative and complex media co-financings and loan arrangements. He recently retired from NBCUniversal as a Senior Vice President in the finance and tax group. Prior to joining NBCUniversal, he retired as a senior partner and Co-Chair of the Media & Entertainment Practice at Gibson, Dunn & Crutcher LLP.

In 45 years as a lawyer and executive in the media and entertainment area, Lawrence has regularly represented film studios in their film distribution and financial matters and banks, private equity firms and financiers providing production financing for theatrical motion pictures and television.

His expertise includes negotiating film slate financings; international tax advantaged film financing transactions; acquisitions of film rights for foreign and domestic film companies; representation of financial institutions in innovative and complex loan arrangements, including film securitizations and credit enhanced and gap lending arrangements; representation of completion guarantors insuring the completion and delivery of independent and major theatrical motion pictures and representation of companies in their advertising campaigns with the major film studios. He also has experience in representing sellers and buyers of film rights and negotiating output and other forms of film and television acquisition agreements.

Clients with which he had a substantial and long-term relationship include Universal Pictures, Warner Bros., New Line Cinema, Paramount Pictures, Twentieth Century Fox, Focus Features, Fox Searchlight, Fireman's Fund, Morgan Stanley, Bank of America, Volkswagen AG, Chrysler, Platinum Equity, and Constantin Film. For five years, he taught entertainment finance at the USC Graduate School of Cinematic Arts.

He is the Co-Chair of the UCLA Entertainment Symposium and a member of the Advisory Board of the USC Entertainment Law Institute. He regularly speaks at media events and has spoken at the Film Finance Forum, UCLA Entertainment Symposium, UCLA Law School, USC Entertainment Symposium, CLE Fora on Entertainment Law, American Film Market, Berlin Film Festival, Beverly Hills Bar Association, and ABA Entertainment Conferences.

He is a graduate of the USC Dornsife College of Letters, Arts, and Sciences, UCLA Anderson Graduate School of Business, and the USC Gould School of Law.



FRIDAY, JUNE 9, 2023 2:20 - 3:10pm PDT

The Price of a Name: Navigating the World of Fictionalized True Stories and Celebrity Endorsements

Moderator: **Diana Palacios** *Partner,* Davis Wright Tremaine LLP

Panelists: **Lisa Callif** *Partner*, Donaldson Callif Perez, LLP

Ann Brigid Clark Shareholder, Greenburg Traurig

Kevin Vick *Partner,* Jassy Vick Carolan LLP

TABLE OF CONTENTS

THE PRICE OF A NAME: NAVIGATING THE WORLD OF FICTIONALIZED TRUE STORIES & CELEBRITY ENDORSEMENT

- A. Outline of Topics/Issues
- B. "To Acquire or Not To Acquire Life Rights," Lisa A. Callif, Intellectual Property Magazine (April 2016)
- C. "Tax and Estate Planning for Postmortem Celebrity," Bradford S. Cohen and Scott J. Loresch, Los Angeles Lawyer (May 2017)
- D. "The Life Story Rights Puzzle," Jorge L. Contreras and Dave Fagundes, Harvard Sports & Entertainment L.J. (forthcoming)
- E. Hoffman v. Capital Cities/ABC, Inc. (9th Cir. 2001)
- F. Porco v. Lifetime Entertainment Services, LLC (N.Y. App. Div. 2017)
- G. De Havilland v. FX Networks, LLC (Cal. Ct. App. 2018)
- H. Greene v. Paramount Pictures Corp. (2nd Cir. 2020)
- I. Order Denying Motion to Dismiss and Denying Motion to Strike, Gaprindashvili v. Netflix, Inc. (C.D. Calif. 2022)
- J. "SEC Charges Kim Kardashian for Unlawfully Touting Crypto Security," U.S. Securities and Exchange Commission (October 3, 2022)
- K. "Celebrities Shilling Crypto Face More Than Just Mockery," The Hollywood Reporter (December 16, 2022)
- L. "The FTC's Endorsement Guides: What People Are Asking," Federal Trade Commission (August 27, 2020)
- M. "In a Pickle?: Vetting and Litigating Docudramas," Jean-Paul Jassy, Communications Lawyer (forthcoming)
- N. MCLE

THE PRICE OF A NAME: NAVIGATING THE WORLD OF FICTIONALIZED TRUE STORIES AND CELEBRITY ENDORSEMENTS

OUTLINE OF TOPICS/ISSUES

FILM AND TELEVISION ARE SO OFTEN BASED ON THE STORIES OF ACTUAL PEOPLE AND REAL-LIFE EVENTS. A FEW RECENT EXAMPLES INCLUDE THE FILMS TILL AND AIR AND THE LIMITED SERIES DOPESICK, PAM & TOMMY AND THE DROPOUT. STUDIOS AND PRODUCTION COMPANIES FREQUENTLY GO OUT OF THEIR WAY TO ACQUIRE AN INDIVIDUAL'S "LIFE RIGHTS" OR PARTNER WITH CELEBRITIES TO TELL THEIR STORIES. WHAT IS THE PRICE OF A CELEBRITY'S NAME, LIKENESS AND LIFE RIGHTS? ARE LIFE RIGHTS NECESSARY TO TELL SOMEONE'S STORY? THIS PANEL DELVES INTO THE FINANCIAL AND NON-FINANCIAL ISSUES SURROUNDING THE PRODUCTION OF FICTIONALIZED TRUE STORIES AND CONTENT THAT IS INSPIRED BY TRUE EVENTS. WE WILL ALSO EXAMINE THE WORLD OF CELEBRITY ENDORSEMENTS, THE INHERENT RISKS IN TALENT LENDING THEIR NAMES TO PROMOTE PRODUCTS OR SERVICES, AND HOW TO AVOID COSTLY MISTAKES THAT CAN DAMAGE A CELEBRITY'S REPUTATION OR BRAND IN THE MARKET.

To Acquire or Not to Acquire – Life Rights

By: Lisa A. Callif

Writers get inspired to write a script after they've read an article about a real-life hero in *Vanity Fair*. Producers see a great idea for a film after they've read an interesting OpEd piece in the *New York Times*. The first question that person asks herself – how do I get the rights? That's not necessarily the right question. The question you should ask yourself is "DO I need to get the rights?"

Historically, movies based on true stories were not made unless the rights to the individuals involved in the story were acquired. Producing movies has been dominated by a culture of big studios with deep pockets that would always obtain life rights whether they were producing a movie based on the life of Martin Luther King, Jr. or someone's next-door neighbor. Today, the picture is much different with more and more independent films being produced and financed without studio involvement. Independent producers have smaller pockets and aren't tied to the policies, standards and practices of studios. Some are beginning to realize that the First Amendment extends to making a movie – even a fictional one.

So how does one decide whether she needs to obtain life rights before embarking on making a film about that person?

Public Domain Facts VS. Copyrightable Expression

Let's first take a brief look at public domain. Facts and events are in the public domain. No one can "own" the date of an election or the fact that the grass is green or the fact that 2 + 2 = 4. However, if you write about any of these facts in an original way, your original writing is protected by copyright. If you hear or read an account of a true event, you can use the facts to your heart's content: you just can't use the other person's way of telling about those facts.

Using this logic, it becomes apparent that the facts related to a person's life story are also public domain. Although perhaps more interesting than 2 + 2 = 4, Gwyneth Paltrow's divorce from Chris Martin is a fact. One can search court records and get information about the divorce proceedings – all facts. The birth of Charlotte to Prince William and Kate Middleton, also a fact. Anyone can write about these interesting facts without obtaining permission to do so. What one cannot do is take the way in which these facts are "expressed" or written and use them without permission.

The essential ingredient present in creations, but absent in facts, is originality. That is what a court said in regards to a copyright suit between CDN, the publisher of *Coin Dealer Newsletter*, and Kenneth Kapes, the operator of a coin business who put together a compilation of the retail prices of many coins using CDN's wholesale price lists. It seems obvious that a wholesale price list would be considered a list of pure facts, yet the court concluded that CDN's prices contained sufficient originality to merit copyright protection. The list of prices qualified for copyright because CDN used "its considerable

expertise and judgment" to construct the list and overall the prices were "created, not discovered."

Accordingly, if you love the expression of the *Vanity Fair* article and want to use the story as written in the article, you had better get the rights to that article. On the other hand, if you are simply culling facts from that *Vanity Fair* article, and it is one of many sources that you are using to craft your own story, you don't need to. The question to ask yourself is – am I telling a story that has already been told? Or am I using facts to create my own story?

So Why Should I Acquire Life Rights?

Even when something is in the public domain, it is often a good idea to acquire an underlying property. It makes studios and financiers feel more comfortable. You can sign a contract directly with the person whose story you wish to tell, or you can purchase the film rights to a book or magazine story about that person. The reasons are several fold.

First, it makes it easier to obtain Errors & Omissions (E&O) insurance, which provides you with coverage if anyone portrayed in your film decides to sue you. People possess rights of privacy and publicity that you cannot invade, and a right not to be put in a false light. When you purchase someone's life story rights, they waive the right to file a lawsuit based on a violation of those rights. In fact, it is the waiver of the right to sue you, no matter what you do to the person's life story, that is at the heart of the Life Story Rights Agreement.

The second advantage of buying underlying rights is that the writer of such a story may very well have some juicy, hard-to-find information that was not used in the article that he or she may share with you if you purchase the film rights to the story. In fact, the person who lived the story always has such information. The story of Charlotte's birth would likely be much more interesting if you have Kate Middleton's cooperation and participation. Simply put, you often make a better movie with the participation of these people.

Finally, it often helps to have a spokesperson for publicity purposes who is familiar with or directly involved with the subject, but is not a direct participant in making the film. Purchasing film rights from a person usually makes them available for such promotional purposes.

A Life Story Rights Agreement is not really an acquisition of an underlying right because, as discussed above, all of the facts of this person's life are in the public domain. Rather, it is a person's waiver of certain personal rights and an agreement by them to cooperate and consult in the making of the film of which they are a subject. The Agreement is formatted like a normal acquisition of underlying rights because that is the tradition in Hollywood, and because most lay persons have the notion that they own something called life story rights. Besides, no one would sign it if it were correctly labeled as a "Waiver of Right to Sue No Matter How Badly You Muck up My Life."

The Amy Fisher Story

One of the best examples of the interplay between public domain facts and life story rights is the Amy Fisher story. Amy Fisher was a seventeen-year-old girl who claimed to have had an affair with body shop owner Joey Buttafuoco. Three different television networks made her story into three different movies. Here is the chronology:

May 19, 1992	Amy goes over to Joey's split-level house on Long Island with a gun. Joey's wife, Mary Jo Buttafuoco, answers the door and takes a bullet to the head.
May 20, 1992	The story is fast becoming the hottest tabloid tale of the moment.
June, 1992	NBC purchases the life story rights of Amy Fisher. Tri-Star purchases the life story rights of Mr. and Mrs. Buttafuoco. ABC purchases nothing: They will rely on public domain material.
Dec. 1, 1992	Amy Fisher enters a plea bargain and is sent to jail for five to fifteen years.
Dec. 28, 1992	NBC airs <i>Amy Fisher: My Story</i> , starring Noelle Parker. This is the tale told through the eyes of Amy herself.
Jan. 3, 1993	ABC airs <i>Beyond Control: The Amy Fisher Story</i> , starring Drew Barrymore. They base it exclusively on public domain facts as they were reported in the transcripts of the trial and in the press.
Jan. 3, 1993	CBS airs <i>Casualties of Love: The Long Island Lolita Story</i> , starring Alyssa Milano. This is the Buttafuoco side of things.

As you might guess from the above, NBC portrayed Joey as an adulterous lover and portrayed Amy more kindly. CBS portrayed Joey as an innocent victim of Amy's obsession. ABC, relying on public domain material found in news accounts, didn't draw conclusions about who was right or wrong or good or evil. One thing is for sure: Amy shot Mary Jo, and for that she sat in jail.

Astonishingly, each made-for-television movie was a genuine ratings success. Even the network executives involved were "stunned" (their word). One NBC executive said, "It's sad . . . it's crazy."

ABC's telling of the Amy Fisher tale garnered the highest rating of the three networks without buying any life story rights. They saved their money and spent it on a star, Drew Barrymore. HBO did the same thing with the same high rating result when they made, *The Positively True Adventures of the Alleged Texas Cheerleader-Murdering Mom*, starring Holly Hunter. That film was based on public domain matter, including a tape-recorded conversation with "Mom" that was originally taped for the police investigating Mom. The conversation was spoken verbatim by the actors in the film.

The Many Faces of Nelson Mandela

A more recent example of the interplay between public domain facts and life story rights can be found in the numerous docudramas portraying the life of Nelson Mandela. Since 2007, the former South African president and anti-apartheid revolutionary has been depicted in film several times. I will discuss two of them here.

In 2007, independent filmmaker Bille August made *The Color of Freedom*, a film from the perspective of prison guard James Gregory, who guarded Mandela when he was imprisoned as a young revolutionary. The film was based on Gregory's autobiography *Goodbye Bafana: Nelson Mandela, My Prisoner, My Friend.* So, when August made the film, he only acquired the rights to Gregory's book. He did not acquire any life story rights. All information in the film, beyond that which was taken from Gregory's book, was based on facts. Facts are in the public domain.

August's film, starring Joseph Fiennes and Dennis Haysbert, was neither a critical nor a financial success. In part, the film was criticized for contradicting many other accounts of Nelson Mandela's story. The film adopted many of the same flaws found in the book.

In 2011, came *Winnie Mandela*, produced by Equinox Films. The film, which starred Jennifer Hudson and Terrance Howard, followed the life of Nelson Mandela's ex-wife, Winnie Mandela. The film was based on the biography, *Winnie Mandela: A Life*, by Anne Marie du Preez Bezrob. And while they got the rights to that book, the filmmakers did not get Winnie Mandela's life story rights when making the movie. In fact, Winnie Mandela openly criticized the movie for not obtaining her permission and for delving only superficially into her life story. *Winnie Mandela* was a flop.

Some Practical Advice

As you can see, life story rights are not necessary to make a film about someone's life as long as the story is based on facts. While, as discussed above, there are many good reasons to obtain such rights, attempting to obtain them can often prove to be difficult if not impossible. We have had many clients seek to acquire life rights only to find that the subject would only participate if he/she had certain approval rights with regard to the script and the film, wanted unreasonable amounts of money for such rights, or proved to be so difficult the filmmaker wished they had just proceeded without even trying to obtain the rights. Additionally, sometimes, by avoiding the costs associated with acquiring those rights, you can use that money on things that will hopefully make your film more successful, like attaching a big-name star or facilitating deeper character research and development.

The downside of not getting life story rights is that the real-life individuals on which the characters are based might be less supportive or helpful, like the situation with Winnie Mandela discussed above. That said, the permission and support of the subject might not necessarily lead to success either.

Something a filmmaker should always keep in mind is the risk of asking for life rights, but not successfully acquiring them. This can become a real problem when seeking to obtain E&O insurance. The application for E&O insurance always has a question that

reads something like, "have you negotiated for and failed to acquire a license for the rights of any person featured in your film?" If you have to answer that question "yes," the underwriter will likely view that as what I like to refer to as, a "pre-existing condition" (to analogize it to health insurance) and will not provide coverage for claims filed by that person from whom you failed to obtain rights. That could put a stop to your film. Before asking for rights, be pretty darn sure you'll be able to acquire them.

Our office often represents filmmakers who want to produce a film without obtaining the rights of the individuals depicted in the film. We review the film at the script stage, before shooting. We read the script and the documentation that supports the facts set forth in the script (e.g., articles, books, news stories and court records) to ensure there are no viable personal, privacy or publicity rights claims. We look not only at the content of the documentation, but also the source of the information, which is quite important in our analysis. We advise that our clients have two independent sources for each fact. If you are basing your film on accounts from tabloids and you are treating those stories as gospel, we very well may have a problem and may not be able to issue a favorable opinion. Having multiple reliable sources is crucial.

If a client fictionalizes scenes, which is commonly the case, we review those scenes carefully. We work with the filmmaker to ensure the fictionalization naturally stems from factual events and such fictionalization does not defame the person or put him in a false light. Courts have recognized that some fictionalization in a film based on a true story is often necessary and have held that it is okay to create some fictional "embroidering" with regard to episodes in which no facts are known. *See Bindrim v. Mitchell*, 92 Cal. App. 3d 61, 78 (Cal. Ct. App. 1978).

The goal of our review is to obtain E&O insurance at the script stage so that the filmmaker is protected (financially) from any potential claims. Importantly, obtaining E&O provides comfort to financiers and distributors as they know the project is viable even without the life rights.

The bottom line: As a filmmaker, whether or not you acquire life story rights for a story based on public facts will ultimately be your decision. Remember, facts are in the public domain. So if you feel that you can successfully and accurately tell the story without any help or guidance from the subject, then go right ahead. The law does not require you to acquire the life story rights to do so.

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Tax and Estate Planning for Postmortem Celebrity

By Bradford S. Cohen and Scott J. Loresch Los Angeles Lawyer May 2017

Moviegoers who sat down to watch the latest *Star Wars film, Rogue One: A Star Wars Story*, may have been surprised to see a middle-aged Peter Cushing reprising the role of Grand Moff Tarkin, the ruthless overseer of the Death Star's construction. Since Cushing passed away in 1994 at the age of 81, the posthumous performance could only be that of an impersonator or the work of a cutting-edge special effects studio. To those in the movie industry, the performance represents a notable achievement in special effects.¹ To trusts and estates practitioners, the posthumous performance raises a number of other questions: Does a studio have the right to use a celebrity's image after his or her death? If so, is there any way to plan ahead to avoid the misappropriation of a celebrity client's likeness after death? If a posthumous performance can generate income for the performer's estate or its beneficiaries, what are the income and estate tax implications? How can the income and estate tax impact be minimized? These questions all touch on the treatment of the right of publicity after a celebrity's death.

There is no single, clear definition of the right of publicity, but it may be defined generally as the right to use an individual's name, image, likeness, or persona. The right of publicity can be distinguished from copyright in that copyright law protects the owner of a work, whereas the right of publicity protects the person depicted in that work. For example, a photographer may hold a copyright to a given photograph and may bring an action under federal copyright law for a third party's unauthorized use of the photograph. In contrast, the subject of the photograph would not have a claim under copyright law for the unauthorized use since he or she does not own a direct interest in the photograph. Instead, the subject's claim must be that the unauthorized use of the photograph violates a more personal right by, for example, suggesting a personal endorsement or involvement, creating unwanted associations with the subject's likeness, or profiting from a persona that the subject, at least intuitively, feels should belong only to him or her.

Publicity rights are more analogous to federal trademark rights, which prevent one person from commercial use of words, terms, names, or symbols that are likely to mislead or deceive consumers regarding association with another person or mislead consumers regarding the quality or origin of a product or service.² Right of publicity and trademark may overlap, for example, when there is false endorsement, unauthorized commercial use of a celebrity's likeness, falsely suggested endorsement, or the likelihood of consumer confusion.³ However, federal trademark law is concerned more with misrepresentation regarding the commercial source of a product—whether an individual, a corporation, or otherwise—whereas the right of publicity is concerned with unauthorized commercial use of an individual's name, likeness, or other distinguishing characteristics.⁴

In contrast to other intellectual property rights, such as copyrights, trademarks, and patents, federal law does not currently provide direct protection for an individual's right of publicity.⁵ Instead, the right of publicity developed under state common law as an outgrowth of the common law right to privacy.⁶ Currently, 38 states provide a right of publicity under statute, common law,

or both.⁷ While each of these states protects at least the individual's name and likeness, the protection provided by states varies widely in scope, with some states explicitly extending protection to an individual's photograph, voice, signature, and appearance—even gestures and mannerisms.

After death, state laws diverge further in protection of publicity rights. A majority of states do not extend rights of publicity after death. Of the states that do provide a right of publicity after death, 15 states—including California— currently provide statutory protection⁸ and six states currently provide protection under common law.⁹

California's right of publicity statute was originally enacted in 1971.¹⁰ Under the statute in its original form, rights of publicity did not extend beyond a celebrity's death. In 1979, in a case brought by the heirs of Bela Lugosi against Universal Pictures, the California Supreme Court reversed a trial court ruling that had held that Lugosi's heirs were entitled to recover the profits made by the defendant for use of Lugosi's likeness, directing the trial court to enter a judgment in favor of Universal Pictures.¹¹ In 1984, in part in response to *Lugosi v. Universal Pictures*, the California legislature enacted what is now Civil Code Section 3344.1, extending the right of publicity beyond death and making the right inheritable by a celebrity's heirs and assignable to a celebrity's beneficiaries.¹² In 1999, the California legislature further expanded the postmortem right of publicity by extending the length of the right from 50 to 70 years after the celebrity's death.¹³ In 2007, in response to litigation around the estate of Marilyn Monroe, California enacted a further amendment to Section 3344.1, which explicitly extends the postmortem right of publicity to celebrities who died before January 1, 1985, and which explicitly allows for transfer of the postmortem right of publicity in contracts, trusts, or other testamentary instruments executed before January 1, 1985.¹⁴

Perhaps unsurprisingly, California is among the states that provide the strongest protections for publicity rights after death.¹⁵ In contrast, New York does not currently provide post-mortem protection for an individual's right of publicity. Given the disparity among state protections after death, the state in which a celebrity was domiciled at the time of his or her death can be the determining factor in whether the celebrity's right of publicity continues to have lasting value to beneficiaries, as the successors to Marilyn Monroe's estate discovered. Despite the fact that Monroe's estate was probated in New York after her death in 1962, a successor to Monroe's estate attempted to enforce Monroe's posthumous right of publicity in California, based on Monroe's ties to California at the time of her death, against a company that was selling unauthorized merchandise bearing Monroe's likeness and photographs. In response to the Monroe litigation, the California legislature passed a law clarifying that even the rights of publicity of decedents who died before the January 1, 1985, effective date of California's posthumous right of publicity statute, were protected under the statute.¹⁶ However, a federal district court, affirmed by the Ninth Circuit, held that Monroe's estate was estop ped from claiming California domicile, since Monroe's executor repeatedly took the position that she was domiciled in New York in probate and other proceedings.¹⁷

In light of the wide range of states' ap- proaches, lack of uniformity, and increasingly national and even global scope of the use of publicity rights, some commentators have called for a federal statute addressing right of publicity.¹⁸

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Given the expanding scope of publicity rights after death, a celebrity's estate planning advisors should plan ahead for the postmortem management of these rights. Just as an individual's estate planning documents may name an investment advisor to assist in management of the estate's investments or a business manager to assist in oversight of a business held by the estate, a celebrity's living trust (or the irrevocable trust to which the celebrity's publicity rights are transferred) should name an individual or team responsible for management of the client's publicity rights after death. This person or team should include an experienced entertainment lawyer and business manager, not necessarily the client's executor, trustee, agent, or family. Not only can such an appointment help to maximize the value of the celebrity's publicity rights, but it also may avoid conflict among the celebrity's beneficiaries and avoid saddling an executor or trustee with the responsibility of navigating business negotiations after the celebrity's death. If the celebrity has specific wishes regarding how his or her publicity rights should or should not be used after death, estate planning documents should provide direction to the publicity rights manager. For example, Robin Williams's living trust reportedly provided that his right of publicity should not be exploited during the 25-year period following his death.¹⁹ It is not yet clear, however, the extent to which such limitations on exploitation of a celebrity's publicity rights may be considered when valuing a celebrity's posthumous publicity rights for estate tax purposes.

As advances in technology expand the ways in which celebrities' likenesses are utilized after death, the tax implications of publicity rights after death will also become increasingly important. In considering a given right held by a decedent's estate, a threshold question for the estate tax practitioner is whether the right represents an asset or an income stream for tax purposes. If the right is an asset, it may be subject to estate tax²⁰ and receive a "step up" in its tax basis equal to the right's fair market value.²¹ If the right is instead an income stream derived from the personal efforts of the decedent during his or her lifetime (or "income in respect of the decedent"), it would not receive this tax basis adjustment (or step-up), but would still be subject to estate tax.²²

Among the first cases to address directly whether a decedent's right of publicity was an asset to be included in a decedent's gross estate for federal estate tax purposes was *Estate of Andrews v. United States.*²³ V.C. Andrews was an author of young adult paperback novels in the 1970s and 1980s. When she died in 1986, Andrews's publisher sought to capitalize on the record demand for her novels by continuing to release books under her name. With the agreement of the executor of Andrews's estate and her surviving family, a ghost writer was hired to write first one and then several additional novels, which were released under Andrews's name and went on to commercial success. Andrews's estate tax return did not include the right to use Andrews's name as an asset, and on audit of the estate tax return, the IRS determined that Andrews's name was an asset with a fair market value of over \$1 million, based on the anticipated revenue stream from the posthumous publication of ghostwritten novels. The U.S. District Court for the Eastern District of Virginia held that Andrews's name was an asset of the estate and had a value of \$703,500 on her date of death.

More recently, the valuation of a celebrity's right of publicity arose in the estate of Michael Jackson. In reporting the value of Jackson's right of publicity on his estate tax return, the executor of Jackson's estate initially claimed the right of publicity to be worth just \$2,105 at the time of his death in 2009,²⁴ based on an analysis of the modest earnings generated by Jackson's publicity rights in the years leading up to his death.²⁵ In an audit of Jackson's estate, the IRS initially claimed

that Jackson's publicity rights were worth more than \$400 million at the time of his death;²⁶ however, prior to trial, the IRS revised this valuation downward, to \$161 million.²⁷ Hearings before the Tax Court regarding this issue took place in February 2017.²⁸

If the decedent's right of publicity is an asset of his or her estate, rather than income in respect of the decedent, estate planning practitioners must also consider whether the right of publicity constitutes a capital asset for income tax purposes in the hands of the estate and its beneficiaries. If the right of publicity is a capital asset, and the celebrity's estate later sells the right of publicity to a third party, any gain recognized by the estate on the sale would be taxed at capital gains rates rather than ordinary income rates.

The Internal Revenue Code defines "capital asset" negatively: if an asset is not in one of an enumerated list of excluded categories of assets, it is a capital asset. Among the types of assets excluded from the definition of capital asset are certain self-created intangibles and certain inventory and other property used in the taxpayer's trade or business.²⁹

Self-created copyrights, musical and literary works, and "similar property"³⁰ produced by a taxpayer's personal efforts are excluded from the definition of "capital asset."³¹ Accordingly, if the creator of such assets sells them during his or her lifetime, the gain will be subject to tax at ordinary income tax rates (currently less favorable than capital gains rates for individual taxpayers). Upon the death of the author, these self-created works become capital assets in the hands of the estate (since the efforts of the estate and its beneficiaries did not produce the assets). The right of publicity is distinct from rights under copyright law and generally bears more resemblance to trademark rights. Accordingly, while the value of publicity rights is undoubtedly generated by the personal efforts of the celebrity, the right of publicity probably is not excluded from the definition of capital asset under the exclusion for self-created copyrights and similar works. Further, if the right of publicity is excluded from the definition of capital asset under this provision during the celebrity's lifetime, the right of publicity would become a capital asset upon the celebrity's death.

Inventory and depreciable property used in a taxpayer's trade or business are generally also excluded from the definition of capital asset.³² This raises the question of whether a celebrity's right of publicity is: 1) depreciable property in the hands of the estate or 2) used by the estate in a trade or business (rather than, for example, held for investment). The answers to these questions likely depend upon the facts and circumstances of a given case. If the estate establishes a company that licenses the celebrity's name to third parties, the right of publicity probably would constitute depreciable property used in the taxpayer's trade or business; therefore, the right of publicity would not be a capital asset. If the estate instead merely holds the right of publicity for future sale, the right of publicity probably would be a capital asset.

Regardless of whether the right of publicity is a capital asset in the hands of a celebrity's estate, it appears that, at least for decedents domiciled in states extending post-mortem rights of publicity, the IRS views the right of publicity as an asset of the celebrity's estate, subject to estate tax. It remains an open question what position the IRS might take for celebrity decedents who are domiciled in states that do not extend posthumous rights of publicity.

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An obvious next question for the estate tax practitioner is whether there is anything that a celebrity can do during his or her lifetime to remove these publicity rights from the celebrity's taxable estate or to reduce the value of the publicity rights included in the estate. With traditional assets, this might be accomplished by, for example, gifting or selling the assets to an irrevocable grantor trust established during the grantor's lifetime for the benefit of his or her children or other beneficiaries. For estate and gift tax purposes, the transfer to the irrevocable grantor trust is a completed sale or gift of the beneficial ownership of the transferred asset, which means that the asset is removed from the grantor's estate for estate tax purposes. However, for income tax purposes, a grantor trust is disregarded during the life of the grantor,³³ meaning that the grantor would continue to be taxed on the income generated by the transferred assets. This presents an additional benefit to the grantor, since the grantor's payment of income tax: 1) is not treated as a taxable gift to the beneficiaries of the trust34 and 2) further reduces the grantor's taxable estate.³⁴

In the estate of a popular celebrity, such a transfer of publicity rights during life might save the estate from paying hundreds of millions of dollars in estate tax on an asset that may not be easily liquidated.³⁵ However, rights of publicity may not be so simple to remove from a celebrity's estate for a number of reasons. First, given the personal nature of the right of publicity, there is a threshold question as to whether the right of publicity may be transferred during the celebrity's lifetime.³⁶ At least in California, the answer appears to be yes. In *Timed Out, LLC v. Youabian, Inc.,³⁷* a California Court of Appeal reversed a trial court decision holding that two models could not assign rights in their likenesses. In reaching its conclusion that the models' publicity rights were assignable during their lifetimes, the court of appeals noted that Civil Code section 3344.1(b) explicitly contemplates such a transfer:

Nothing in this section shall be construed to render invalid or unenforceable any contract entered into by a deceased personality during his or her lifetime by which the deceased personality assigned the rights, in whole or in part, to use his or her name, voice, signature, photograph, or likeness.³⁸

There is also precedent for celebrities' sell- ing outright interests in their rights of publicity during life. For example, in April 2016, Muhammed Ali reportedly sold an 80 percent interest in his name and likeness to a New York-based company for \$50 million.³⁹

A second issue raised by an inter-vivos transfer of a celebrity's rights of publicity is whether the celebrity's continued control over those rights following the transfer might result in the rights being included in his or her taxable estate. Notwithstanding the transfer, Section 2036(a)(2) of the Internal Revenue Code re- quires that, when a decedent retained the right during his or her lifetime to determine the persons who may possess or enjoy the income from property, the decedent must include that property in his or her taxable estate upon death, notwithstanding the fact that beneficial ownership may have been formally transferred during the decedent's lifetime.

While the application of Section 2036 and related provisions of the Internal Revenue Code to rights of publicity transferred during a celebrity's lifetime remains untested, celebrities may reduce the risk of such rights being brought back into their taxable estates. First, the celebrity should not be the trustee of the irrevocable trust to which he or she transfers the publicity rights,

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and if the celebrity retains the right to replace the trustee, the terms of the trust should require that an independent trustee (rather than a related or subordinate trustee) must be chosen as the replacement. Second, the celebrity should consider selling, rather than gifting, the publicity rights to the irrevocable trust since transfers resulting from a sale "for adequate and full consideration" are outside the scope of Section 2036.⁴⁰ A third issue, if the celebrity's career is ongoing, concerns the need to continue to make use of his or her persona and likeness without, for example, first seeking the approval of the trustee of a trust. This issue may create an opportunity, however, since the celebrity may enter into a contract with the irrevocable trust pursuant to which the celebrity is allowed to continue to use his or her name, likeness, or other publicity rights in exchange for a series of royalty payments.⁴¹ Since the irrevocable grantor trust is disregarded for income tax purposes, these payments will not result in taxable income to the celebrity or the celebrity's beneficiaries. Also, since the payments will represent an arm's-length fair value price for the celebrity's use of his or her name or likeness,⁴² the payments should not be treated as gifts to the beneficiaries of the irrevocable trust. Accordingly, the celebrity may achieve a further reduction to his or her taxable estate.

Celebrities domiciled in California may be able to avoid some of these tax risks because the California Civil Code creates distinct lifetime (Section 3344) and posthumous (Section 3344.1) rights of publicity. A celebrity domiciled in California could transfer only the posthumous right of publicity to an irrevocable grantor trust during his or her lifetime, retaining the lifetime right of publicity. Section 3344.1 specifically allows the transfer of post-humous rights alone. By retaining a lifetime right of publicity, the celebrity could avoid risks related to retention of control and determining an arm's-length royalty rate for the lifetime use of the publicity rights. Further, since the retained lifetime right of publicity would terminate at the time of the celebrity's death pursuant to Section 3344, the celebrity should not be required to include the retained lifetime right of publicity in his or her estate.

As technology advances and posthumous performances become more and more prevalent, postmortem publicity rights are likely to continue to expand in scope. This will present new challenges to executors and beneficiaries, but it will also present new opportunities and responsibilities for celebrities and their advisors to plan ahead to minimize taxation, provide for their beneficiaries, and manage a lasting legacy. Moreover, as technology advances to allow digital recreation of celebrities' likenesses, studios may, in an effort to reduce the cost of hiring talent, create digital amalgamations of various body parts and gestures of beloved celebrities. Such a digital Frankenstein's monster might subliminally spark feelings of recognition and goodwill in audiences without obviously infringing on any one celebrity's rights. O brave new world, that has such actors in't!

¹ To older viewers, the appearance of Cushing may bring back memories of a string of posthumous performances in commercials in the 1990s, most notably a Super Bowl ad in 1997 in which Fred Astaire danced with a Dirt Devil vacuum. To younger viewers, the appearance may bring to mind the hologram of Tupac Shakur that performed at the Coachella Valley Music and Arts Festival in 2012.

² See 15 U.S.C. §1125(a).

³ See Weston Anson, Right of Publicity: ANALYSIS, VALUATION AND THE LAW 49 (2015) [hereinafter Anson]

⁴ See 1 J. THOMAS MCCARTHY, RIGHTS OF PUBLICITY AND PRIVACY §§5:7-17 (2d ed. 2016) (discussing differences between trademark and publicity rights) [hereinafter MCCARTHY].

- ⁹ Georgia, Michigan, New Jersey, Pennsylvania, South Carolina, and Tennessee. (Pennsylvania and Tennessee recognize a postmortem right of publicity under both common and statutory law).
- ¹⁰ CIV. CODE §3344 (1971, ch. 1595, §1).
- ¹¹ Lugosi v. Universal Pictures, 25 Cal. 3d 813 (1979).
- ¹² CIV. CODE §3344.1(b)-1(d) (1984, ch. 1704, §1).
- ¹³ *Id.* §3344.1(g) (1999, ch. 1000, §9.5).
- ¹⁴ *Id.* §3344.1(p) (2007, ch. 1135, §§1-2).
- ¹⁵ Indiana provides even greater postmortem protection for rights of publicity. IND. CODE §32-36-1 (protecting right of publicity for 100 years after death and extend- ing the right to gestures and mannerisms).
- ¹⁶ *Id.* §3344.1(p).
- ¹⁷ Milton H. Greene Archives, Inc. v. Marilyn Monroe, LLC, 692 F.3d 983 (9th Cir. 2012), *aff'g* 568 F. Supp. 2d 1152 (C.D. Cal. 2008).
- ¹⁸ See, e.g., J. Eugene Salomon Jr., *The Right of Publicity Run Riot: The Case for a Federal Statute*, 60 S. CAL. L. REV. 1179 (1987). More recently, the Uniform Law Commission announced its intention to create a committee to "study the need for and feasibility of drafting a uniform act or model law addressing the right of publicity." Minutes to Midyear Meeting of the Committee on Scope and Program, Uniform Law Commission (Jan. 13, 2017), available at http://www.uniformlaws.org.
- ¹⁹ Eriq Gardner, *Robin Williams Restricted Exploitation of His Image for 25 Years After Death*, THE HOLLYWOOD REPORTER, Mar. 30, 2015, available at http://www.hollywoodreporter.com/thr-esq/robin -williams-restricted-exploitation-his-785292.
- ²⁰ I.R.C. §2031(a).
- ²¹ I.R.C. §1014(a).
- ²² I.R.C. §§61(a)(14), 1014(c); see also O'Daniel's Estate v. Comm'r, 173 F. 2d 966 (2d Cir. 1949).
- ²³ Estate of Andrews v. United States, 850 F. Supp. 1279 (E.D. Va. 1994).
- ²⁴ Jeff Gottlieb, *Michael Jackson Estate Embroiled in Tax Fight With IRS*, L.A. TIMES, Feb. 7, 2014, *available at* http://articles.latimes.com [hereinafter Gottlieb].
- ²⁵ Estate of Jackson v. Comm'r, Tax Ct. Docket No. 017152-13, Test. of Owen Dahl (Feb. 10, 2017), Trial Tr. vol. 13 (filed Feb. 17, 2017).
- ²⁶ Gottlieb, *supra* note 24.
- ²⁷ Estate of Jackson v. Comm'r, Tax Court Docket No. 017152-13, Respondent's Pretrial Memorandum (filed Feb. 1, 2017).
- ²⁸ Estate of Jackson v. Comm'r, Tax Court Docket No. 017152-13. As of the date of writing, the Tax Court has not reached a conclusion on this issue.
- ²⁹ I.R.C. §1221(a)(1)-(3).
- ³⁰ Treasury Regulations interpreting the definition of "capital asset" clarify that the phrase "similar prop- erty" is intended to include other property eligible for copyright protection. Treas. Reg. §1.1221-1(c)(1).
- ³¹ I.R.C. §1221(a)(3). However, under I.R.C. §1221 (b)(3), authors of musical works may elect to treat the works as capital assets.
- ³² I.R.C. §1221(a)(1)-(2). A number of interconnected provisions of the Internal Revenue Code may alter the character of gain recognized on the sale of property used in a trade or business. *See, e.g.,* I.R.C. §§1231, 1245. A complete discussion of these provisions is beyond the scope of this article.
- ³³ I.R.C. §§671-79; *see also* Rev. Rul. 85-13, 1985-1 C.B. 184 (holding that a sale between a grantor and an irrevocable grantor trust established by the grantor is disregarded for federal income tax purposes).
- ³⁴ Rev. Rul. 2004-64, 2004-2 C.B. 7.
- ³⁵ For example, if the IRS's original assertion as to the value of Michael Jackson's publicity rights were sustained, the estate could owe in excess of \$160 mil- lion in additional estate taxes (40 percent of \$400 million).
- ³⁶ Compare, for example, rights of privacy, which are fundamentally attached to the individual and cannot be transferred or assigned in a traditional sense.
- ³⁷ Timed Out, LLC v. Youabian, Inc., 229 Cal. App. 4th 1001 (2014).

⁵ An individual may seek relief under federal trademark law for the use of his or her image or likeness, for example, on the theory that the defendant's use of the individual's likeness or persona is likely to give the impression of the involvement or endorsement of the individual or his or her estate.

⁶ See MCCARTHY, supra note 4, at §1.25.

⁷ See ANSON, supra note 3, at 72.

⁸ Arizona, Florida, Hawaii, Illinois, Indiana, Kentucky, Nevada, Ohio, Oklahoma, Pennsylvania, Tennessee, Texas, Virginia, and Washington are the other states.

³⁸ *Id.* at 1008, quoting CIV. CODE §3344.1.

³⁹ Greg Johnson, Ali's Name Value Put at \$50 Million, L.A. TIMES, Apr. 12, 2006, available at http://articles.latimes.com.

- ⁴⁰ I.R.C. §2036(a). The performer would need to hire an appraiser to perform an independent appraisal.
- ⁴¹ Compare a grantor's payment of rent to an irrevocable trust in exchange for continued use of a personal residence that the grantor transferred to the irrevocable trust.
- ⁴² In determining the amount of these arm's-length royalty payments, the celebrity should err on the side of overpaying the irrevocable trust, since any excess above fair value would be treated as a taxable gift. If instead the IRS determined that the celebrity was underpaying for the use of these rights, the IRS may argue that he or she retained an interest in the rights and that they should be brought back into the celebrity's estate for estate tax purposes.

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The Life Story Rights Puzzle

Jorge L. Contreras* and Dave Fagundes†

ABSTRACT

The life story deal is a staple of Hollywood entertainment law practice. Studios seeking to make a docudrama (a feature based on real life facts but including dramatized elements) often do so only after securing life story rights from the subject of the production. Yet "life story rights" are a fiction. No source of law vests exclusive rights in the facts that comprise the narratives of our lives. Despite popular misconceptions, neither copyright, trademark, privacy nor the right of publicity give individuals the exclusive right to exploit facts concerning their lives. On the contrary: in the United States, First Amendment considerations severely limit any legal constraint on expressive speech, including dramatic depictions. So why do production

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Harvard Journal of Sports & Entertainment Law / Vol. 14

companies pay amounts that are sometimes in the millions to acquire these "rights"? Drawing on interviews with practitioners across the entertainment industry, we approach this puzzle by identifying the principal components of life story rights: a grant of (illusory) rights, a waiver of liability claims, guaranteed access to the subject, and an agreement to work exclusively with the acquirer. The modularization of these distinct jural relations under the rubric "life story rights" is the result of successful private ordering within a fast-moving and highly competitive industry, thereby enhancing transactional efficiency through reduced information costs, signaling and litigation avoidance.

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CONTENTS

INTRODUCTION			503	R
I.	No	RIGHT TO ONE'S STORY	508	R
	Α.	Copyright	510	R
	В.	Right of Publicity	512	R
	С.	Public Disclosure of Private Facts	515	R
	D.	Defamation	517	R
	Е.	False light	519	R
	<i>F.</i>	Trademark	521	R
	G.	Conclusion	521	R
II.	Soi	lving the Life Story Puzzle	522	R
	Α.	History of Docudramas and Life Story Rights	522	R
	В.	The Mechanics of Acquiring Life Story Rights	527	R
		1. Fictionalization	528	R
		2. From Whom Are Life Story Rights Acquired?	530	R
		3. Insurance Coverage	532	R
		4. Life Story Rights Across Media	534	R
	С.	Basic Elements of a Life Story Deal	535	R
		1. Grant of Rights	535	R
		2. Liability Waiver	537	R
		3. Exclusivity	538	R
		4. Access and Cooperation	540	R
		5. Valuing Life Stories: Compensation	542	R
		6. Granularity	544	R
		7. Creative control	545	R
	D.	Life Story Acquisitions versus Releases and Other Agreements		
			546	R
III.	De	CONSTRUCTING LIFE STORY RIGHTS	548	R

\jciprod01\productn\H\HLS\14-2\HLS205.txt	unknown	Seq: 3	1-JUN-2

A. Lif	e Story Rights as Private Ordering – The Interplay of		
La	w and Norms	548	R
B. Tra	unsactional Efficiency	553	R
1.	Modularity, Standardization and Information Costs		
	· · · · · · · · · · · · · · · · · · ·	553	R
2.	Litigation Avoidance	556	R
3.	The Signaling Function of Life Story Acquisitions		
	••••••	557	R
CONCLUSION		558	R

INTRODUCTION

One of the breakout hits of early 2022 was *Inventing Anna*.¹ The Netflix series recounted the story of Anna Delvey, purportedly a German heiress who wormed her way into New York's social and financial elite circles. In fact, "Anna Delvey" was actually Anna Sorokin, a Russian woman who was eventually jailed for fraud based on her subterfuge.² *Inventing Anna* was widely perceived as a true story and was compelling in part for that reason. But was it a true story? The answer to the question lies in the distinctive niche it occupies within the entertainment world.

Inventing Anna is a docudrama. Docudramas are rooted in true facts, hence part documentary, but also substantially fictionalized, hence part drama.³ For this reason, ads for the show claimed not that it was a true story,

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¹ See Kelli Boyle, 'Inventing Anna' Tops Every Nielsen Streaming Ratings Chart in Second Week, TV INSIDER (Mar. 18, 2022), https://www.tvinsider.com/1036973/inventing-anna-tops-nielsen-streaming-ratings/.

² INVENTING ANNA (Netflix 2022). Among other things, Sorokin hoodwinked a series of minor New York celebrities (former child star Macaulay Culkin, pharma bro Martin Shkreli and Fyre Festival promoter Billy MacFarland) and wheedled her way into a surprising number of unpaid hotel stays and lines of credit.

³ Seale v. Gramercy Pictures, 964 F. Supp. 918, 923 (E.D. Pa. 1997) (quoting a definition of docudrama in *Davis v. Costa-Gavras*, 654 F. Supp. 653 (S.D.N.Y. 1987) as "a dramatization of an historical event or lives of real people, using actors or actresses . . . utiliz[ing] simulated dialogue, composite characters, and a telescoping of events occurring over a period into a composite scene or scenes"). *See also* Tom W. Hoffer & Richard Alan Nelson, *Docudrama on American Television*, 30 J. UNIV. FILM ASSN. 21 (1978) (defining docudrama as a "blend of fact and fiction which dramatizes events and historical personages from our recent memory"). Other terms for film/television productions that dramatize recent real-life events include story documentary, dramatic reconstruction, faction, reality-based film, murdo-fact, fact-based drama and biopic. *See* ALAN ROSENTHAL, WHY DOCUDRAMA? FACT-FICTION ON FILM AND TV (1999). For the sake of consistency, we use the term "docudrama" to describe this category. We intentionally avoid the term "biopic" (biographical pic-

Harvard Journal of Sports & Entertainment Law / Vol. 14

but that it was "inspired by a true story." And opening-scene chyrons coyly inform viewers that "This whole story is completely true—except for all the parts that are totally made up."⁴ Despite (or perhaps because of) its ambivalent relationship with the historical record, the docudrama is one of the most popular genres in film and television and has been for decades.⁵

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Because of their popularity, studios compete fiercely to make and release the leading docudramas each season. This competition manifests in races to secure "life story deals" with the subjects of potential docudramas. These deals are understood within the entertainment industry to reserve to the acquirer the exclusive right to make a production based on that subject's life. As such, life story deals are the subject of industry gossip and news, often earning subjects a substantial paycheck. Netflix, for example, paid Anna Sorokin \$300,000 for the exclusive right to dramatize her story.⁶ For all of these reasons, life story deals are big business.

ture), as it is generally understood to encompass depictions of historical, as well as contemporary, subjects. *See* GEORGE F. CUSTEN, BIO/PICS: HOW HOLLYWOOD CONSTRUCTED PUBLIC HISTORY (1992). While some biopics are docudramas, many are not.

⁴ INVENTING ANNA, *supra* note 2. This line seemingly pays homage to Kurt Vonnegut's famous opening lines to *Slaughterhouse-Five*, "All this happened, more or less. The war parts, anyway, are pretty much true." KURT VONNEGUT, SLAUGHTER-HOUSE-FIVE, (Random House) (1969).

⁵ See Section II.A, infra. There is no comprehensive bibliography of docudrama productions, though some related compilations give a sense for the large body of this work. See Eileen Karsten, From Real Life to Reel Life: A Filmography OF BIOGRAPHICAL FILMS (1993) (cataloging over 1,000 biographical films), MICHAEL G. STEVENS, REEL PORTRAYALS: THE LIVES OF 640 HISTORICAL PERSONS ON FILM, 1929 THROUGH 2001 (2003) (cataloging 640 individuals about whom two or more films have been produced). For more recent, though selective, lists, see 71 Must-Watch Movies Based on True Stories, TOWN & COUNTRY, Sept. 27, 2022, https:// www.townandcountrymag.com/society/g15907978/best-movies-based-on-true-stories/; Samuel R. Murrian, 65 of the Best Movies Based on True Stories-Must-Watch Movies From History! PARADE, June 20, 2022, https://parade.com/1253091/ samuelmurrian/best-movies-based-on-true-stories/; Matthew Singer, The 20 best movies based on true stories, TIME OUT, Mar. 15, 2022, https://www.timeout.com/film/ best-movies-based-on-true-stories. Although not definitive, the Wikipedia entries for List of films based on actual events, https://en.wikipedia.org/wiki/ List_of_films_based_on_actual_events (visited Apr. 17, 2022) and List of films based on actual events (2000-present), https://en.wikipedia.org/wiki/ List_of_films_based_on_actual_events_(2000-present)#2020 (visited Apr. 17, 2022) are informative.

⁶ Vicky Baker, Netflix and Anna Delvey: The Race to Secure the Story of New York's 'Fake Heiress', BBC NEWS (Feb. 20, 2021), https://www.bbc.com/news/world-us-ca-nada-56113478. Paying Sorokin for her story raised complications under New York's "Son of Sam" law, N.Y. Exec. Law § 632-a (McKinney 2001), which re-

There's only one problem: "life story rights" do not exist.⁷ They have been referred to as a legal fiction,⁸ a misnomer⁹ and an urban myth.¹⁰ No source of American law secures to individuals the exclusive right in the facts that comprise the narrative of their lives. Quite the contrary: copyright law explicitly reserves all facts, including the facts that make up life stories, to the public domain. Nor does trademark law prevent studios from freely making features based on true life facts, absent confusion about false endorsement or source of origin. Moreover, courts have generally interpreted the First Amendment's Speech Clause to bar any laws from restricting expressive speech based on its content (life stories or otherwise).¹¹

There are state law tort theories that pose some threat of liability to studios that make unauthorized docudramas, but conceptually this liability, even if found, does not amount to a "life story right." That is, the ex post risk of tort liability is not the equivalent of, nor does it give rise to, an ex ante property right in the content of one's life narrative. And most of these causes of action pose only remote liability risks to studios willing to risk making unauthorized docudramas. Defamation and invasion of privacy pro-

⁸ Perot, *supra* note 7, at 200 (quoting anonymous California interview subject).

⁹ Anonymous Interview #8 at 2 (calling life story rights a misnomer); Anonymous Interview #5 at 4 ("[L]ife rights is one of the biggest misnomers in the entertainment industry").

quires that victims be notified when incarcerated felons profit from depictions of their crimes. According to press reports, Netflix complied with the law and paid funds owed to Sorokin into an escrow account while she was in prison. Baker, *supra*; Emma Tucker, *New York's 'Son of Sam' Law Invoked in German Heiress Fraud Scheme*, WALL ST. J. (Dec. 28, 2020), https://www.wsj.com/articles/new-yorks-son-of-sam-law-invoked-in-german-heiress-fraud-scheme-11609167604.

⁷ See, e.g., Bob Tarrantino, Life story rights: They don't exist, but you should still get them, ENTERTAINMENT & MEDIA LAW SIGNAL, Dec. 1, 2020, https:// www.entertainmentmedialawsignal.com/life-story-rights-they-dont-exist-but-youshould-still-get-them/; Eric Goldman, The True Story About Life Story Rights, UPCOUNSEL BLOG (2019), https://www.upcounsel.com/blog/true-story-life-storyrights ("The truth is that life story rights do not exist."). See also Emma Perot, The Interaction of the Influences of Law, Contract, and Social Norms on the Commercialisation of Persona: A Comparative Empirical Study of The United Kingdom and the United States of America (2020) (Ph.D. dissertation, King's College London) (similar views expressed by interview subjects).

 $^{^{10}}$ See Anonymous Interview #4 at 7 (calling the idea of life story rights "almost like this urban myth").

¹¹ *E.g.*, De Havilland v. FX Networks, LLC, 230 Cal. Rptr. 3d 625, 630 (2018) ("Whether a person portrayed in one of these expressive works is a world-renowned film star—'a living legend'—or a person no one knows, she or he does not own history. Nor does she or he have the legal right to control, dictate, approve, disapprove, or veto the creator's portrayal of actual people.").

Harvard Journal of Sports & Entertainment Law / Vol. 14

Seq: 6

tect reputational and dignitary interests, but these theories require plaintiffs to overcome enough substantive hurdles that the risk of liability to studios that make unlicensed docudramas is low and cases involving successful recoveries are nearly nonexistent.¹² The right of publicity, which allows individuals to recover some of the value created by unauthorized uses of their identities, represents the most plausible basis of recovery for a subject incensed by an unlicensed feature based on their life, though even these claims have seldom been successfully pursued against docudrama productions.¹³

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Life story rights thus present a puzzle: why do production companies pay considerable sums to acquire rights that don't exist? This article offers a solution to the puzzle. While life story deals do not convey a recognized property interest, like copyright or trademark, they do establish a set of privately ordered contractual commitments that can be important in the production of works based on true stories. Life story rights, as the term is commonly used throughout the entertainment industry, emerge from acquisition contracts (and related option agreements) that generally embody four sets of related provisions:

(1) the producer's authorization to use and adapt factual events concerning the subject,

(2) the subject's release of the producer from liability for claims arising from the production, whether for defamation, violation of the right of publicity, or otherwise,

(3) a prohibition against the subject's cooperation with any other producer on a similar project and

(4) the producer's access to the subject for consultation and interviews, as well as a commitment to provide further information and/or documents, photographs and other artifacts.

In short, in exchange for a payment, the purchaser of life story rights obtains a contractual package containing an authorization, a release, exclusivity and access.

In this article, for the first time, we excavate the theoretical underpinnings of life story transactions and analyze the systemic implications of this longstanding entertainment industry practice. Our solution to the life rights puzzle yields further descriptive insights. First, it contributes to the growing literature about the prevalence of norms-based regulation of property and business relationships. The practice of enforcing life story rights seems to be a product of such norms. While one would expect that these agreements are occasionally breached or are at least the site of strategic be-

¹² See Sections I.C and I.D, infra.

¹³ See Section I.B, infra.

havior between competing studios, our interview subjects reported that industry actors exhibit near-perfect compliance with them, and reported cases involving breach are vanishingly rare. Interview subjects suggested that the high rate of fidelity to these agreements was due to industry participants' aversion to sanctions and exclusion. By contrast, studios appear to acquire life story rights not due to customary pressures, but from cost-benefit analyses suggesting that they are justified (indeed, in some cases where they are not warranted, studios eschew them). This analysis reveals that both law and norms are at play in the domain of life story rights, and illustrates that the two can function as complementary rather than mutually exclusive forms of regulation.

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Second, we show how the life story phenomenon connects to scholarly observations of modularization in transactional law. The bundling of contractual elements under the unitary label of life story rights exemplifies how a complex set of contractual arrangements can be simplified by the deployment of a modular approach. Henry Smith observes that the modularization of rights reduces information costs, as parties need only observe and comprehend the module, rather than its constituent elements, thereby facilitating transactions in modularized assets.¹⁴ This account shows *why* life story rights took their distinctive form: as means to lower transaction costs, increase transactional efficiency and provide important signals to the market.

Finally, we explore why life story rights are acquired in some docudrama productions but not in others. For example, while Netflix took pains to acquire rights to Anna Sorokin's story for *Inventing Anna*, the producers of *The Social Network* (concerning Mark Zuckerberg and the founding of Facebook) and *The Crown* (concerning Queen Elizabeth II and the British royal family) did not. In interviews that we conducted with industry insiders, most conceded that life story rights are acquired in a majority, but not all, docudrama productions, with the percentage varying based on the type of production, producer and story.¹⁵ We conclude that producers are

¹⁴ Henry E. Smith, *Property as the Law of Things*, 125 HARV. L. REV. 1691, 1708 (2012). See also Carol M. Rose, *Modularity, Modernist Property, and the Modern Architecture of Property*, 10 PROP. RIGHTS J. 69, 70-71 (2022) (noting such modularized architectures "save[] us all from spending a great deal of time figuring out what we can and cannot do vis-á-vis all kinds of resources").

¹⁵ Anonymous Interview #4, follow-up email Oct. 27, 2022 (80-90%), Anonymous Interview #7, follow-up email Nov. 10, 2022 (70%), Anonymous Interview #10 ("more likely than not"), Anonymous Interview #11 (30-70%).

Harvard Journal of Sports & Entertainment Law / Vol. 14

pragmatists who carefully assess both benefits and risks before deciding to acquire life story rights from the subject(s) of a particular production.¹⁶

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Our analysis draws on a comprehensive review of the case law concerning life story rights, together with adjacent topics such as copyright, trademark, the right of publicity and right of privacy, as well as interviews that we conducted with experienced in-house counsel at television and motion picture production companies and law firm practitioners in the entertainment industry.¹⁷

The remainder of this article proceeds as follows: Part I summarizes existing U.S. law governing the production of works based on real persons and events. It begins with a review of First Amendment principles applicable to the relation and adaptation of factual events, then discusses in turn various doctrines that have been raised, mostly unsuccessfully, to attempt to control or limit the production of such works – copyright, right of publicity, right of privacy, defamation, and trademark. Part II summarizes the history and contours of life story transactions, including the types of productions for which life story rights are sought and the key contractual elements of life story rights transactions. Part III then explains the private ordering mechanisms that led to the emergence of life story deals and describes how they have enhanced transactional efficiency through reduced information costs, signaling and litigation avoidance.

I. NO RIGHT TO ONE'S STORY

Life story deals are a familiar and longstanding practice of the entertainment industry. Yet, as we show in this Part, their mere existence is confounding because, as a matter of law, "life story rights" do not exist.

¹⁶ See Christian Simonds, When To Acquire Life Rights In Biographical Content Battle, LAW360, Sep. 13, 2022 (outlining legal considerations favoring and disfavoring acquisition of life story rights).

¹⁷ We conducted semi-structured interviews of 13 individuals using Zoom video conferencing. One or both of the authors conducted each interview, which lasted from approximately 30 to 60 minutes. All interviews were transcribed. The interview subjects included 8 entertainment attorneys in private practice, 4 in-house attorneys at major motion picture or television production studios, and one independent producer. Ten subjects were based in California, two in Utah and one in Japan. All subjects had at least ten years of experience in the entertainment industry and indicated that they had been personally involved in the drafting and negotiation of more than ten life story rights transactions.

There is no vested property interest in the facts that comprise one's own life story.¹⁸

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On the contrary, our constitutional tradition protects expressive speech regardless of subject matter. The First Amendment broadly prohibits states from enacting laws that abridge the freedom of speech.¹⁹ Laws that target speech based on its communicative content—content-based restrictions— are presumptively unconstitutional and may be justified only if the restrictions are narrowly tailored to serve compelling state interests.²⁰ As such, the First Amendment creates a strong presumption favoring expressive speech, even in the face of otherwise applicable rights of publicity and privacy.²¹ As one California appellate court recently explained in rejecting a legal challenge to an unauthorized docudrama,

Authors write books. Filmmakers make films. Playwrights craft plays. And television writers, directors, and producers create television shows and put them on the air—or, in these modern times, online. The First Amendment protects these expressive works and the free speech rights of their creators. Some of these works are fiction. Some are factual. And some are a combination of fact and fiction . . . Whether a person portrayed in one of these expressive works is a world-renowned film star—"a living legend"—or a person no one knows, she or he does not own history. Nor does she or he have the legal right to control, dictate, approve, disapprove, or veto the creator's portrayal of actual people.²²

¹⁸ This is, of course, only one way of understanding what it may mean to have a life story right. We choose this framing because both the interview subjects we spoke to and the popular conversations we observed seemed to invoke the idea of life rights in this vested property sense. We discuss later how one may think of these agreements as creating, if not transferring, other kinds of rights. See *infra* Part II.

¹⁹ Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015).

²⁰ Id.

²¹ See infra Parts I.B and I.C. See also Robert C. Post & Jennifer E. Rothman, The First Amendment and the Right(s) of Publicity, 130 YALE L.J. 86, 150-51 (2020) ("The First Amendment requires that in public discourse the public be constitutionally entitled to discuss whatever public information comes to its attention, including the names and images of persons. It contradicts the constitutional function of public discourse to make speakers pay for this privilege.").

²² De Havilland v. FX Networks LLC, 21 Cal. App. 5th 845, 849-50 (2018) (action brought by actress Olivia de Havilland against FX Networks with respect to its docudrama miniseries *Feud: Bette and Joan* (2017). The series depicted the rivalry between film stars Joan Crawford and Bette Davis. An actress portraying de Havilland appeared in two fictionalized scenes spanning less than 17 minutes of the 392-minute miniseries).

Laws that could give rise to claims based on the production of an expressive work such as a docudrama are thus subject to strict scrutiny under the First Amendment.

But even though producers should be in the clear to make docudramas without significant legal hurdles, they often seek subjects' agreement before doing so. In this Part, we explore the paradoxical pervasiveness of life story rights, considering causes of action that have been used to challenge the production of dramatized versions of individual life stories. We show that while most of these theories range from marginal to completely unworkable, one—the right of publicity—has more purchase in doctrine and case law. Nevertheless, the propensity for litigation in Hollywood supports producers' acquisition of life story rights, if only as prophylactic measures.²³

A. Copyright

The events that make up our lives, whether salacious or mundane, enjoy no copyright protection. Copyright inheres in creative expression that an author generates, such as a novel, film, or musical composition.²⁴ Conversely, facts-mere data about the world that do not originate with any author-are not copyrightable.²⁵ Though researchers may expend significant effort to unearth previously unknown facts, this does not change mattersthere is no "sweat of the brow" copyright conferred simply because one invested effort in producing a work that is not otherwise original.²⁶ Thus, when an author who laboriously gathered facts surrounding the destruction of the airship Hindenburg and developed theories surrounding the perpetrators' motives sued the producers of a film that relied on those facts, the Second Circuit held that "where, as here, the idea at issue is an interpretation of an historical event, our cases hold that such interpretations are not copyrightable as a matter of law . . . Such an historical interpretation, whether or not it originated with [the author], is not protected by his copyright and can be freely used by subsequent authors."27 Originality, not ef-

²³ As one commentator notes, life story acquisitions are, to a large degree, done for "peace of mind." Eriq Gardner, *Inside HBO's Lakers Headache*, PUCK NEWS, Apr. 25, 2022, https://puck.news/when-tv-shows-lie-inside-hbos-lakers-headache/.

²⁴ See 17 U.S.C. § 102(a).

²⁵ Miller v. Universal City Studios, Inc., 650 F.2d 1365, 1368 (5th Cir. 1981) ("Obviously, a fact does not originate with the author of a book describing the fact. Neither does it originate with one who 'discovers' the fact.").

²⁶ See Feist Pubs., Inc. v. Rural Tel. Serv. Co., Inc., 499 U.S. 340, 352-54 (1991) (rejecting "sweat of the brow" copyright); *Miller*, 650 F.2d at 1371-72 (stressing that research itself is not copyrightable).

²⁷ Hoehling v. Universal City Studios, 618 F.2d 972 (2d Cir. 1980).

fort, is "the *sine qua non* of copyright."²⁸ Because the details of all life stories are facts, they lie well outside copyright's domain.²⁹ So while a docudrama may make for a gripping viewing experience, and may contain audiovisual expression that merits copyright protection, any true facts that comprise the core narrative of that docudrama remain part of the public domain, free for all to use.³⁰

The lack of copyright in facts does not, however, necessarily dissuade aggrieved (or greedy) parties from threatening or initiating legal action. For example, the estate of the author of the 1983 magazine article that inspired the 1986 film *Top Gun* recently sued the producers of the 2022 blockbuster sequel *Top Gun: Maverick.*³¹ That article factually profiled Yogi and Possum, two brash, young F-14 fighter pilots at the Navy Fighter Weapons School known as Top Gun. To our knowledge, the sequel used no original lines, or even characters, from that article, thereby eliminating the typical grounds for a claim of copyright infringement. But because the rights acquired by the producers of the 1986 film apparently terminated in 2019, before production of *Top Gun: Maverick* was completed, the sequel for copyright infringement. That case is currently pending and could lead to a monetary settlement or, at a minimum, substantial attorneys' fees, despite its tenuous copyright argument.³²

²⁸ Feist, 499 U.S. at 345.

²⁹ See, generally, Jacqui Gold Grunfeld, *Docudramas: The Legality of Producing Fact-Based Dramas – What Every Producer's Attorney Should Know*, 14 HASTINGS COMM. & ENT. L.J. 483, 511-15 (1991) (analyzing copyright issues in docudramas).

³⁰ *E.g.*, *Miller*, 650 F.2d 1365 (not infringement for studio to make film about victim's kidnapping without permission from her or from author of news articles about the incident); *cf.* Childress v. Taylor, 945 F.2d 500 (2d Cir. 1991) (purported co-author acquired no copyright interest in script about historical person by accumulating information about her).

³¹ Yonay v. Paramount Pictures Corp., Case No. 22-CV-03846 (C.D. Cal., filed Jun 6, 2022). Ehud Yonay's article "Top Guns" appeared in the May 1983 issue of *California* magazine.

³² A similar copyright claim was made under English law in 1994, when Sir Stephen Spender sued the publisher of a novel that was allegedly based on Spender's autobiography, published in 1951. The case settled with the publisher's agreement to withdraw the novel from the market. *See* David Streitfeld, *Publisher Kills Novel over Pilfered Plot*, WASH. POST, Feb. 17, 1994, https://www.washingtonpost.com/archive/politics/1994/02/17/publisher-kills-novel-over-pilfered-plot/765ca239-

abc9-40c8-9ea9-b9403f97af8b/ (the authors thank Professor Michael Madison for bringing this episode to our attention).

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512

Harvard Journal of Sports & Entertainment Law / Vol. 14

B. Right of Publicity

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The right of publicity is a state-law cause of action that enables individuals to recover a share of the economic value created when their identities are used without consent.³³ Thus, unlike defamation and invasion of privacy, and like copyright and trademark, this cause of action seeks predominately to advance a plaintiff's financial rather than dignitary interests.³⁴ Thus, though the right of publicity is not an IP right, *per se*,³⁵ we consider it to be IP-adjacent.

The right of publicity is notoriously fragmented. It is broadly construed in many jurisdictions, more narrowly in others, and some states have no right of publicity at all. Some states extend the right of publicity to all people, while others limit it to public figures.³⁶ Amid this disarray, however, one thing is clear: attempts are being made to expand the right of publicity further.³⁷ It was once used almost exclusively to prevent unauthorized uses of plaintiffs' personae in commercial settings—hence Johnny Carson's successful right of publicity claim against a company that sought to brand a portable toilet with his famous tagline "Here's Johnny!",³⁸ and singer Bette Midler's successful publicity claim against Ford Motor Company, which used a voice impersonator singing one of her most famous songs in a car commercial.³⁹ In its more expansive iterations, rights of publicity extend not only to unauthorized uses of plaintiffs' identities in consumer

³³ See Restatement (Third) of Unfair Competition § 46 (Am. L. Inst. 1995).

³⁴ This was not always the case. As Jennifer Rothman has illustrated, the right of publicity and the right of privacy share a common origin and used to vindicate similar interests. The emergence of a distinct right of publicity giving individuals a property-like interest in their personae emerged only when the two causes of action diverged during the mid-to-late twentieth century. JENNIFER E. ROTHMAN, THE RIGHT OF PUBLICITY 11-44 (2018) (showing the shared origin of these causes of action in right of privacy law of the early twentieth century).

³⁵ See Ratermann v. Pierre Fabre USA, Inc., 2023 WL 199533 (S.D.N.Y. 2023) (claims under the New York Civil Right Law (right of publicity) "sound in privacy, not intellectual property" for purposes of the exemption from liability under Section 230 of the Copyright Act).

³⁶ See ROTHMAN, *supra* note 34, at 96-98 (describing the patchwork of U.S. rights of publicity as "the state(s) of disarray").

 $^{^{37}}$ *Id.* at 87 (explaining that after the Supreme Court's decision in *U.S. v. Zacchini*, "the right of publicity has proliferated across the United States and increasingly across the globe, and expanded in its breadth").

³⁸ Carson v. Here's Johnny Portable Toilets, Inc., 698 F.2d 831 (6th Cir. 1983).

³⁹ Midler v. Ford Motor Co., 849 F.2d 460 (9th Cir. 1988).

products, but also in expressive works.⁴⁰ And while the right of publicity conceptually remains a tort, courts have begun to imbue it with property-like characteristics such as transferability and heritability.⁴¹

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As the breadth of the right of publicity has grown, plaintiffs have increasingly sought to invoke it to recover a share of the value generated by nonconsensual uses of their identities in film and other creative media. For the most part, these suits have failed on First Amendment grounds.⁴² Films and television shows are generally considered to be expressive speech that merits greater protection under the First Amendment than products and advertising.⁴³ The Ninth Circuit's recent rejection of a right of publicity claim against the producers of the film *The Hurt Locker* clearly articulates this point. The film, the court held, "is speech that is fully protected by the First Amendment, which safeguards the storytellers and artists who take the raw materials of life—including the stories of real individuals, ordinary or extraordinary—and transform them into art, be it articles, books, movies, or plays. If California's right of publicity law applies in this case, it is simply a content-based speech restriction. As such, it is presumptively unconstitutional[.]"⁴⁴

While the run of cases has been against plaintiffs who have raised right of publicity claims for unauthorized docudramas, there are notable exceptions. Olivia de Havilland lost the appeal of her much-publicized lawsuit against FX Studios for its unflattering portrayal of her in the docudrama *Feud: Bette and Joan* on appeal,⁴⁵ but originally prevailed at the trial court.⁴⁶ And in *Doe v. TCI Cablevision*, NHL tough guy Tony Twist won his right of

⁴⁰ Consider, for example, the Restatement's broad framing of the right of publicity as arising whenever someone "appropriates the commercial value of a person's identity by using without consent a person's name, likeness, or other indicia for purposes of trade[.]" RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (AM. L. INST. 1995). *See also* ROTHMAN, *supra* note 34, at 3 (observing that many states' rights of publicity appear to extend to "virtually any use of a person's identity, including use in news, movies, books, video games, and political campaigns.").

⁴¹ In California, for example, the right of publicity can be transferred, inherited by the beneficiaries of the original subject's estate, and lasts for 70 years after the subject's death. CAL. CIV. CODE § 3344.1(b) (2022); *but see* James v. Delilah Films, Inc., 544 N.Y.S.2d 447, 451 (N.Y. Sup. Ct. 1989) (in New York, right of publicity does not survive original subject).

⁴² See, e.g., Sarver v. Chartier, 813 F.3d 891 (9th Cir. 2016) (denying right of publicity claim brought with respect to film *The Hurt Locker* on First Amendment grounds).

⁴³ See Post & Rothman, supra note 21.

⁴⁴ Sarver, 813 F.3d at 905-06; see also De Havilland v. FX Networks, LLC, 230 Cal. Rptr. 3d 625, 630 (2018).

⁴⁵ De Havilland, 230 Cal. Rptr. 3d. at 630.

publicity suit over his portrayal as a heavily fictionalized villain in the "Spawn" comic book series.⁴⁷

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Different courts have come to very different conclusions concerning the right of publicity and fictionalization due to the tension between the plaintiffs' interest in their identity and the defendants' First Amendment rights. The *Sarver* and appellate *de Havilland* courts situated the plaintiffs' right of publicity claims as content-based speech restrictions, which unsurprisingly led to the defendants prevailing. But the *de Havilland* trial court asked a question less favorable to the studios—was the use of the subject's identity transformative?⁴⁸—which led to a preliminary victory for the plaintiff.⁴⁹ And the Missouri Supreme Court in *TCI Cablevision* asked a more plaintifffriendly question still— whether the use of the defendant's identity was predominately commercial or expressive⁵⁰—eventually resulting in an eightfigure judgment for the plaintiff on remand. Given this doctrinal variance, with its outcome-determinative implications, studios cannot be confident even about what law will apply in a lawsuit by a subject over an unauthorized docudrama, let alone what the outcome may be.

In light of the foregoing, our interview subjects indicated that when thinking about the possible legal risks associated with a docudrama, they weigh the right of publicity quite seriously.⁵¹ This concern reflects an awareness of the expanding doctrinal footprint of this cause of action. Second, and related, the elements of a right of publicity cause of action present a low threshold to plaintiffs as compared to defamation and invasion of privacy claims.⁵² In a publicity claim, it is generally not necessary to show that the defendant harmed the plaintiff's reputation or engaged in conduct that

⁴⁶ De Havilland v. FX Networks, LLC, No. BC667011, 2017 WL 4682951 (2017) (denying defendant's anti-SLAPP motion to strike complaint).

⁴⁷ Doe v. TCI Cablevision, 110 S.W.3d 363 (Mo. 2003).

⁴⁸ This is the leading test used in California to mediate between right of publicity and free speech. *See* Comedy III Prods., Inc. v. Gary Saderup, Inc., 21 P.2d 797, 807-11 (Cal. 2001). The appeals court in *de Havilland* held that the test did not apply to docudramas because they were inherently transformative.

⁴⁹ The trial court did not rule for de Havilland after a trial on the merits, but rather held that her complaint survived the defendant's motion to strike it under the California anti-SLAPP statute.

⁵⁰ *TCI Cablevision*, 110 S.W.3d at 374.

⁵¹ *E.g.*, Anonymous Interview #3 at 11 (discussing the pitfalls of the right of publicity for docudramas and identifying it as the primary concern that motivated execution of life story rights deals).

⁵² Invasion of privacy suits are hamstrung in particular by the showing that the defendant's conduct is "unreasonably offensive." We catalog these and other doctrinal limits in *supra* Parts I.C and I.D.

was "objectively outrageous," but only that an unauthorized use was made of the plaintiff's persona. Finally, and perhaps most importantly, while courts have usually rejected plaintiffs' right of publicity claims in the context of creative productions, there are enough counterexamples to give pause to risk-averse studios, especially in light of the doctrinal uncertainty plaguing the free speech/right of publicity interface.

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C. Public Disclosure of Private Facts

Among the several iterations of privacy torts familiarly outlined by Dean Prosser,⁵³ the cause of action for public disclosure of private facts has been invoked periodically by subjects of unauthorized docudramas. Such an invasion of privacy is actionable when a defendant makes public some fact about the plaintiff that was formerly private in a manner that would be highly offensive to a reasonable person.⁵⁴ This tort does not arise where the disclosed fact is of legitimate public concern.⁵⁵ Examples of violations include making public facts about a plaintiff's physical condition or sexual preferences purely for purposes of providing titillation or shock value.⁵⁶

Unauthorized docudramas may expose studios to some risk from this tort. A docudrama is fictionalized but includes substantial true facts about its subjects. While many of those facts are likely to be in the public record, some may be private facts that a studio acquires through legitimate means such as interviews with the subject's friends and family. If those facts are embarrassing to the subject and not in themselves of public interest, the subject could plausibly sue the studio for the disclosure of private facts.

Consider an example: a television studio is making a dramatized feature based on a story from a local paper about an otherwise obscure man's battle with cancer. The production team interviews the man's family and

⁵³ Prosser identified four iterations of the right of privacy: intrusion on seclusion; appropriation; publicizing private facts; and false light. RESTATEMENT (SECOND) OF TORTS §§ 652A-652E (1976). Appropriation has developed into the right of publicity, which we discuss above. We address false light below.

⁵⁴ *Id.* § 652D. Not all jurisdictions recognize this tort. *See, e.g.*, Freihofer v. Hearst Corp., 480 N.E.2d 349 (N.Y. 1985) (declining to recognize a common-law cause of action for public disclosure of private facts); Hall v. Post, 372 S.E.2d 711 (1988) (same).

⁵⁵ Id.

⁵⁶ E.g., Diaz v. Oakland Tribune, Inc., 139 Cal.App.3d 118 (1983) (disclosing student's transsexual identity held actionable because unrelated to news story); Catsouras v. Department of Cal. Highway Patrol, 181 Cal. App. 4th 856, 874 (publicizing pictures of decapitated woman held actionable because it was done so only to appeal to a "morbid or sensational interest").

Harvard Journal of Sports & Entertainment Law / Vol. 14

unknown

friends to learn more about his life, and in one such interview, the subject's ex-spouse volunteers explicit information about his sexual proclivities. While this information may have little to do with the man's brave fight against disease, the studio decides to include the prurient revelations solely to attract viewers. This kind of gratuitous exposure of embarrassing, highly personal information unrelated to the public interest in the subject would likely be actionable as a tortious disclosure of private facts.⁵⁷

While this risk of liability theoretically exists for unauthorized docudramas, in practical terms it remains remote. One reason is evident from the implausible character of the foregoing example. Docudramas almost always seek to pursue a coherent narrative and derive appeal from the subject's story. If that story is not compelling in itself, the studio will not make a financial commitment to the project in the first place. Adding unrelated facts for shock or titillation is thus rare in the genre.

But what about otherwise private facts that are related to the subject's story, and are also embarrassing? For example, what if the hypothetical docudrama showed scenes in which the subject vomited on himself after undergoing chemotherapy? This scene would probably not trigger liability due to courts' extremely broad interpretation of "legitimate public concern." This latter category is not limited to public figures, but extends to otherwise private figures who are swept up in public events.⁵⁸ In *Cox Broadcasting Corp. v. Cohn*, the Supreme Court held that a television station's disclosure of the identity of a rape and murder victim did not violate her father's right of privacy because the crime was a newsworthy event.⁵⁹ "Legitimate public concern" need not even involve public events. In *Haynes v. Alfred A. Knopf, Inc.*, for example, Judge Posner opined that disclosing intimate (though not explicit) details of the lives of several working-class people did not violate their rights of privacy because those details were germane to

⁵⁷ The defendant's motive matters. Here, we are assuming that the fact was disclosed only for prurient appeal. But if the producers sincerely thought that it was related to the subject's story, that might make the fact part of the feature's "public concern," and hence not actionable. *See, e.g.*, Sipple v. Chronicle Publ'g Co., 154 Cal.App.3d 118 (1984) (holding that a newspaper's disclosure of the sexual orientation of an otherwise private citizen who helped thwart a presidential assassination was newsworthy because the newspaper reported the fact not out of sensationalism but because it thought knowing the sexual orientation of the plaintiff would help counter negative stereotypes about gay people).

⁵⁸ E.g., Shulman v. Group W Prods., Inc., 955 P.2d 469 (1998) (holding newspaper was not liable for showing pictures of auto accident victims who were not public figures because the accident was newsworthy).

⁵⁹ 420 U.S. 469, 492-96 (1975).

the narrative work of sociology in which they appeared.⁶⁰ And because studios choose to develop docudramas because they leverage well-known public narratives or because they tell new stories that will have broad audiences, it is unlikely that a court would regard any legitimate docudrama as not being of public concern.

Cox and Haynes signal the narrowing of the tort of public disclosure of private facts. While its domain originally extended to telling any story that might be offensive to its subject, now this tort can arise only where a defendant gratuitously publicizes a highly intimate and embarrassing detail that was not before widely known and that is unrelated to the public interest. Because the aim of docudramas is to tell stories that are currently salient and/or generate substantial interest, the chances that an unauthorized docudrama will have liability under this privacy tort are small.

D. Defamation

Defamation imposes liability on defendants who make false public statements that cause plaintiffs harm. Unlike the public disclosure of private facts, defamation centers on falsehoods rather than true but embarrassing facts. Defamation remedies seek to vindicate injury both to the defendant's dignity as well as to her economic reputational interests.⁶¹ In order to state a claim for defamation, a plaintiff must show that the defendant made a false statement about the plaintiff to some third party or the public and that the statement caused the plaintiff measurable harm.⁶² If the plaintiff is not a public figure, they need only show that the defendant made the false statement negligently.⁶³ If they are a public figure, they must show that the defendant made the statement knowing of, or with reckless disregard for, its falsehood.64

Because docudramas often fictionalize the true stories on which they are based, they relate the kind of falsehoods that may give rise to defamation liability. Imagine, for example, that a docudrama purports to tell the story of a famous athlete but fictionalizes his story to invent an ongoing struggle with drug addiction in order to increase the feature's dramatic impact. The

⁶⁰ 8 F.3d 1222, 1233 (7th Cir. 1993) ("No detail in the book claimed to violate the Hayneses' privacy is not germane to the story that the author wanted to tell[.]").

⁶¹ DAN B. DOBBS, ET AL., HORNBOOK ON TORTS (2d ed. 2011) 931-32 (discussing and contrasting economic and dignitary function of defamation law).

⁶² RESTATEMENT (SECOND) TORTS § 558 (1977); e.g., Davis v. Boeheim, 24 N.Y.3d 262 (N.Y. 2014).

 ⁶³ Id. § 580Å (1977).
 ⁶⁴ Id. § 580B (1977).

Harvard Journal of Sports & Entertainment Law / Vol. 14

unknown

athlete could plausibly argue that the film conveyed a falsehood about him (the drug addiction) to third parties (the film's audience) and caused him harm (reputational costs, lost endorsements, etc.).⁶⁵ Because the athlete is a public figure, they must prove either that the studio knowingly or recklessly propounded these falsehoods, but since we are assuming that the producers intentionally invented this story line to make the story more enticing, that standard would be met. This hypothetical is not implausible. Recently, chess grandmaster Nona Gaprindashvili sued Netflix, arguing that its brief depiction of her in *The Queen's Gambit* as never having faced men in chess competition was defamatory.⁶⁶ The district court denied Netflix's motion to dismiss, concluding that the statement was objectively false (since Gaprindashvili had in fact played and beaten many of the world's top male chess players) and injurious to her reputation (because it cast aspersions on her skill and status as a professional chess player).⁶⁷

One hurdle that will complicate most docudrama subjects' defamation cases against studios is the heightened "actual malice" standard for defamation that applies when the subject is a public figure.⁶⁸ This higher bar is intended to mediate between the free speech interests at play when speaking about a matter of public import and the reputational interests of subjects. What it means in practice, though, is that if a plaintiff is reasonably well known, they cannot state a defamation cause of action unless they can show that the producer acted with knowledge of, or reckless indifference to, the falsity of the statement. Plaintiffs have generally found this standard difficult to meet.⁶⁹ But it is not impossible, especially in the context of docudramas where screenwriters often consciously invent facts they know to

 $^{^{65}}$ Cf., e.g., Bindrim v. Mitchell, 92 Cal.App.3d 61 (Cal. App. 1979) (finding a book publisher liable for defamation where it released a novel portraying the therapist subject as using vulgar language in sessions and making sexual advances to clients).

⁶⁶ Gaprindashvili v. Netflix, Inc., 2022 WL 363537 (C.D. Cal. Jan. 27, 2022). ("The Queen's Gambit" is a fictional feature, not a docudrama, that is based on a novel. But it refers to many actual chess players from the mid-late twentieth century, and those depictions can be the subject of defamation liability regardless of whether they are in docudramas or pure dramas.) *See id.* at *5 ("[T]he fact that the Series is a fictional work does not insulate Netflix from liability from defamation if all the elements of defamation are present.").

⁶⁷ *Id.* at *6-8.

⁶⁸ N.Y. Times v. Sullivan, 376 U.S. 254 (1964) (establishing the "actual malice" standard in defamation cases for public figures).

⁶⁹ See Philadelphia Newspapers v. Hepps, 465 U.S. 767 (1986) (holding that the Constitution requires the scales to be tipped against private figure plaintiffs in defamation matters).

unknown Seq: 19

2023 / Life Story Puzzle

be untrue in order to enhance the story. This is precisely what happened in the *Queen's Gambit* case: the screenwriters concocted the detail that Gaprindashvili had not played chess against men, despite knowing from the book on which their script was based that this was not true.⁷⁰ On this basis, the court held that her defamation complaint survived Netflix's motion to dismiss even when applying the actual malice standard.⁷¹

Since the nature of docudramas is the fictionalization of subjects' lives to make them more entertaining to the viewing public, depicted subjects will be able to state plausible defamation cases if fictionalization portrays them negatively. For this reason, the industry professionals we spoke with highlighted defamation, along with the right of publicity, as one of the chief sources of liability that led them to acquire life story rights from their subjects.

E. False light

It is also worth considering false light. This common-law cause of action is enumerated as part of Prosser's taxonomy of privacy torts though, like defamation, it vindicates the plaintiff's interest in being depicted truthfully.⁷² False light is, however, unlike defamation in several key ways. First, the information publicized by the defendant need not be false; it can be accurate but misleading.⁷³ Second, the defendant's statement need not be defamatory, but only "highly offensive to a reasonable person."⁷⁴ Third, the defendant must have known of the false light in which they were placing the plaintiff, or acted in reckless disregard of it.⁷⁵

These elements of false light tend to offer plaintiffs a lower threshold than defamation. Plaintiffs need not show that they suffered reputational harm, only that the facts asserted by the defendant would cause a reasonable person psychological harm. Plaintiffs may thus state false light claims even where defamation is unavailable. A film portrayal could simply distort a subject's life or embarrass them in a way that triggered false-light liability even if it fell short of inflicting the kind of reputational harm required for

⁷⁰ *Id.* at *8-9.

⁷¹ Id.

⁷² See Haynes, 8 F.3d at 1230 (observing that both defamation and false light protect "the interest in being represented truthfully to the world").

 $^{^{73}}$ See e.g., Uhl v. Columbia Broad. Sys., Inc., 476 F. Supp. 1134 (W.D. Pa. 1979) (plaintiff prevailed in a false light claim against a television station when the station spliced together actual footage of the plaintiff but did so to make it seem as though he shot geese on the ground rather than in flight).

⁷⁴ Restatement (Second) of Torts § 652E (1977).

⁷⁵ Id.

Seq: 20

defamation. Hall of Fame baseball pitcher Warren Spahn, for example, stated a false light claim against the publisher of a book that, in Spahn's view, portrayed him in an excessively *positive* light. A court eventually held that Spahn stated a valid claim for false light because the hagiographic portrayal was objectively offensive, even though it cost the pitcher nothing reputationally.⁷⁶

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While plaintiffs likely have an easier time making a false light claim than a defamation claim based on a docudrama, numerous roadblocks remain. Defendants cannot be held liable unless they acted with knowledge or reckless indifference to the false light in which they placed the plaintiff.⁷⁷ This is a high bar but not an insurmountable one, especially because—as with defamation—docudramas as a matter of course involve conscious fictionalization of the subject's life. Second, and more troublesome to plaintiffs, false light typically applies only to aspects of a plaintiff's private life.⁷⁸ So to the extent that most docudramas involve details that have already been made public, this cause of action will be categorically unavailable to them.⁷⁹ Finally, the false light tort is falling into desuetude. Many jurisdictions have ceased to recognize it or never did,⁸⁰ often finding its differences with defamation too slender to warrant a separate cause of action. The most recent Restatement of Torts, for example, does not even mention false light.

The domain of the false light tort has shrunk enough that it is not a meaningful threat of liability to makers of unauthorized docudramas as compared with the right of publicity or defamation. It cannot be wholly dismissed, though. Where jurisdictions continue to recognize it, and where the facts at issue relate to the subject's personal life, it remains a plausible cause of action.⁸¹

⁷⁶ See Spahn v. Julian Messner, 18 N.Y.2d 324, 329 (N.Y. 1967) (upholding false light cause of action against publisher for book that distorted details of base-ball player's life).

⁷⁷ See Time, Inc. v. Hill, 385 U.S. 374, 387 (1967) (articulating "actual malice" standard in false light case).

⁷⁸ See Patton v. Royal Indus., Inc., 263 Cal. App. 2d 760, 768 (Cal. App. 1968) ("[F]alse light is a division of invasion of privacy tort, the claim must relate to the plaintiff's interest in privacy, and hence cannot involve matters, however offensively misrepresented to the public, which are in essence "public" themselves.").

⁷⁹ See, e.g., Gaprindashvili, 2022 WL 363537 at *4 (dismissing false light claim as a matter of law on this basis).

⁸⁰ *E.g.*, Denver Publ'g Co. v. Bueno, 54 P.3d 893 (Colo. 2002) (rejecting the false light tort as a common-law cause of action); Cain v. Hearst Corp., 878 S.W.2d 577, 579 (Tex. 1994); Costanza v. Seinfeld, 279 A.F.2d 255 (N.Y. App. Div. 2001)

⁸¹ For example, false light was among the causes of action that survived the initial motion to dismiss in Olivia de Havilland's lawsuit against FX, along with

1-JUN-23

2023 / Life Story Puzzle

521

9:47

F. Trademark

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Trademarks generally indicate the source of a product or service to consumers. Well-known personalities can acquire trademark rights in their names and personae when the public associates them with particular goods or services (e.g., Jack Nicklaus golfing attire and accessories).⁸² Likewise, goods or services that use the name or likeness of a well-known personality, or which imply that such a person has endorsed the good or service, can be liable under trademark theories.⁸³ This being said, First Amendment considerations impact the analysis of trademark claims when applied to expressive works, just as they do in the other types of claims discussed above.

Courts have decided relatively few cases involving the assertion of trademark rights against fictionalized dramas. The best known of these involved a fictional film about two Italian dancers who become known as "Ginger and Fred," after the legendary American dancing team of Fred Astaire and Ginger Rogers. Following the film's U.S. release, Rogers sued the producers for violation of her right of publicity, defamation, false light invasion of privacy and on a trademark-based theory for creating a false impression that she endorsed the film by virtue of its title.⁸⁴ In rejecting Rogers's trademark claim, the court held that the title "Ginger and Fred" bore a sufficient relationship to the artistic content of the film that its use was justified, observing that "to the extent that there is a risk that the title will mislead some consumers as to what the work is about, that risk is outweighed by the danger that suppressing an artistically relevant though ambiguous title will unduly restrict expression."⁸⁵

G. Conclusion

Despite the ubiquity of life rights deals, industry insiders dismiss the notion of life rights as a legal fiction and an urban legend. This Part has given substantive heft to this instinct, showing that wherever one looks in the law—from copyright to trademark, rights of privacy to rights of public-

right of publicity and defamation. Havilland, DBE v. FX Networks, 2017 WL 4682951 (Cal. App. Supp. Sept. 29, 2017), *2-9.

⁸² In a recent article, Jennifer Rothman argues that trademark law also serves more directly to protect individual personality and persona. Jennifer E. Rothman, *Navigating the Identity Thicket: Trademark's Lost Theory of Personality, The Right of Publicity, and Preemption*, 135 HARV. L. REV. 1271 (2022).

⁸³ *Id*.

⁸⁴ Rogers v. Grimaldi, 875 F.2d 994 (2d Cir. 1989).

⁸⁵ Id. at 1001.

ity—there is no legal theory that gives individuals ownership of the facts that comprise their lives. So why do production companies regularly pay significant sums to secure deals for rights that don't exist? This is the puzzle that we address in Part II.

II. SOLVING THE LIFE STORY PUZZLE

If there is no legal right to one's life story, why do studios often pay to acquire such rights? In this Part, we examine this puzzle. Life story rights are not recognized property rights, but something else entirely. Life story deals comprise a bundle of semi-standardized rights packaged together under a common label. This Part discusses how and when life story rights emerged as tradable commodities in the entertainment industry, and what a life story acquisition today generally entails.

A. History of Docudramas and Life Story Rights

The dramatization of real-life people and events has been a staple of dramatic practice for centuries.⁸⁶ William Shakespeare's "history plays" are hardly historical, even by sixteenth century standards, yet their rich characters and text are far more memorable than renditions of the same events by contemporary historical scriveners.⁸⁷ Many of the earliest moving picture newsreels from the late nineteenth and early twentieth centuries involved recreated or dramatized versions of battles and other recent events that could not practically be captured on film as they were occurring.⁸⁸

New York's 1903 Civil Rights Law⁸⁹ was the first indication that the producers of such dramatized works, as opposed to documentary or news productions, might require the consent of the individuals that they depicted. The law, for the first time, expressly prohibited the use of an individual's "name, portrait or picture" in trade without that person's prior

⁸⁶ John Aquino traces the first attempts to "present dramas based on contemporary events" to a Greek play written in 492 B.C. JOHN T. AQUINO, TRUTH AND LIVES ON FILM: THE LEGAL PROBLEMS OF DEPICTING REAL PERSON AND EVENTS IN A FICTIONAL MEDIUM 11 (2d ed. 2022).

⁸⁷ See IRVING RIBNER, THE ENGLISH HISTORY PLAY IN THE AGE OF SHAKE-SPEARE 12 (2005 Routledge ed., first published 1957) ("In the history play the dramatic and the historical intentions are inseparable. The dramatist's first objective is to entertain a group of people in a theatre").

⁸⁸ See Hoffer & Nelson, *supra* note 3, at 22, John Corner, *British TV Drama:* Origins and Developments in ROSENTHAL, ED., *supra* note 3, 38-39.

⁸⁹ Civil Rights Law, NY Consol. Laws, §50 c.6 (1903).

written consent.⁹⁰ Numerous early actions under the New York statute involved unauthorized reproductions of photographic images of individuals, including in motion pictures.⁹¹ Some of these cases indicate that written consents were obtained from individuals in cases involving motion pictures, suggesting an early precursor today's life story deals.⁹² However, it was not until the 1913 case *Binns v. Vitagraph Co. of America*⁹³ that a U.S. court formally considered an individual's right to consent to an actor's depiction of him in a film.

John R. ("Jack") Binns was the wireless telegraph operator on the steamship *Republic* when it collided with another vessel in 1909.⁹⁴ Thanks to Binns's quick dispatch of the telegraphed distress code "C.Q.D.," another ship came to the rescue and saved the passengers and crew of the *Republic*. Shortly after this newsworthy event, Vitagraph produced a short film titled "C.Q.D. or Saved by the Wireless; A True Story of the Wreck of the *Republic*." In the film, Vitagraph staged scenes using actors and sets constructed to resemble parts of the ship.⁹⁵ Binns sued to enjoin distribution of the film under the New York Civil Rights Law. In ruling for Binns, the court reasoned that, unlike a newsreel, Vitagraph used an actor portraying Binns "to amuse those who paid to be entertained."⁹⁶ The statute was clear that such uses in trade, without the prior written consent of the subject, were prohibited.⁹⁷

Lawsuits like the one brought in *Binns* raised a cautionary flag among motion picture producers who began to seek permission from real life subjects before making films about them. It was not until World War II, how-

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⁹⁰ Prior to the enactment of the Civil Rights Law in 1903, the right of privacy in New York was found not to prohibit the use of an individual's likeness in trade. *See* Roberson v. Rochester Folding Box Co., 171 NY 538 (N.Y. 1902) (denying recovery for the unauthorized use of an individual's photograph on a flour advertisement). *See also* ROTHMAN, *supra* note 34, at 22-25 (discussing case and its impact on NY legislation).

⁹¹ See Louis D. Frohlich & Charles Schwartz, *The Law of Motion Pictures, Including the Law of the Theatre* 274-78 (1918) (collecting cases), Rothman, *supra* note 34 at 31-35.

⁹² See, e.g., Ford v. Heaney 170 App. Div. 979 (N.Y. App. 1910) (reproduced in FROHLICH & SCHWARTZ, *supra* note 91, at 275-76) (written consent obtained but expired after one year).

⁹³ Binns 103 N.E. 1108 (N.Y. App. 1913).

 $^{^{94}}$ Id. at 1109.

⁹⁵ Id.

⁹⁶ Id. at 1111.

 $^{^{97}}$ Id. at 1109.

ever, that the docudrama format truly came into its own. As explained by John Corner,

the central idea was to take a documentary theme (the submarine service, for example, or the nightly bombing raids of the Royal Air Force) and treat this by "particularizing" it around a story line with characters, which could be given an intimate rendering using the depictive methods of feature fiction. The result mixed informational throughput with narrative satisfaction, allowing for empathy with the main figures of portrayal, whose experiences and whose personal qualities were projected with far greater intensity and focus than more conventional documentary formats could have achieved.⁹⁸

The growing popularity of docudramas in the United States led to an increasing awareness of the need for contractual consents from their subjects. As noted above, the 1903 New York Civil Rights Law required a producer to obtain consent to use an individual's "name, portrait or picture." It was not long, however, before motion picture producers began, in addition to name and image permissions, to acquire rights to events comprising individuals' "life stories."

The earliest assignment of life story rights for a film that we have identified was made by Sergeant Alvin C. York, one of the most famous American heroes of World War I.⁹⁹ In 1919, film producer Jesse Lasky saw the potential for a film focusing on the war hero. But when Lasky offered to buy York's story, the soldier is reported to have replied, "My life is not for sale."¹⁰⁰ After a series of failed overtures by Lasky, York finally agreed in 1940 to sell the motion picture rights to his life story for \$50,000.¹⁰¹ The

524

⁹⁸ Corner, *supra* note 88, at 35, 36. In addition to these aesthetic considerations, docudramas were also cheaper and more practical to produce than news footage that required filming on location, often in places with restricted access. *See id.* at 37.

⁵⁹ See PAT SILVER-LASKY, HOLLYWOOD ROYALTY: A FAMILY IN FILMS (2017) ("This American soldier unbelievably, and practically unassisted, had wiped out a machine-gun battalion in the Argonne Forest in north-eastern France, and with just twenty-eight bullets in his rifle, had killed twenty-eight German soldiers, captured 132 more, and had taken possession of thirty-five machine guns. As war heroes went, nobody could top Sergeant York.").

¹⁰⁰ SILVER-LASKEY, *supra* note 99. See also Todd McCarthy, The Making of Howard Hawks 'Sergeant York,' New Yorker, Jan. 9, 2017.

¹⁰¹ See Lasky v. Commissioner of Internal Revenue, 22 T.C. 13, 14 (1954). In addition to the rights to York's life story, Lasky obtained motion picture rights to three books about York: SAM K. COWAN, SERGEANT YORK AND HIS PEOPLE (1922), TOM SKEYKILL, SERGEANT YORK: LAST OF THE LONG HUNTERS (1930), and ALVIN C. YORK, SERGEANT YORK: HIS OWN LIFE STORY AND WAR DIARY (Tom Skeykill, ed., 1928). See McCarthy, *supra* note 100.

film *Sergeant York* became the top-grossing film of 1941 (topping even *Citizen Kane*) and earned actor Gary Cooper an Oscar.¹⁰² Though York did not actually agree to sell his life story rights until 1940, it is clear that Lasky, a prominent Hollywood producer, perceived such acquisitions as necessary, or at least desirable, when he first approached York in 1919.

The expansion of television to homes throughout the United States in the 1950s led to an increasing number of televised docudrama movies and miniseries based on true stories.¹⁰³ Yet it appears that life story rights were still acquired predominantly in the motion picture industry, most likely for budgetary reasons. Even so, not all life story acquisitions during this period commanded the sums paid to Sergeant York. For example, in 1956, Christine Sizemore, the psychiatric patient whose case first brought multiple personality disorder to the attention of the public, sold her life story rights to Twentieth Century-Fox for \$7,000.¹⁰⁴ The result was the popular 1957 film *The Three Faces of Eve*, for which Joan Woodward won an Oscar playing Eve (a fictionalized version of Sizemore).¹⁰⁵

It was not until the 1970s and 1980s, a period characterized by the overwhelming popularity of made-for-tv docudramas (so-called "movies of the week"),¹⁰⁶ that television producers became sensitized both to potential liability arising from these productions as well as the advisability of acquir-

¹⁰² See id.

¹⁰³ See Hoffer & Nelson, *supra* note 3, at 23-24, KARSTEN, *supra* note 5, at vii-viii ("With the advent of television, biographical films reached a new popularity, and were made not only about major current and historical personalities, but also about minor personalities who briefly made the headlines — films frequently limited to the event that made them famous. With television, too, the lives of major figures now could be made into mini-series lasting four to eight hours, stretching over two or three nights and exploring many aspects of their lives in detail.").

¹⁰⁴ Michael L. Rudell, *The Three Faces of Eve: Granting Life Story Rights*, N.Y.L.J., Apr. 28, 1989, at 3, col. 1. The film grossed approximately \$3 million at the box office. *See* Emanuel Levy, *Three Faces of Eve, The (1957): Joanne Woodward as Multi-Personality Patient in Oscar-Winning Performance*, Cinema 24/7, Jun. 27, 2008, https:// emanuellevy.com/review/three-faces-of-eve-the-1957-3/.

¹⁰⁵ THE THREE FACES OF EVE (20th Century-Fox, 1957). Sizemore's story was also the subject of a book, CORBERT H. THIGPEN & HERVEY M. CLECKLEY, THE THREE FACES OF EVE (1957). According to one report, one of Sizemore's physicians, Corbert Thigpen, persuaded her to enter into the agreement with Twentieth Century-Fox. Rudell, *supra* note 105.

¹⁰⁶ See, e.g., sources cited at n. 108, *infra. See also* Renee Wayne Golden, *The Business of Movies for TV: What Practitioners Should Know*, N.Y.L.J., May 29, 1987 ("The subject of docudramas that do not concern the celebrity will vary. So many have covered quadriplegics, Alzheimer's disease, cancer, blindness, etc. that they have become known as 'disease of the week.' Others depict the heroic exploits of an individual overcoming insuperable odds, e.g., winning a highly contested athletic

ing life story rights from their subjects. This trend was likely reinforced by a spate of high-profile controversies and lawsuits relating to docudramas that played out during the 1980s and which involved well-known figures including Elizabeth Taylor and Senator Joseph McCarthy's lawyer Roy Cohn, as well as the victims and defendants in several high profile murder trials.¹⁰⁷

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These cases attracted the attention of practitioners, legal academics and law students, who published a spate of articles, notes and comments exploring the boundaries of docudrama liability and the parameters of life story rights deals.¹⁰⁸ By the mid-1990s, however, this fascination with docudramas and life story rights appears to have subsided, perhaps as the docudrama gave way to reality television and other forms of entertainment, and as life story acquisition practices became more normalized within the film and television industries.¹⁰⁹ From the mid-1990s through the early

¹⁰⁸ See, e.g., Erik D. Lazar, Towards a Right of Biography: Controlling Commercial Exploitation of Personal History, 2 COMM/ENT J. COMM. & ENT. L. 489 (1979). Deborah Manson, The Television Docudrama and the Right of Publicity, 7 COMM. & L. 41 (1985) (Taylor case); Lisa A. Lawrence, Television Docudramas and the Right of Publicity: Too Bad Liz, That's Show Biz, 8 COMM/ENT J. COMM. & ENT. L. 257 (1985) (Taylor case); Marsha S. Brooks, The Maze of Docudrama: Issues to Consider when Dramatizing Factual Material, N.Y.L.J., Apr. 19, 1985 (general discussion); Neil J. Rosini, Releases for Docudramas: When Are They Advisable and What Goes into Them, 5 COMM. L. 7 (1987) (general discussion); Renee Wayne Golden, Docudramas Raise Thorny Legal Issues, N.Y.L.J., Jun. 12, 1987 at 5, 19 (general discussion); Joan Hansen, Docudrama - Invented Dialogue, Impersonation and Concocted Scenes: Beware of Lurking Lawsuits, 5 ENT. & SPORTS L. 1 (1987) (general discussion); Rudell, supra note 104 (Sizemore case); Tim A. Pilgrim, Docudramas and False-Light Invasion of Privacy, 10 COMM. & L. 3 (1988) (general discussion); Diane Leenheer Zimmerman, False Light Invasion of Privacy: The Light that Failed, 64 N.Y.U. L. REV. 364 (1989) (general discussion); Michelle E. Lentzner, My Life, My Story, Right - Fashioning Life Story Rights in the Motion Picture Industry, 12 HASTINGS COMM. & ENT. L.J. 627 (1990) (Sizemore case); Debra Meyer Glatt, Trial by Docudrama: Fact or Fiction, 9 CARDOZO ARTS & ENT. L.J. 201 (1990) (Hunt case); Grunfeld, supra note 29 (general discussion); Megan Moshayedi, Defamation by Docudrama: Protecting Reputations from Derogatory Speculation, 1993 U. CHI. LEGAL. F. 331 (1993) (Street case).

¹⁰⁹ As an illustration of the absorption of this practice as a standard industry practice, a 1997 episode of Seinfeld turned on hijinks resulting from Kramer's sale of his life story rights to J. Peterman. "The Van Buren Boys," Seinfeld episode #148 (first aired Feb. 6, 1997). Among other things, Elaine believes that Kramer

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event or escaping from a prison camp. Some are love stories, some are political, few are comedic.")

¹⁰⁷ See, e.g., Taylor v American Broadcasting Co., No. 82, Civ 6977 (S.D.N.Y. 1982), Cohn v. N.B.C., 67 A.D.2d 140, (N.Y.S.2d1979), *aff'd*, 50 N.Y.2d 885, *cert. denied*, 449 U.S. 1022 (1980) and William E. Schmidt, *TV Movie on Atlanta Child Killings Stirs Debate and Casts Doubt on Guilt*, N.Y. TIMES, Feb. 1, 1985.

2010s, relatively few life-story-related lawsuits were filed in the U.S. and comparatively little academic literature was published concerning them.¹¹⁰

The industry shifted again in the early 2010s. As we discuss in Part III, the rise of the major streaming networks – Netflix, Amazon Prime, AppleTV, HBO Max among others – as content producers in constant need of new programming, coupled with the increasing popularity of social media influencers and testimonials, has led to renewed interest in the docudrama genre. While some recent productions have been based on deceased subjects, likely not requiring the acquisition of life story rights at all (see Section II.B.2.d, below), many concern subjects who were living at the time of production, and thus, like *Inventing Anna* and *King Richard*, likely involved life story acquisitions.

B. The Mechanics of Acquiring Life Story Rights

Before detailing the principal features of life story deals in Part C, below, we pause to explain how these deals typically unfold in the industry. The process often begins with some true story reported in the news or featured in a book or magazine article that a producer deems promising as the subject of a docudrama.¹¹¹ The producer will contact the subject or their agent or manager (and, in some cases, the author of the relevant book or article) to solicit interest in making the story into a feature film or television production. If the subject agrees, the producer will ask the subject to enter into an option agreement for a life story deal, so that when the producer shops the project to studios, they are not just pitching an idea but have actually "acquired the life rights"—i.e., secured the many advantages of life story agreements outlined in this Subpart.¹¹² If the studio greenlights the

can no longer tell others about his adventures following the sale. Luckily for the series, Peterman rescinds the sale at the end of the episode.

¹¹⁰ Although the decades of the 1990s and 2000s did not see the level of controversy that the 1980s saw, they were not wholly without disputes. *See, e.g.*, AQUINO, *supra* note 86, at 9-11 (discussing cases).

¹¹¹ Anonymous Interview #1 at 3-5. This could be an independent producer who shops prospective films to different studios like Paramount or Netflix, or an inhouse producer for one of those production companies. In either case, the producer needs to make the case to the studio that the docudrama is a compelling project that the studio should develop into a film. *Id.*

¹¹² DINA APPLETON & DANIEL YANKELEVITZ, HOLLYWOOD DEALMAKING: NEGO-TIATING TALENT AGREEMENTS FOR FILM, TV AND NEW MEDIA 31 (2d ed., 2010) (noting that option fees are usually around 10% of the purchase prices); *see also* Anonymous Interview #6 at 14 (explaining that options nearly always precede final life rights deals).

Harvard Journal of Sports & Entertainment Law / Vol. 14

project, the producer will often assign the option agreement to the studio, which may then exercise the option and pay the subject the agreed purchase price. Upon exercise, the subject and the studio will execute a full life story acquisition agreement.

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In the remainder of this Part B, we discuss in greater detail the types of stories and productions for which life story rights are typically acquired, and from whom.

1. Fictionalization

The term "fictionalization" has been defined as "the blending of truth and fiction in such a manner that it is difficult, if not impossible, to determine which parts are real and which are invented."¹¹³ Fictionalization can entail adding a couple of spicy details about a subject's life or creating entirely new characters, scenes, dialog, and events.¹¹⁴ Fictionalization is one of the defining characteristics of the docudrama genre, situated between the entirely factual accounts presented by documentaries and the entirely fictitious portrayals offered by dramas. Studios have fictionalized true stories since the Golden Age of Hollywood, in which films such as *Billy the Kid* (1930) and *Mata Hari* (1931) indiscriminately combined historical facts with stock elements of melodrama.¹¹⁵

It is fictionalization that warrants life story rights agreements for docudramas but not documentaries. Netflix would have required no rights from Anna Sorokin if it were merely producing a documentary along the lines of HBO Max's one-hour episode about Sorokin in its *Generation Hustle* documentary series.¹¹⁶ But Netflix envisioned *Inventing Anna* not as a documentary, but as a fully dramatized narrative series in which invented elements, dialog and scenes were necessary to propel the narrative. And when a

¹¹³ Lawrence, *supra* note 108, at 278.

¹¹⁴ For example, the producers of the 2022 Netflix series *Dahmer – Monster: The Jeffrey Dahmer Story*, are reported to have added numerous gruesome details to the depiction of serial killer Jeffrey Dahmer, including his drinking of human blood when he was employed at a local blood bank. *See Jasmine Washington*, *Fact Or Fiction: How Much of Netflix's Dahmer Show Monster Is REALLY True?* Seventeen, Oct. 3, 2022, https://www.seventeen.com/celebrity/movies-tv/a41463978/how-true-ismonster-jeffrey-dahmer/.

¹¹⁵ See AQUINO, supra note 86, at 26.

¹¹⁶ Documentary producers typically obtain written appearance releases from subjects that they wish to interview on screen, often with no payment or a modest fee. *See* JON M. GARON, THE INDEPENDENT FILMMAKER'S LAW AND BUSINESS GUIDE: FINANCING, SHOOTING, AND DISTRIBUTING INDEPENDENT AND DIGITAL FILMS 306-07 (3d ed. 2021).

screenwriter adds invented material to a portrayal of a real person, that subject has a plausible claim for defamation, and the producer's First Amendment protection is lessened, because the film is portraying the subject in a manner that is partially false.¹¹⁷ Accordingly, as one court has noted, "dramatization, imagined dialog, manipulated chronologies, and fictionalization of events" have all given rise to claims by a depicted subject.¹¹⁸

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Fictionalization may also have upsides for producers. Inventing a wholly fictional character raises few liability concerns because such characters are unrecognizable as actual persons and their portrayal cannot be found to have defamed someone. For this reason, producers often use fictionalization as a way to handle secondary characters from whom the producer has not obtained full life story rights or releases of liability. For example, the 2022 Netflix docudrama *The Stranger* was based on the real life murder of a 13-year old Australian boy and the subsequent manhunt for his killer.¹¹⁹ Because the victim's family objected to the production, the producers invented several scenes and changed the names of the principal characters, though their appearances and actions were largely based on a nonfiction book that described the case.¹²⁰ An even more extreme case of altering characters.

¹¹⁷ See Porco v. Lifetime Entertainment Services LLC, 147 A.D.3d 1253, 1254-44 (N.Y. App. Div. 2017) ("a work may be so infected with fiction, dramatization or embellishment that it cannot be said to fulfill the purpose of the [First Amendment] newsworthiness exception" (citing Messenger v. Gruner+ Jahr Print. & Publ., 94 NY2d 436, 441 (N.Y. 2000)).

¹¹⁸ See Spahn v. Julian Messner, Inc., 221 N.E.2d 543 (N.Y1966) (fictionalized biography of a well-known baseball player was not authorized under First Amendment, as an accurate biography would have been). See also James M. Treece, Commercial Exploitation of Names, Likenesses, and Personal Histories, 51 TEX. L. REV. 637, 655 (1973) ("Liability for factual inaccuracy proceeds from an inference, based on evidence of "fictionalization," that the publisher intended to blend fact and fiction to increase circulation. Courts then weight this commercial purpose to override any purpose to convey information about newsworthy events. As a result, the publisher finds himself stripped of his constitutional privilege and charged with invasion of privacy.")

¹¹⁹ The Stranger (Netflix, 2022).

¹²⁰ See Leslie Katz, 'The Stranger' on Netflix: The True Story That Inspired the Unsettling Thriller, CNET, Nov. 9, 2022, https://www.cnet.com/culture/entertainment/ the-stranger-on-netflix-the-true-story-that-inspired-the-unsettling-thriller/ According to the Sydney Morning Post, the actor playing the lead detective in the case never met his subject, who remains anonymous. The actor explained "we were investigating the truth, taking that truth and telling a fictionalised version of it, which is about protecting everyone involved." Stephanie Bunbury, 'So much at stake': Joel Edgerton's risky mission for The Stranger, SYDNEY MORNING POST, Oct. 8, 2022, https:// www.smh.com.au/culture/movies/so-much-at-stake-joel-edgerton-s-risky-missionfor-the-stranger-20221003-p5bmu3.html.

Harvard Journal of Sports & Entertainment Law / Vol. 14

acters can be found in the hit 1942 musical film *Yankee Doodle Dandy*, in which composer George M. Cohan's two wives (Ethel, whom he divorced, and Agnes, a dancer) were combined into a single composite character named Mary, largely because Cohan wanted no reference to Ethel in the film and preferred the more melodic name Mary for use in his lyrics.¹²¹

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In stories about particularly prominent figures, public sentiment has caused producers to clarify their role in fictionalizing real events. For example, in Season 5 of *The Crown*, which aired shortly after the death of Queen Elizabeth II, private meetings between Prime Minister John Major and both Prince Charles and the Queen were portrayed. Buckingham Palace, Major, Dame Judy Dench and other prominent figures condemned the portrayals, with Major calling them a "barrel-load of nonsense."¹²² In response, the producers added a disclaimer to the trailer for the show emphasizing its fictionalized nature: "Inspired by real events, this fictional dramatisation tells the story of Queen Elizabeth II and the political and personal events that shaped her reign."¹²³

2. From Whom Are Life Story Rights Acquired?

a. Sources of Life Story Rights

Given that life story rights generally include requirements of cooperation and exclusivity, the principal source of life story rights are the individual subjects being depicted. However, producers may also seek to secure life story rights from third parties who knew subjects well, such as family members, journalists and police investigators.¹²⁴ The reason for this practice is that such third parties serve as alternative sources for the subject's narrative, giving rise to competing projects. For example, though Netflix acquired life story rights for *Inventing Anna* directly from Anna Sorokin, HBO Max is reported to have optioned a tell-all article about Sorokin written by her former friend Rachel Williams.¹²⁵ Netflix's gamble may have paid off, however, as a scripted HBO docudrama about Sorokin has not yet emerged,

¹²¹ See AQUINO, supra note 86, at 53.

¹²² Emily Burack, *The Drama Over Adding a Disclaimer to The Crown, Explained*, Town & Country Mag., Oct. 27, 2022, https://www.townandcountrymag.com/leisure/arts-and-culture/a41735275/the-crown-season-5-disclaimer-controversy/

¹²³ *Id*.

¹²⁴ See Grunfeld, supra note 29, at 516.

¹²⁵ See Stacey Lamb, Anna Sorokin's Story of Fraud Documented in 'Generation Hustle' and Shonda Rhimes Series, ET, Oct. 25, 2021, https://www.etonline.com/anna-delveyfrom-fake-german-heiress-to-subject-of-shonda-rhimes-netflix-series-164058.

though HBO did produce the aforementioned one-hour documentary episode that recounted her story in its *Generation Hustle* show.¹²⁶

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b. Uncooperative Subjects

It is always possible that an individual whom a producer plans to depict will not wish to be depicted, will not give the producer sufficient artistic control over the depiction, or demands an unreasonable level of compensation.¹²⁷ Other subjects may decline to enter life story rights deals because they correctly intuit that fictionalization clauses give producers the right to depict them in an unflattering light.¹²⁸ And some subjects (e.g., the British royal family) may simply feel that "selling" their life story rights is beneath their dignity and not something that they wish to entertain. In these cases, a producer may not be able to obtain life story rights for an individual depicted in a docudrama. In some cases, this lack of rights will persuade a producer not to pursue the project. As noted in Part I.A, above, producer Jesse Lasky waited twenty-one years until Sergeant Alvin York was willing to sell his life story rights for film.

In other cases, a producer may be willing to take the risk of producing a film about a living person without obtaining their consent. Such was the case with the 2010 film *The Social Network*, which portrayed Facebook founder Mark Zuckerberg without his permission or cooperation.¹²⁹ While Zuckerberg criticized aspects of his on-screen depiction, to our knowledge neither he nor Facebook brought litigation.¹³⁰ The result was different for Equinoxe's docudrama *Winnie Mandela*, which the principal subject disparaged in the media before it was released, contributing to the film's critical and commercial failure.¹³¹

¹²⁶ See id.

¹²⁷ See Grunfeld, supra note 29, at 516; Perot, supra note 7, at 205.

¹²⁸ Anonymous interview subject #4 at 9-10 (noting that subjects will frequently walk away from life story deals when they realize studios will be allowed to depict them in a negative light).

¹²⁹ See Ben Child, Mark Zuckerberg rejects his portrayal in The Social Network, THE GUARDIAN, Oct. 20, 2010, https://perma.cc/SN4H-UXAP.

¹³⁰ Whatever the likelihood that such litigation would ultimately have been successful, a lawsuit by a well-funded plaintiff could have caused problems, and certainly increased costs, for the producers. Some press accounts have speculated that Zuckerberg did not sue because the movie seemingly increased the popularity of Facebook. *Id.*

¹³¹ See notes infra 181-183 and accompanying text.

Harvard Journal of Sports & Entertainment Law / Vol. 14

c. Centrality of the Character

Even a docudrama that focuses intensely on one particular character usually depicts other individuals – friends, relatives, neighbors, colleagues, teammates, opposing counsel, police officers, victims, and the like. A producer must decide which of these individuals warrant the acquisition of life story rights, and which may require only a release¹³² or, if the subject is uncooperative, how to proceed absent the subject's cooperation. Unlike a principal character, a secondary character may more readily be depicted in a non-controversial and accurate manner or fictionalized to a degree that the real person is no longer represented.¹³³

d. Living Persons

Producers generally acquire life story rights only from living individuals, as most claims for defamation, privacy rights and rights of publicity do not survive the subject's death,¹³⁴ and deceased individuals will be unable to cooperate with a production. While some posthumous rights, such as rights of publicity in some states, do exist, industry practice, by and large, is not to seek life story rights other than from living individuals.¹³⁵ As one commentator suggests, "[t]his may account for the abundance of biographical docudramas produced shortly after a celebrity's death."¹³⁶

3. Insurance Coverage

A final, but crucial, element in the acquisition of life story rights is their role in securing errors and omissions (E&O) insurance coverage for a project. As explained by one entertainment industry broker,

Producers Errors and Omissions Insurance covers all of the potential legal liabilities and defense costs against lawsuits alleging unauthorized use of titles, formats, ideas, characters, plots, plagiarism, unfair competition or privacy, and breach of contract. It also protects against alleged libel, slan-

¹³² See discussion infra Part II.D.

¹³³ See supra Part II.B.1.

¹³⁴ But see ROTHMAN, supra note 34, at 81-88 (discussing post-mortem rights of publicity recognized in some states).

¹³⁵ See Anonymous Interview #2 at 8; MARK LITWAK, DEALMAKING IN THE FILM & TV INDUSTRY (4th ed., 2016) ("If the subject of the life story is deceased, much of the rationale for buying these rights disappears.").

¹³⁶ Grunfeld, *supra* note 29, at 494 and n.76 (noting 1980s docudramas based on the lives of Rock Hudson, Karen Carpenter and Liberace that were produced shortly after their deaths).

der, defamation of character or invasion of privacy. Errors & Omissions is a requirement for distribution deals with studios, television, cable networks, DVD and Internet sites prior to the release of any film production.¹³⁷

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By the 1980s, the acquisition of life story rights from docudrama subjects had become so common within the film and television industry that leading E&O insurance carriers required a producer to represent that it had acquired releases from all persons depicted in a production as part of the policy application process.¹³⁸ Moreover, the policies of major television networks began to tie the authorization of a production to the satisfaction of carrier requirements for insurability.¹³⁹

Risk averse E&O carriers are influential norm setters in the film and television world.¹⁴⁰ Several of the entertainment practitioners whom we interviewed emphasized the importance of obtaining life story rights in order to secure E&O coverage. Though some carriers may be willing to insure productions for which such rights have not been obtained,¹⁴¹ the result may be a substantially higher premium.¹⁴² Larger studios, however, may self-insure their productions, thereby eliminating the need to bow to the demands of third party E&O carriers.¹⁴³

¹³⁷ front row insurance brokers inc., *E&O* insurance 101: How to protect your film (2021).

¹³⁸ See, e.g., Perot, supra note 7, at 199; Grunfeld, supra note 29, at 530, 539 (quoting Fireman's Fund Insurance Co. application, "Written releases must be obtained from all persons who are recognizable or who might reasonably claim to be identifiable in the Insured production, or whose name, image or likeness is used.").

¹³⁹ See Golden, Docudramas, supra note 108 (citing ABC Program Standards Guide).

¹⁴⁰ Cf. Patricia Aufderheide, Fair Use Put to Good Use: 'Documentary Filmmakers' Statement' Makes Decisive Impact, DOCUMENTARY MAGAZINE, Aug. 15, 2007, https:// perma.cc/ZKA4-BCVN ("insurance companies are both the ultimate gatekeepers for television documentary and also historically cautious to adopt practices that involve risk"); see also James Gibson, Risk Aversion and Rights Accretion in Intellectual Property Law, 116 YALE L.J. 882, 893-94 (2007) (discussing the importance of E&O coverage and the risk aversion of E&O carriers).

¹⁴¹ E.g., The Social Network, supra Part II.B.2.b.

¹⁴² See Front Row, *supra* note 137, at 46 ("a possible result of not getting permission from a celebrity to do a docudrama could be a much higher E&O deductible

^{...} In some cases your deductible could jump from around \$10,000 to as high as \$250,000 for that one item"); Perot, *supra* note 7, at 199-200, 206.

¹⁴³ Interview with Subject #10 (date of interview).

Harvard Journal of Sports & Entertainment Law / Vol. 14

Seq: 34

4. Life Story Rights Across Media

It is worth noting that practices surrounding the acquisition of life story rights in the film and television industry have not been widely adopted in other media industries such as publishing, radio broadcasting or podcasting. This is not to say, of course, that the potential for liability does not exist when real persons are depicted in these media. For example, in the 1960s, the reclusive tycoon Howard Hughes assigned to a personal holding company the exclusive right to exploit his "name, personality, likeness or the life story or incidents in [his] life."¹⁴⁴ When Random House announced plans to publish a biography of Hughes, the company sued the publisher under a number of theories.¹⁴⁵ Similar cases have been brought against other book, newspaper and magazine publishers that have released fictionalized portrayals of real people.¹⁴⁶

Given cases such as these, one might envision the practice of obtaining life story rights, or at least releases, emerging in the publishing industry as it did in the motion picture industry. Yet journalists, authors and publishers seldom enter into life story agreements with their subjects.¹⁴⁷ There are several possible reasons for this difference between industries. First, films and television shows are typically produced by corporate entities with legal representation and significant financial backing, whereas journalists and authors typically produce articles and books independently on modest budgets,

¹⁴⁶ See Streitfeld, supra note 32; Treece, supra note 118, at 655-59. Even nonfiction biographies have been subject to lawsuits when pursued without the permission of a living subject, though these lawsuits have seldom been successful. See NPR Staff, Kitty Kelley Defends The 'Unauthorized' Biography, NPR (Dec. 11, 2010), https://perma.cc/VT5R-C5EY.

 ¹⁴⁴ Rosemont Enterprises, Inc. v. Random House, Inc., 294 N.Y.S.2d 122, 125 (Sup. Ct. 1968).
 ¹⁴⁵ The plaintiff's theories of liability were not entirely clear to the court. *Id.* at

¹⁴⁵ The plaintiff's theories of liability were not entirely clear to the court. *Id.* at 126 (referring to plaintiff's theories as a "combination of diverse allegations relating to several separate and distinct legal concepts which are all woven together into some not easily decipherable hybrid"). The case was dismissed, the court holding that "a public figure can have no exclusive rights to his own life story, and others need no consent or permission of the subject to write a biography of a celebrity." *Id.* at 129. *But see* Spahn v. Julian Messner, Inc., 221 N.E.2d 543 (N.Y. App. 1966) (fictionalized biography of a famous baseball player was enjoined under NY Civil Rights Law).

¹⁴⁷ One growing exception is podcasts, in which producers increasingly seek life story rights from their subjects. *See* Anonymous Interview #4 at 20 (interview date) (describing life story deal for a podcast). Anonymous Interview #12 (interview date) (increasing acquisition of life story rights by podcast producers who had experience in television industry).

with large advances reserved for only the most prominent. And while publishers may earn significant revenue from popular books (more, in some cases, than motion pictures), norms in the publishing industry place the onus for obtaining third party permissions on the author rather than the publisher. Thus, most authors and independent journalists are unable to afford a significant outlay to acquire life story rights, whereas even films with modest production budgets can accommodate these costs. Further, E&O insurance does not exist to the same extent in the publishing industry as it does in television and film. Thus, there appears to be little external pressure for journalists and authors, and even publishers, to acquire life story rights. For all of these reasons, we see few life story deals outside the film and television industries.

C. Basic Elements of a Life Story Deal

Agreements to acquire life story rights are multilayered contracts that include four key features: a putative conveyance of rights; a waiver of liability; an exclusivity commitment; and an agreement to grant access or cooperate. We discuss each of these features, as well as some others, in greater detail in this Section.

1. Grant of Rights

Since at least the 1940s, life story agreements have contained a formal grant of rights of the type typically seen in intellectual property licenses.¹⁴⁸ This grant includes the right to portray the subject factually or fictionally. For example, the 1956 agreement between Christine Sizemore, the psychiatric patient on whom The Three Faces of Eve was based, and Twentieth Century-Fox contains an assignment to the studio of "all versions of my life story heretofore published or hereafter published and unpublished versions thereof."149 By the 1980s a more robust version of this grant, phrased as a license rather than an assignment or conveyance of rights, had become common in life story agreements, requiring the subject to grant to the producer:

A perpetual, exclusive, and irrevocable right, throughout the universe, to depict the subject, whether wholly or partially factually or fictionally, and to use the subject's name, likeness, voice, and biography, in any and all media and by any and all means whether now known or hereafter devel-

¹⁴⁸ See Jorge L. Contreras, Intellectual Property Licensing and Trans-ACTIONS: THEORY AND PRACTICE 149 (2022) (describing grants of rights in intellectual property assignments). ¹⁴⁹ Rudell, *supra* note 105.

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oped and in all advertising and exploitation thereof [and] to portray, impersonate, and simulate the subject in any way in which the producer in his sole discretion may determine.¹⁵⁰

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Such a grant of rights continues to appear prominently in life story agreements today. Yet, as discussed in Part II, life story rights are not property rights that can be conveyed and licensed like copyrights or trademarks. The grant of rights in life story rights agreements, then, seems superfluous, or at least redundant in view of the operative contractual provisions discussed below (i.e., access, exclusivity, and waiver).¹⁵¹

This being said, the grant of rights in life story agreements may serve at least one important function: it may establish, beyond a shadow of a doubt, that the producer is permitted to fictionalize the subject's story.¹⁵² If an express authorization to fictionalize is not granted, the subject could argue that the producer is only entitled to depict their actual story, truthfully and without embellishment, as in a documentary. The grant of fictionalization rights thus authorizes producers to embellish the truth, eliminating any risk that the agreement will be read otherwise.¹⁵³

Such contractual grant language may also be useful to evidence the scope of a subject's agreement and thereby avoid disputes between competing producers. For example, in 2009 sportswriter Kirstie McLellan Day co-authored with Canadian hockey star Theo Fleury a book about his experiences with sexual abuse as a junior league player.¹⁵⁴ In 2021, a Hollywood studio announced plans to produce a docudrama about Fleury's life. Day objected on the ground that the agreement she signed with Fleury gave her

¹⁵⁰ Lentzner, *supra* note 108, at 633 (quoting Williams & Frascott, *The Lawyer's Role in the Acquisition and Exploitation of Life Story Rights*, 31 BOSTON BAR J., July/Aug. 1987, at 9).

¹⁵¹ In *Marder v. Lopez*, the Ninth Circuit held that a grant of rights in a life story agreement was *not* redundant with a release from claims. The court explained that while a release "extinguishes claims against the released party," a grant, by contrast, "is an agreement that creates a right. Parties may include both provisions in a contract without undermining the effect of either the grant or the release." 450 F.3d 445, 452 (9th Cir. 2006). *Id.*

¹⁵² See Kelly v. William Morrow & Co., 186 Cal. App. 1625 (1986) (holding that a "personal depiction waiver" for book publication covered the book's mixed truthful and invented portrayal of the subject because it granted the right to depict that subject "either factually or fictionally").

 $^{^{153}}$ Id. (implying that granting the right to portray the subject's life fictionally was necessary to allow the grantee to do so).

¹⁵⁴ Theo Fleury & Kristie McLellan Day, Playing with Fire (2009).

"the right to exploit all subsidiary rights in respect of the [book]."¹⁵⁵ Despite Day's contentions, it is not clear that this contractual language would apply to an original script about Fleury's life that is not derivative of the book itself.¹⁵⁶ Had Day wished more reliably to secure the exclusive right to make a production based on Fleury's life story, she might have been better off with a contractual grant of rights more akin to those described above.

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2. Liability Waiver

Industry insiders describe the liability disclaimer or waiver clause as the central feature of life story agreements.¹⁵⁷ These clauses are broad and include general waivers of liability as well as disclaimers of liability under specific theories ranging from more plausible (right of privacy and defamation) to largely inapplicable (copyright and trademark).¹⁵⁸

Despite the relative freedom that producers have under the First Amendment to tell stories that are based on true facts, and the decreased risk of liability when characters are partially or fully fictionalized, liability rooted in the right of publicity and privacy is a real threat, so these waivers do reduce studios' litigation exposure.¹⁵⁹ Their greatest value, though, is likely as a preemptive, litigation-avoidance measure. Unhappy docudrama subjects may sue regardless of whether they have a valid cause of action, and even meritless lawsuits can exact costs in terms of attorney's fees, distraction, bad publicity and possible nuisance-value settlements. By requiring subjects to agree to liability waivers, producers can reduce the possibility that such litigation will be initiated, since individuals tend to comply with agreements that they execute.¹⁶⁰

¹⁵⁵ Meghan Grant, Hollywood movie about Theo Fleury stalled as autobiography co-author claims ownership over his life story, CBC News, Jul. 6, 2021, https://perma.cc/4FHN-92JR.

¹⁵⁶ The matter is pending in Canada, and we express no views about Canadian law.

¹⁵⁷ Anonymous Interview #6 at 4 (summarizing "life story rights" as "you're buying the right not to be sued"); Anonymous Interview #7 at ("[T]he key from my perspective is the release. What we're trying to do is avoid a lawsuit by getting this. That's really, to me, what it's all about.").

¹⁵⁸ See Anonymous Interview #4 (waivers list all of these enumerated causes of action, even though copyright and trademark are likely unnecessary).

¹⁵⁹ James Gibson observes similar risk aversion behavior in a variety of copyright licensing contexts where a license may not actually be required by law but is useful to avoid potential litigation. Gibson, *supra* note 140.

¹⁶⁰ Anonymous Interview #6 at 14 (reporting that subjects tend to comply with life story rights agreements). Empirical work also shows that people tend to perceive contracts they execute as binding, at least where (as here) the parties have a mean-

Harvard Journal of Sports & Entertainment Law / Vol. 14

Seq: 38

3. Exclusivity

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Life story rights agreements generally require the subject to agree to sweeping exclusivity restrictions.¹⁶¹ This means, at a minimum, that the subject will not cooperate with another producer or studio to create a docudrama based on their life. Sometimes, such provisions also mandate that subjects refrain from sharing their stories with other media outlets: no news interviews, no confessional blog posts, no magazine features.¹⁶² When subjects want to engage with media in a manner that will not undermine the project, the life story agreement could expressly permit such engagement, or require the subject to seek the prior authorization of the studio (which may be granted if the request is reasonable).¹⁶³

Studios desire exclusivity in part because preventing a subject from cooperating with other production companies will make it harder for them to make a competing film, notwithstanding their general ability to base a production on known facts.¹⁶⁴ Moreover, the more the details of the subject's story become widely known, the less public appetite is likely to remain for the production once it is released. While there are instances of multiple docudramas being released on the same subject, the later market entrant often has had its thunder stolen by the earlier one.¹⁶⁵ For example, the 2005 Truman Capote biopic, *Capote*, won widespread critical acclaim, was a box office hit, and won an Academy Award for Philip Seymour Hoffman.¹⁶⁶ The

ingful sense of the contract's content. See Zev J. Eigen, When and Why Individuals Obey Contracts: Experimental Evidence of Consent, Compliance, Promise, and Performance, 41 J. LEGAL STUD. 67, 87-88 (2012) (demonstrating that people are more likely to comply with negotiated contracts than with adhesory ones).

¹⁶¹ GARON, *supra* note 116, at 315 (discussing exclusivity as a core feature of life story rights).

¹⁶² Anonymous Interview #3 at 5.

¹⁶³ Anonymous Interview #10; Stephen Rodner, *Life story rights: What's possible and what's not?* HOLLYWOOD REP., Jan. 24, 2008 ("Usually, an exclusion is negotiated which gives the subject the right to appear on news interviews and (sometimes) to appear in documentary films that would not interfere with the producer's fictional film.").

¹⁶⁴ Anonymous Interview #5 at 9 (explaining that with exclusivity "you can prevent those people [subjects] from working on the other ones [competing projects[] and making their projects better or spilling their secret sauce").

¹⁶⁵ Anonymous Interview #7 at 11 ("It's very hard to do two movies on the same subject matter. The second one usually tanks").

¹⁶⁶ See Kenneth Turan, 'Infamous' Fails Where 'Capote' Succeeded, NPR, Oct. 13, 2006, https://perma.cc/KZG9-P7RU. Interestingly, Capote's most famous book, In Cold Blood (1965), was itself a fictionalized account of a notorious murder and the trial and execution of its perpetrators. See CASEY CEP, FURIOUS HOURS: MURDER,

2006 film *Infamous* also dramatized the same period in Capote's life. Nevertheless, the public appetite for Capote dramatizations had seemingly been sated by the earlier film, and *Infamous* turned out to be a commercial failure.¹⁶⁷

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For all of these reasons, Netflix secured Anna Sorokin's exclusive cooperation for *Inventing Anna*,¹⁶⁸ despite the fact that, prior to the series' February 2022 release, Sorokin's story had already been the subject of a televised documentary episode by HBO Max, features on news programs, and podcasts produced by BBC and others.¹⁶⁹ Though Sorokin appears personally in several of these, none dramatizes her story using actors and staged scenes in the manner of *Inventing Anna*. While Netflix's agreement with Sorokin could not keep her story under wraps, it did guarantee them Sorokin's exclusive cooperation, complicating the efforts of any other studio to create an Anna Delvey dramatization.

Whether exclusivity provisions are enforceable is debatable as a practical and legal matter.¹⁷⁰ If a subject who signed an exclusive life story agreement with a studio then did an interview with a newspaper discussing features of her story, it is not clear that the studio could successfully sue the subject to enforce the agreement.¹⁷¹ Optically, the public perception of the studio seeking to silence its subject could reflect poorly on the studio and its project. Suing the subject could also destroy any goodwill between the subject and the studio, making it unlikely the subject would cooperate in a

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FRAUD, AND THE LAST TRIAL OF HARPER LEE (2020) (discussing Capote's writing of *In Cold Blood*).

¹⁶⁷ See Turan, supra note 166.

¹⁶⁸ Baker, *supra* note 6 ("A "life rights" deal does not mean other people can't tell the story – which has multiple perspectives – but it gives the company free rein and ensures Sorokin cannot assist the competition.").

¹⁶⁹ Divya Meena, 5 Anna Delvey Documentaries and Podcasts to Check Out Before "Inventing Anna", Yahoo!, Feb. 8, 2022, https://perma.cc/H2X9-STNJ.

¹⁷⁰ See Anonymous Interview #5 at 10 (conceding that whether exclusivity clauses are enforceable is debatable).

¹⁷¹ A contractual non-disparagement clause waiving an individual's First Amendment right to free speech will generally be enforceable only if it was entered into knowingly and voluntarily and, under the circumstances, the interest in enforcing the waiver is not outweighed by a relevant public policy that would be harmed by enforcement. Overbey v. Mayor of Baltimore, 930 F.3d 215, 223 (4th Cir. 2019). In addition, in the wake of the Harvey Weinstein scandal and the #MeToo movement, California enacted legislation prohibiting employment contracts and settlement agreements from containing non-disparagement clauses restricting an individual's right to disclose information regarding sexual harassment and other unlawful activities. Cal. Civ. Proc. Code § 1001 (2022); Cal. Gov't Code § 12964.5 (2022).

Harvard Journal of Sports & Entertainment Law / Vol. 14

useful manner with the film's production. And legally, whether the studio could enforce an exclusivity provision to bar the subject from speaking about a matter of public interest with a news outlet is questionable given the free speech objections the subject and newspaper could plausibly raise. So here, too, the function of a broad exclusivity clause could be predominantly *in terrorem*. Knowing that they have executed such a clause, subjects are less likely to tell their story publicly. If a studio were to learn that a subject were contemplating doing a media interview, they could remind the subject of the exclusivity clause in an effort to prevent them from doing so.¹⁷²

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4. Access and Cooperation

Life story agreements secure subjects' cooperation with a project both by engaging their help with production and by preventing disparagement.¹⁷³ Many docudrama subjects are not well known enough that the details of their lives are in the public record.¹⁷⁴ Extensive research can be necessary to acquire enough detail to tell the subject's story richly. Many life story agreements thus include provisions requiring subjects to be interviewed at length and to provide access to source material, such as journals, news clippings, notes, photographs, or family albums, that may help the writers to tell their story.¹⁷⁵

¹⁷² See Anonymous Interview #5 at 10 (indicating that these clauses are enforced informally by reminding subjects of their existence rather than via litigation); cf. Anonymous Interview #8 at (reporting zero instances of breach of life rights agreements in their practice experience). A studio would, however, be more likely to aggressively enforce an exclusivity provision in the event of a more consequential breach, such as where a subject sought to execute another life story rights deal with a competing studio. In that case, the breach would threaten the viability of the studio's project, rather than just marginally sating the public appetite for information about the subject.

¹⁷³ GARON, *supra* note 116, at 315 (noting that many life story deals entail "active assistance" with, not just passive agreement to, the project).

¹⁷⁴ Anonymous Interview #8 at (explaining that life rights agreements secure access to "things that aren't available publicly" such as "photos and home videos and whatever else").

¹⁷⁵ See, e.g., Jessica Sager, Where Is Sarma Melngailis Now? How the Bad Vegan Is Making Good on Her Debts, Parade, Mar. 21, 2022, https://perma.cc/9B5U-RHG3 (agreement with "Bad Vegan" subject required her to contribute "source materials and images for the documentary"). See also Anonymous Interview #3 (observing that the subject may "have access [to] materials that you really want that are going to enhance the story or the script. And so you get that cooperation even if, under the law, you don't need it.").

Access clauses may also obligate subjects to secure the cooperation of other people essential to the project, such as friends and family members.¹⁷⁶ These clauses may also require subjects to be available to give commentary and advice on the script or film during its production, in some cases in exchange for additional compensation. Studios may want, perhaps even need, some subjects to advise on the project to assure realism. They will want other subjects to stay away to avoid unwanted interference.¹⁷⁷ For example, with *Inventing Anna*, Anna Sorokin consulted on the Netflix production, including by meeting with actress Julia Garner, who played her, while Sorokin was still in prison.¹⁷⁸ And consulting with a subject, especially one who may be opinionated or even hostile toward the project, can assure that they approve, or at least do not feel blindsided by, the final version.¹⁷⁹

Access clauses may also prohibit the subject from publicly disparaging a production. Especially where the subject of a life-based project is well known, the project could fail both critically and commercially if the subject were to trash it in the press.¹⁸⁰ For example, in 2011, Equinoxe Films released *Winnie Mandela*, a dramatization based on an unauthorized biography of Mandela.¹⁸¹ The filmmakers did not secure a life story agreement with Mandela and declined her requests to be involved in its production. Before the film release, Mandela publicly distanced herself from the project, questioning its truthfulness and calling it an "insult."¹⁸² Likely in part because its beloved subject disparaged it before it even hit theatres, *Winnie Mandela* failed at the box office and was panned by critics.¹⁸³ This fiasco may have been avoided had the studio secured Mandela's cooperation, or at least pre-

541

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¹⁷⁶ Anonymous Interview #6 at 7 (cooperation clauses often extend to securing cooperation from family and friends).

¹⁷⁷ Anonymous Interview #5 at 4 ("[I]t depends on what kind of relationship you want to have with that person. Sometimes, you want to have a collaborative relationship. You really want them involved in the production. [While] sometimes you don't want these people involved at all in your project[.]").

¹⁷⁸ Baker, *supra* note 6.

¹⁷⁹ Anonymous Interview #5 at 8.

¹⁸⁰ Anonymous Interview #3 ("[S]ometimes you just want to do a deal . . . because the [subject is] super influential or they have an angle, a lever they can pull to either enhance the success and the marketing and the publicity of the production, or to the contrary, put a torch to it.").

¹⁸¹ Winnie Mandela (Equinoxe, 2011).

¹⁸² David Smith, *Winnie Madikizela-Mandela 'insulted' by movie about her life*, THE GUARDIAN, June 14, 2011, https://perma.cc/4SJX-2ZNQ.

¹⁸³ See, e.g., ROTTEN TOMATOS, rottentomatoes.com/m/winnie_mandela (last visited Apr. 22, 2022) (only 15% of critic's reviews were positive).

542 Harvard Journal of Sports & Entertainment Law / Vol. 14

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vented her public disparagement of the project.¹⁸⁴ Life story agreements may thus seek to secure the goodwill of both the subject and the public. As basketball legend Ervin "Magic" Johnson said of the recent HBO docudrama *Winning Time*, which did not seek cooperation from him or other team members, "You gotta have the guys."¹⁸⁵ Even though a subject's story may be told without executing a life story agreement, telling a story—especially the story of a sympathetic subject—without their permission can have bad optics for studios and generate negative PR.¹⁸⁶

5. Valuing Life Stories: Compensation

Perhaps the most important feature of a life story deal, at least from the subject's standpoint, is compensation.¹⁸⁷ Often compensation is far less than the subject expects or the public imagines. Studio executives and entertainment lawyers alike report that while subjects increasingly think they are entitled to huge paydays, life story deals tend to disappoint these expectations.¹⁸⁸ Thus, as one commentator notes:

¹⁸⁴ Criticism by figures not covered by non-disparagement commitments does not necessarily sink a film. Tom Ford publicly excoriated the docudrama *House of Gucci*, but this did not prevent the film from earning a broad viewership. Priya Elan, *Tom Ford 'laughed out loud' during House of Gucci screening*, THE GUARDIAN, Nov. 30, 2021, https://perma.cc/AE8P-V7TG

¹⁸⁵ Selome Hailu & Ramin Setoodeh, *Magic Johnson's Next Shot: The NBA Legend* on Changing Lakers History, HIV Activism and His Revealing Apple Docuseries, VARIETY, Apr. 5, 2022, https://perma.cc/CYC3-329K. Though there is no indication that Johnson has threatened litigation over HBO's *Winning Time*, former Lakers coach Jerry West, who is portrayed in the series, has threatened suit. See Check Schilken, *Jerry West: 'If I have to, I will take this all the way to the Supreme Court'*, LA TIMES, Apr. 26, 2022, https://www.latimes.com/sports/story/2022-04-26/jerry-west-supremecourt-hbo-winning-time-showtime-lakers.

¹⁸⁶ Anonymous Interview #5 at 7-8 (noting that even though studios can usually tell stories without permission, they still do life story deals to avoid PR and because they "want to do right by" the subjects).

¹⁸⁷ In rare cases, a subject may grant a producer life story rights for free because they are eager to have their stories told publicly. Anonymous Interview #8 at 8 (noting that even high-profile individuals may assign life story rights with no compensation if they strongly want to have their story told in film).

¹⁸⁸ See Anonymous Interview #1 at 8 ("[T]hey all think[] that it's going to be a life-changing amount of money, and it isn't."); Anonymous Interview #3 at 7 ("People have unreasonable expectations in this business. They think, 'Oh you're making a movie based on me. I'm never going to have to worry about money for the rest of my life.'").

Seq: 43

2023 / Life Story Puzzle

Unless the person whose life rights you're acquiring is a world leader, pop culture icon, or unquestionably revered household name, the rights are worth considerably less than you think. While most people assume their life rights will sell for at least \$500,000 to north of \$1 million, most life rights are offered \$35,000-\$75,000. Thus, many deals get squashed before they get started, because the people who are selling their life story feel slighted by the offer. Sure, there are the occasional seven-figure deals, but those are reserved for stories that wrangle enthusiastic interest from A-list actors, coupled with a major studio that's willing to spend \$50-\$75 million or more on the production, plus \$25-\$35 million more in [print and advertising.]¹⁸⁹

The two traditional drivers of price in a life story acquisition have been a subject's preexisting notoriety and whether the medium is film or television,¹⁹⁰ though the increasing reach and prestige of streaming features may be changing this conventional wisdom. It has been rumored that Apple TV+ recently paid upwards of \$25 million to secure rights from NBA superstar Ervin "Magic" Johnson for its series *They Call Me Magic*.¹⁹¹

In most cases, the subject of a life story acquisition is paid only when the deal is completed. As noted above, nearly all life story acquisitions are preceded by option agreements, where a producer pays the subject a much smaller amount in exchange for the exclusive right to shop the story to studios or networks. These option fees seldom exceed 10% of the agreed-on price for the subject's life rights and may be nominal or even zero.¹⁹²

In addition to up-front payments for the acquisition of life story rights, producers occasionally offer subjects a small percentage of the film's net profits. In theory, this form of "back end" compensation incentivizes subjects to root for the project's success and to cooperate more willingly with the producer. Nevertheless, given the economics of the film industry and the

¹⁸⁹ Hammad Zaidi, *3 Things You Need to Know About Acquiring Life Rights*, Going Bionic Column, Mar. 13, 2017, https://goingbionic.com/2017/03/13/3-things-you-need-to-know-about-acquiring-life-rights/. *See also* Anonymous Interview #5 at 5 (most film life story fees are in the range of zero to \$250,000); Anonymous Interview #7 at 14 (stating that most deals are in the \$20,000 to \$250,000 range, though a handful are in the higher six figures).

¹⁹⁰ APPLETON & YANKELEVITZ, *supra* note 112, at 31 ("Generally, purchase prices for life rights in connection with feature films will fall within the range of \$100,000 to \$250,000. For television projects, the range is usually \$25,000 to \$100,000"); Anonymous Interview #6 at 12 (estimating the life rights for a "Hallmark TV movie" at \$25,000 to \$75,000).

¹⁹¹ Christian Rivas, *Apple TV+ wins bidding war for Magic Johnson docuseries*, SIL-VER SCREEN AND ROLL (Nov. 6, 2021), https://www.silverscreenandroll.com/2021/11/ 6/22765953/lakers-news-magic-johnson-docuseries-details-apple-tv-plus.

¹⁹² Anonymous Interview #4 (option price may be as low as "a dollar").

aggressive accounting mechanisms used to compute a film's net profits, few productions actually result in the payment of this form of compensation to subjects.¹⁹³

Why are compensation amounts low, at least as compared to the astronomical dollar values sometimes paid to top actors, directors and studio executives? One reason is that a key feature of life story agreements is the subject's waiver of claims against the producer. Even if a subject could win a defamation or right of privacy lawsuit against a major film studio, reputational damages tend to be modest, especially for the majority of docudrama subjects who are not famous. So at a price point above about a million dollars, studios could be better off making the film and letting the subject sue them.¹⁹⁴

Another reason for low prices is that most life story deals are for television projects, where budgets are lower than in feature films. Moreover, even in feature films, stories based on real life, with the possible exception of some war films or *Titanic*, are seldom big-budget productions with massive special effects, expensive computer animation and exotic on-location shoots. As a result, the production's budget to acquire life story rights must remain modest.

6. Granularity

Many notable individuals have lived long and interesting lives, including many episodes worthy of dramatization. As a result, life story deals are often limited to a particular portion of a subject's life—their time in college, the military or public office, their investigation (or commission) of a particular crime, or the events leading up to a notable victory or achievement.¹⁹⁵ Periods not covered by the agreement are generally considered off-limits to the producers and may be sold by the subject for use in other projects.

Disputes can arise if agreements are not specific enough in this regard and a subject lives past the period that was originally depicted in a production. For example, when Christine Sizemore sold her story to Twentieth Century-Fox in 1956 for *The Three Faces of Eve*, the obvious subject of interest

¹⁹³ See Anonymous Interview #1 (making this point by reference to financial practices designed to shortchange performers, a practice known as "Hollywood accounting").

¹⁹⁴ As one industry lawyer put it, "[y]ou're not going to make a movie unless you're an idiot that results in \$30 million of damages," or anything close to that amount, so life rights deals seldom approach that level. Anonymous Interview #3 at 7.

¹⁹⁵ See APPLETON & YANKELEVITS, supra note 112, at 31.

was her experience with, and treatment for, multiple personality disorder. More than thirty years later, however, Sizemore wrote a book about her posttreatment life and granted an option for its film dramatization to actress Sissy Spacek.¹⁹⁶ Twentieth Century-Fox, however, claimed that it owned rights in the entirety of Sizemore's life and contested Spacek's option.¹⁹⁷

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Time periods are not the only variables as to which life story deals can become granular. Like copyrights,¹⁹⁸ life story rights are divisible, so that separate rights can be granted with respect to the production of films, television shows, books, magazine articles, podcasts and merchandise, as well as series, sequels and remakes of the original production.¹⁹⁹ While subdividing life story rights into multiple units for licensing to different entities can help an individual to maximize the return from his or her life story rights, it can also create confusion and disagreement. For example, the press has reported on a dispute between two production companies that sought to create film versions of the life of Richard Williams, the father of tennis stars Serena and Venus Williams. One company putatively acquired the right to produce a film based on Richard Williams's autobiographical book Black and White: The Way I See It,²⁰⁰ while another seemingly acquired life story rights from Williams himself.²⁰¹ Such acquisitions of the same stories from multiple sources is not uncommon.²⁰² All of these examples illustrate the many dimensions of granularity that life story agreements can address.

7. Creative Control

As discussed above, life story deals typically require subjects to waive their right to make claims based on the how they are depicted in a film or television show. Some industry insiders stress that the very point of a life story deal is that the studio can make whatever film it wishes about the

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¹⁹⁶ Rudell, *supra* note 105.

¹⁹⁷ *Id.* It appears that the dispute was eventually settled on undisclosed terms. Lentzner, *supra* note 108, at 627 n.1.

¹⁹⁸ See 17 U.S.C. § 201(d)(2) ("Any of the exclusive rights comprised in a copyright, including any subdivision of any of the rights specified by section 106, may be transferred . . . and owned separately.").

¹⁹⁹ See APPLETON & YANKELEVITS, supra note 112, at 31.

²⁰⁰ Richard Williams, Black and White: The Way I See It (2014).

²⁰¹ See Ashley Cullins, Father of Venus and Serena Williams Headed to Court Over Film Adaptation, HOLLYWOOD REPORTER (Jun. 24, 2020) www.hollywoodreporter.com/business/business-news/venus-serena-williamss-fatherheaded-court-life-story-rights-1300118/.

²⁰² See Grunfeld, supra note 29, at 516.

Harvard Journal of Sports & Entertainment Law / Vol. 14

subject.²⁰³ Nevertheless, contrary to the advice of many entertainment lawyers,²⁰⁴ some life story agreements give their subjects the right to review or approve these depictions at certain stages during the production. Such approval rights, if granted, usually occur at the stage of the treatment (story outline), selection of screenwriter, casting of talent, or review of a draft script, but seldom at the final script stage, and never after filming has commenced.²⁰⁵ Traditionally, such approval rights have only been granted to famous subjects like Hugh Hefner²⁰⁶ and George M. Cohan,²⁰⁷ though there appears to be an increasing use of these clauses in recent years.

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In lieu of blanket approval rights, an increasing number of life story agreements contain provisions restricting the producer from depicting the subject engaging in particular forms of off-limits behavior, such as conducting illegal or immoral acts, swearing or cursing, or being portrayed in sexual situations.²⁰⁸ While provisions like these give the subject less artistic and creative control over the project, they are less in tension with producers' desire to make the feature they want.

D. Life Story Acquisitions versus Releases and Other Agreements

It is important to distinguish life story agreements from other types of agreements used in the entertainment industry. The first is the simple "appearance" or "depiction" release, in which a subject agrees not to sue the producer on any theory, usually premised on accurately representing the subject.²⁰⁹ As this latter condition indicates, the simple release is most common for documentary subjects as well as individuals briefly portrayed in docudramas.²¹⁰ Given the multiplicity of legal claims that may be brought

²⁰³ Anonymous Interview #7 at 11 ("[Y]ou want to tell your own story, your own version of the story. That's what screenwriters want.").

²⁰⁴ See Rodner, supra note 163 ("Many times the subject asks for script approval or some control over how he is portrayed. This is something a producer should try to avoid at all costs.").

²⁰⁵ See APPLETON & YANKELEVITS, supra note 112, at 32.

²⁰⁶ Id.

²⁰⁷ AQUINO, *supra* note 86, at 27, 53 (for the 1942 musical film *Yankee Doodle Dandy*, composer George M. Cohan was reportedly granted the right to approve both the script and the actor who would portray him).

²⁰⁸ Anonymous interview #9, Anonymous interview #10.

 $^{^{209}}$ See Anonymous Interview #8 at 6-7 (describing the simple "appearance release").

²¹⁰ Anonymous Interview #4 at 11-13 (explaining that documentaries often execute simple releases rather than full life story rights agreements with their subjects, and that the same is true with more peripheral characters in docudramas). Studios will also use the simple release to secure the right to portray individuals inadver-

by even minor characters depicted in a production, E&O insurance carriers often require that a producer obtain releases from all living persons recognizably portrayed in a production.²¹¹

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The life story rights agreement, as we have discussed above,²¹² secures the producer substantially more rights.²¹³ While simple appearance releases are more common for documentaries and life story acquisition are more common for docudramas,²¹⁴ life story rights may be secured for documentaries if the producer wishes to enhance the project by obtaining the subject's exclusivity or cooperation.²¹⁵ Finally, participants in reality-television projects sign much more robust agreements that grant the producer the right to use the subject's name and likeness for any purpose and without limitation.²¹⁶

This Part II solves the puzzle posed in Part I: Why do studios pay to acquire life story rights if they don't exist? The answer is that life story deals

tently included in any scene shot in a public place, often for no or little consideration. Anonymous Interview #1 at 12 (production assistants will often give people in the background of shots in public venues \$100 in exchange for signing a quick appearance release).

²¹¹ See Grunfeld, *supra* note 29, at 530 (noting that in the docudrama *Kent State*, the producers were required to obtain depiction releases from 85 individuals). See *also* notes 138-139, *supra*, and accompanying text (discussing requirements for E&O insurance).

²¹² See Part II.C, supra.

²¹³ Some entertainment lawyers also noted an additional category, the "heavy appearance release", that includes a release and some but not all of the features typical of a full life story agreement. *See* Anonymous Interview #8 at 6 (referring to a "heavy appearance release").

²¹⁴ GARON, *supra* note 116, at 307, 314 (discussing releases in the context of documentaries, and observing that life story rights are more relevant for filmmakers "pursing narrative film based on a person's true story").

²¹⁵ See Sections II.C.3 and 4, *supra* (discussing cooperation and exclusivity features of life story deals).

²¹⁶ Reality television contracts prospectively require contestants to relinquish any control or right to sue over the content that they will participate in creating with the studio. Life story rights deals retrospectively cede to the studios the right to sue for damages arising out of a feature based on their life. *See* Anonymous Interview #6 at 16-22 (detailing the operation of reality TV agreements). Because these agreements more closely approach the contracts actors sign with studios and are distinct from life story rights, *see id*. (distinguishing life rights deals from reality TV deals and comparing the latter to actor's agreements), we say little about them in this Article.

548 Harvard Journal of Sports & Entertainment Law / Vol. 14

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do not convey affirmative property-like interests, but instead comprise complex agreements with a remarkably stable character. This Part has adumbrated the core features of those deals, which comprise a grant of rights, a waiver of claims and covenant not to sue, an exclusivity commitment and an agreement to cooperate with production. In Part III, we turn to the biggerpicture themes raised by this descriptive account.

III. DECONSTRUCTING LIFE STORY RIGHTS

Life story rights are not formal property interests, but four distinct contractual relations (permission, waiver, exclusivity, and access) that are bundled together under a common label. In this Part, we discuss the twin underlying motivations for this bundling: private ordering and transactional efficiency.

A. Life Story Rights as Private Ordering – The Interplay of Law and Norms

We begin this Part with an origin story: Part II described the beginning of life story deals in the Golden Age of Hollywood, but why, precisely, did these early producers seek out and acquire such non-existent rights? To answer this question, we return to the puzzle that gave rise to this article: Why do studios pay for life story rights when such rights don't exist? This puzzle is puzzling, though, only if one makes what Robert Ellickson has called the "legal centralist" assumption that only state-created laws govern our conduct.²¹⁷ Our assertion that life story rights do not exist means only that there is no behavioral obligation backed by a state sanction giving individuals a property-like interest in their life stories.²¹⁸ But law is not the only source of regulation. Many of the rules that govern our behavior are not found in judicial opinions or statutory codes, but arise spontaneously out of practices that are repeated over time until they form a kind of informal regulation-a social norm-that does not emanate from the state but still affects and shapes our conduct.²¹⁹ And of course parties can also use private agreements to arrive at arrangements that reconfigure law's baselines. In this

²¹⁷ Robert Ellickson, Order Without Law: How Neighbors Settle Disputes (3d prtg. 1994).

²¹⁸ See Robert Cooter, Do Good Laws Make Good Citizens? An Empirical Analysis of Internalized Norms, 86 VA. L. REV. 1577, 1579 (2000).

²¹⁹ See Robert Cooter, Decentralized Law for a Complex Economy: The Structural Approach to Adjudicating the New Law Merchant, 144 U. PA. L. REV. 1643(1996).

Subpart, we expound on the origin of life story rights as an interaction between these two forms of private ordering: contract and norms.

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Over the past several decades, scholars have shown how norms can fill in the "negative spaces" left unprotected by intellectual property law. This work tends to follow a common model: the creative production of some community is unprotected by intellectual property law, and that community reacts by creating an extralegal system of protection for that content. For example, stand-up comedians' jokes are unprotected by copyright because they are told extemporaneously during in-person performances, hence not fixed in any tangible medium of expression.²²⁰ Sprigman and Oliar showed that comedians have reacted to this lacuna in IP law by forging a normbased system of protection that uses a combination of shaming, exclusion, and even violence that seeks to prevent comedians from using one another's jokes.²²¹

The institution of securing life story rights initially appears to be another example of this kind of norms system. For one thing, this practice operates in a space left untouched by IP or IP-adjacent law. Law secures no rights in one's life story; life story deals provide an alternative source of protection for the facts of subjects' lives. Also, the setting in which these deals have emerged has all the indicia necessary to give rise to stable normbased regulation. Ellickson's cornerstone work on norms among cattle ranchers in Shasta County illustrates that norm-based systems arise where three conditions are met. First is the presence of a closely knit group that recognizes and is governed by the norm. Second, and relatedly, repeated interactions over time must allow the norm to become familiar and wellaccepted. Third, some mechanism for sanctioning violators must assure that the norm is taken seriously even in the absence of state sanctions.²²²

²²⁰ 17 U.S.C. 102(a) (copyright vests only in original works of authorship fixed in tangible media of expression).

²²¹ See Dotan Oliar & Chris Sprigman, There's No Free Laugh (Anymore): The Emergence of Intellectual Property Norms and the Transformation of Stand-Up Comedy, 94 VA. L. REV. 1787 (2008). Other examples and variations abound. The copyrightability of tattoo artists' work is debatable, but in any event it has given rise to a system of community norms to regulate and prevent copying. See Aaron Perzanowski, Tattoos & IP Norms, 98 MINN. L. REV. 511 (2013). Norm-based regulation may arise also where IP is effectively but not substantively unavailable, as with roller derby names. See Dave Fagundes, Talk Derby to Me: Emergent Intellectual Property Norms in Roller Derby Pseudonyms, 90 TEX. L. REV. 1093 (2012) (showing that derby skaters created a norm-based system of regulation for their skate names because federal trademark registration was too costly). And fashion is largely unprotected by IP, but designers regard this as a feature not a bug because it allows piracy to drive fashion trends.

²²² ELLICKSON, *supra* note 217 at 167.

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550

Harvard Journal of Sports & Entertainment Law / Vol. 14

The entertainment industry that trades in life story rights has several indicia of a close-knit community. First, it possesses a degree of the geographic concentration (if not isolation) that characterized the ranchers that Ellickson studied. While film and television productions today are made globally, the epicenter of the business of entertainment in the United States continues to be Los Angeles. LA is not only the headquarters of the relatively small number of major studios and firms in show business, but it is also where a disproportionate percentage of the human and industrial capital necessary to produce film and television is located.²²³ The industry is also notoriously insular as compared to many other contemporary businesses, so much so that it operates to a large extent by reputational capital and word of mouth.²²⁴ One industry insider told us that there are only a dozen or so law firms in LA that specialize in the industry to the degree that they all know one another and their respective practices, and view outsiders as lacking the requisite industry experience and knowledge to make deals efficiently.²²⁵ This insularity is reminiscent of the closed industrial worlds that Bernstein catalogued, and thus has a similar degree of susceptibility to norm-based governance.

Second, and relatedly, norms arise within close-knit communities only if they are iterated frequently over time. This matters because norms, unlike state-created law, lack an external referent to make their existence and content unambiguous. Through repeated practice, though, norms become "internalized" in actors, so that they are made effective even in the absence of a statute or judicial decision enshrining them.²²⁶ Here, the practice of acquiring life story rights from the subjects of docudramas is the subject of repeat play in several senses. The practice of securing life story rights is as old as the docudrama itself, one that dates back at least as far as the 1940 Sergeant

²²³ Jonathan M. Barnett, *Hollywood Deals: Soft Contracts for Hard Markets*, 64 DUKE L.J. 605, 633 (2015) ("Hollywood exhibits some, but not all, of the characteristics of the close-knit environments in which reputation-based transacting has been most convincingly documented. Hollywood is at best a relatively small world populated by firms and individuals that do business with each other repeatedly: six major studios, three major talent agencies, a handful of mini–major studios, a larger number of independent production companies, a small group of high-value talent, and a much larger group of lower-value talent consisting of tens of thousands of actors.").

²²⁴ See Gary M. McLaughlin, Oral Contracts in the Entertainment Industry, 1 VA. SPORTS & ENT. L.J. 101, 129-31 (2001) ("the entertainment industry shares many of the characteristics of a small, close-knit business community").

²²⁵ Anonymous Interview #10.

²²⁶ See Cooter, supra note 218 at 1577-80 (discussing the phenomenon of norm internalization).

York film.²²⁷ In the more than eight intervening decades, it is likely that Hollywood executives have inked thousands of these deals. The insistence on these deals by influential external players, such as insurers and distributors,²²⁸ reinforces the norm. These multiple points of iteration over a long span of time have caused industry insiders to internalize the life story deal as a practice, even though it is not explicitly required by law.

Finally, the enforcement mechanism for life story rights seems obvious: courts could intervene to enforce these agreements as a matter of contract law. Yet, this is not the account that industry insiders tell. In fact, violations of life story agreements are so rare that most interview subjects could not recall a single instance of a subject flouting them or a claim of breach by either studios or subjects. This absence of state enforcement suggests that enforcement is also a matter of norms rather than law. This norm-based enforcement has two valences. One is endogenous. The entrenched character of life story deals in the entertainment industry means that industry actors have internalized the norm in favor of honoring such deals, and they follow it reflexively. Cooter has shown that most norms systems rely to some extent on internalization, with actors complying due to their own distaste for deviation rather than fear of some external sanction.²²⁹ One industry insider reported that while Hollywood players are thought of as amoral "sharks," there is some intrinsic sense of morality that leads them to respect norms and agreements, and that this in part explains the industry's near-perfect rate of compliance with agreements granting life story rights.²³⁰

Internalization is not the only source of enforcement for life story deals. There are exogenous pressures toward compliance as well. Dealmakers who may otherwise be willing to flout norms are to a large extent deterred by the risk of social sanctions in the form of exclusion from professional relationships. The entertainment industry's close knit character means that reputational capital is at a premium and exclusion sanctions can be killers.²³¹ Several industry insiders explained to us that failing to respect an executed life story rights deal would brand the violator as untrustworthy and compli-

²²⁷ See Part II.A, supra (history of life story rights).

²²⁸ See Section II.B.3, supra.

²²⁹ See Cooter, supra note 219 at 1694 (arguing that the internalized compulsion to comply with norms is equally if not more effective in controlling behavior than the threat of external sanctions for norm violation).

²³⁰ Dave Fagundes, *The Social Norms of Waiting in Line*, 41 L. & SOC. INQUIRY 1179, 1189 (2017) (citing research showing that people queue more because of internalized norms than externalized threats of sanction).

²³¹ Cf. Oliar & Sprigman, *supra* note 221 (comedians who are excluded from comedy clubs due to reputations as "joke thieves" can find their careers derailed).

552

Harvard Journal of Sports & Entertainment Law / Vol. 14

cate if not end their career.²³² Even more than threats of litigation, studios appear to comply with life story rights deals because they recognize that if they do not, then (as the old Hollywood shibboleth runs) they'll never work in that town again.²³³

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Subjects of docudramas are not necessarily members of the entertainment community and so may not be constrained by internalization. Interview subjects reported, though, that even when subjects complained to studios about their portrayal, those complaints rarely resulted in litigation. Rather, aggrieved subjects almost invariably submit to the *in terrorem* effect of an agreement once studios remind them of the broad language to which they agreed.²³⁴

The practice of bargaining for life story rights is, however, different in salient ways from these other norms systems. For one thing, life rights deals promise studios packages of amenities beyond just the "grant" of the subject's life rights. The part of these agreements that is not rooted in IP law thus is not the only part doing real work; on the contrary, many subjects reported that securing cooperation or waiver were significant motivations in landing these deals. Moreover, not all studios secure life story rights before producing docudramas. Estimates vary, but anywhere from 20-50% of lifebased films proceed without such a deal.²³⁵ If there were a strong norm in favor of securing life story rights, we would expect the practice to be nearly universal, and for the explanation to sound in terms of expected compliance with social practices rather than pragmatism.

So is the practice of acquiring life story rights a norm-based system or not? The answer is both yes and no, and depends on which stage of the deal process one looks at. The formation of these deals does not appear to be the product of norms, but rather a business decision made on a cost-benefit basis that is made only some of the time. This makes sense since the deals are between industry insiders (studios) and outsiders (subjects), so the parties do not operate within the same close-knit community. But with respect to enforcement, norms do significant work. Interviewees reported a surprising absence of breach or even strategic behavior with respect to life story deals, even though rational choice would suggest that larger studios in particular could poach subjects from independents, who lack the capital to recover

²³² See, e.g., Anonymous interview #12.

²³³ This classic threat can be traced back to strong-armed producers like Louis B. Mayer during Hollywood's Golden Age. *See* Scott Eyman, LION OF HOLLYWOOD: THE LIFE AND LEGEND OF LOUIS B. MAYER 355 (2005).

²³⁴ See Anonymous Interview #1 (stating that the in terrorem effect of life story rights agreements deters most subjects from following through on threats of suit).

²³⁵ See Anonymous Interview #4, supra note 15.

damages in litigation. The near-perfect compliance with these agreements, by contrast, is a function of strong norms within the entertainment industry holding people in line due to internalized respect for this practice and fear of reputational sanctions.

This discussion illustrates that the question should not be whether this, or any, regulatory system is driven by norms or law. While some may be products almost entirely of one or the other, the institution of life story rights bears features of each. The formation of these deals is more a matter of rearranging the law's baselines through private agreements due to practical cost-benefit calculations. But the enforcement of these deals involves neither legal sanctions nor their threat. It is instead stitched together by an internalized sense of right and wrong as well as a fear of being deemed a bad cooperator. Framing the question whether a regulatory system is norm- or lawbased wrongly assumes a binary choice between two options. Perhaps the better way to think about the issue is that regulation may contain features of both norms and law, and that the two can work in combination (as here) to supplement each other.

B. Transactional Efficiency

As noted in the Introduction, the general concept of life story rights is familiar not only to entertainment law experts but to non-experts and even members of the general public. As a result, almost anyone who has been exposed to popular culture and media has a rough notion that there is a practice of selling one's "life story." Yet it is also likely that few non-experts could draft, negotiate, or even understand, the details of a typical life story agreement. This divide is, of course, neither surprising nor unusual. The conceptualization of life story rights as a "thing" arose as a convenient method for labelling a more diffuse and abstract set of contractual relations between parties (i.e., authorization, waiver, access and exclusivity, plus the secondary elements discussed in Part II.C). This bundling of contractual elements under the unitary label of life story rights thus creates a convenient transactional *module* that facilitates transactions, reduces information costs, avoids litigation and serves a valuable signaling function to the market.

1. Modularity, Standardization and Information Costs

Modularity is a concept that is useful across all fields that involve the interaction of components and systems within a whole. Whether a product is a commercial jetliner, a software operating system or a smartphone, its myriad subsystems are often developed independently and assembled to op-

554

Harvard Journal of Sports & Entertainment Law / Vol. 14

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erate with one another through a series of common interfaces.²³⁶ Modularization of this kind goes hand in hand with standardization: while it is beneficial for a product designer to organize a complex system into a series of more manageable subunits, it is even more beneficial for those subunits to be interchangeable and available from any producer that adheres to a common set of protocols. The ability of different manufacturers to produce the components of a complex system enables greater specialization in component design and manufacture²³⁷ and can result in greater efficiency, reduced costs and improved quality of both the standardized components and overall systems.²³⁸

Henry Smith has demonstrated that the principles of modularization and standardization can also be applied to legal doctrine, particularly the rules surrounding property. As Smith explains,

To serve as a platform for private interactions, the law of property employs modules and interfaces. By setting boundaries around clumps of interactions (modules) and defining the permitted interface between them, the system can manage the complexity of private interactions. Because interactions take place in one or a few modules and not the system as a whole, modularization permits specialization. For example, an owner can specialize in developing and exploiting information about the asset she owns. Remote parties need not know anything about the owner or her plans; the law of trespass and theft merely direct them to steer clear in a fashion that is simple and easy to comply with.²³⁹

Smith also observes that the modularization of property rights reduces information costs, as parties need only observe and comprehend the features exhibited by a module as a whole, rather than all of its constituent elements.²⁴⁰

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²³⁶ See Henry Smith, Property as Platform: Coordinating Standards for Technological Innovation, 9 J. Competition L. & Econ. 1057, 1058 (2013); CARLISS Y. BALDWIN & KIM B. CLARK, DESIGN RULES: THE POWER OF MODULARITY 6, 63-64 (2000).

²³⁷ Smith, Property as Platform, supra note 236, at 1058; BALDWIN & CLARK, supra note 236, at 33.

²³⁸ U.S. Dep't Just. & Fed. Trade Comm'n, Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition 33 (2007) ("Standards can make products less costly for firms to produce and more valuable to consumers. They can increase innovation, efficiency, and consumer choice; foster public health and safety; and serve as a fundamental building block for international trade.").

²³⁹ Smith, Property as Platform, supra note 236, at 1058.

²⁴⁰ Smith, *Law of Things, supra* note 14, at 1708. See also Rose, supra note 14, at 70–71.

The production of a feature film or television series can likewise be conceptualized as an assembly of different modular contractual arrangements with actors, screenwriters, composers, set designers, location managers, distributors, promoters and the like. In his analysis of Hollywood deals, Jonathan Barnett refers to the efficiencies and value enhancement that studios can achieve through "fractionalization" (modularization) of the different functions involved in the production of a motion picture.²⁴¹

When life story rights are conceptualized as a single legal module, rather than a bundle of diverse jural relations, similar efficiencies are achieved. Most Americans understand, at a high level, what legal rights they obtain when they rent a car. Because automobile rental contracts are largely standardized today, parties can effectuate highly efficient transactions. Rather than worrying about the contractual details, a consumer renting a car can focus primarily on price versus make and model, perhaps giving some attention to the various insurance options offered by the rental company.

Similarly, with life story rights, parties can negotiate a deal with a single price tag, rather than haggle over the price of separate liability releases, access, and exclusivity provisions. Information costs are further reduced because comparisons between prices of comparable life story deals can be made more readily that comparisons of prices for separate deal elements.²⁴²

Moreover, the establishment of clear contractual rules regarding the use and exploitation of an individual's life story can eliminate the uncertainty created by variations in state law, and among federal judicial circuits, concerning the right of publicity, privacy and defamation, and how these interact with the First Amendment. Transactional efficiency and certainty are thus enhanced.

This is not to say, of course, that life story deals are entirely standardized along the lines of residential mortgages or corporate debentures.²⁴³ In addition to features that vary among even the most standardized contracts

²⁴¹ Jonathan M. Barnett, Why is Everyone Afraid of IP Licensing?, 30 HARV. J. L. & TECH. 123, 138–41 (2017). See also Barnett, Hollywood Deals, supra note 223.

²⁴² E.g., "If Anna got \$X for her life story, then I deserve \$Y for mine."

²⁴³ See Marcel Kahan & Michael Klausner, Standardization and Innovation in Corporate Contracting (Or "The Economics of Boilerplate"), 83 VA. L. REV. 713 (1997) (corporate bonds); Joseph M. Perillo, Neutral Standardizing of Contracts, 28 PACE L. REV. 179, 184–89 (2008) (numerous standardized contract forms); Anna Gelpern & Mitu Gulati, Innovation after the Revolution: Foreign Sovereign Bond Contracts Since 2003, 4 CAP. MKT. L.J. 85 (2009) (sovereign bond contracts). In this paper, we have not attempted a systematic, empirical analysis of life story rights agreements. Such an analysis would be a useful subject of future research.

556

Harvard Journal of Sports & Entertainment Law / Vol. 14

(e.g., price and asset description), life story agreements can differ both at to their principal terms (e.g., exceptions to exclusivity, scope of authorization, nature of cooperation)²⁴⁴ and secondary terms (e.g., degree of creative control). These variations are typically negotiated by experts (lawyers), but subjects can have strong preferences concerning, and even emotional responses to, some of them. Nevertheless, the existence of variations among life story deals does not mean that life story rights have not been modularized in a manner that is efficiency-enhancing. In the end, despite the differences, industry veterans observe that most life story deals look more similar than not.²⁴⁵

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2. Litigation Avoidance

Litigation imposes costs on productions, including expense, delay and uncertainty. As a result, producers, and insurance carriers have adopted practices intended to reduce the risk that a particular production will be subject to litigation. The acquisition of life story rights from individuals depicted in docudramas is such a practice that can give producers "peace of mind."²⁴⁶

Subjects from whom life story rights are acquired are occasionally upset about their portrayal in docudramas, but they rarely sue. This may be because when irate subjects approach a producer to complain about their depiction, the producer's lawyers can produce the life story agreement, which clearly shows that the subject gave permission to depict them in any manner, however fictional and unflattering, and that they have given up the right to sue the producer. According to the industry insiders that we interviewed, nearly all subjects drop the issue at this stage without filing a

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²⁴⁴ In exceptional cases, one or more of the four principal elements of life story rights may even be missing. *See, e.g.*, People v. Corona, 80 Cal. App. 3d 684, 703 (1978) (criminal defendant grants his attorney, in lieu of fees, "the exclusive and irrevocable literary and dramatic property rights in and to my life story and any part or portion of my life story, and any incidents thereof, both present and future," leading to claims of ineffective representation of counsel).

²⁴⁵ Anonymous Interview #9. Interestingly, the tendency for life story acquisitions to be documented with formal, written agreements runs counter to observations regarding the prevalence of oral and other informal agreements in Hollywood. *See, e.g.,* McLaughlin, *supra* note 224, Barnett, *supra* note 223. One possible reason for this divergence from the trend is that, unlike transactions among Hollywood insiders – producers, directors, studios and talent – life story deals are usually consummated with outsiders who are not part of the community and are unfamiliar or uncomfortable with community norms relating to transactions.

²⁴⁶ Gardner, *supra* note 23. See also Gibson, *supra* note 159.

claim²⁴⁷ presumably due, at least in part, to the language granting the producer the right to fictionalize the subjects' lives.

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Thus, even if, as shown in Part I, legal claims brought by depicted individuals under publicity, privacy, copyright and trademark theories are unlikely to succeed, such claims can delay a production, increase costs and introduce at least some risk that the production itself will be enjoined. Thus, acquiring bundled life story rights increase the efficiency of film and television production by eliminating potentially disruptive litigation risks before they are incurred. In other words, the decision not to acquire life story rights for a particular project involves a gamble by the producer: the gamble could pay off and a project can be released successfully without legal challenge by a subject, as was the case with Mark Zuckerberg (portrayed in *The Social Network*) and Queen Elizabeth II (portrayed in *The Crown*). On the other hand, an irate and determined subject like former LA Lakers coach Jerry West (portrayed in *Winning Time*) could bring expensive and disruptive litigation costing far more than the initial acquisition of life story rights might have.²⁴⁸

3. The Signaling Function of Life Story Acquisitions

As noted in the preceding sections, while life story rights do not exist as recognized property interests, contracting to acquire life story rights facilitates transactional efficiency in the entertainment industry. Another indirect function that life story acquisitions play is a signaling one. Cathy Hwang and Matthew Jennejohn observe that private contracts are intended for multiple audiences beyond the parties and the courts that may be called upon to interpret them.²⁴⁹ Hwang and Jennejohn focus on the intended influence of contractual arrangements on regulatory authorities,²⁵⁰ but a wide range of other audiences for the "signaling" function of private contractual arrangements also exists. In the case of transactions involving patent rights, for example, commentators have identified as potential audiences: financial investors, customers, employees and the public.²⁵¹

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²⁴⁷ E.g., Anonymous Interviews #8 15.

²⁴⁸ See Schilken, *supra* note 185 West's annoyance at not being paid for his portrayal in *Winning Time* might have been exacerbated by the rumors that Lakers star Magic Johnson was paid upwards of \$25 million for a separate Apple TV+ docuseries. See Rivas, *supra* note 191.

²⁴⁹ Cathy Hwang & Matthew Jennejohn, *Contractual Depth*, 106 MINN. L. REV. 1267 (2022).

²⁵⁰ Id.

²⁵¹ See, e.g., Clarissa Long, Patent Signals, 69 U. CHI. L. REV. 625, 626 (2002) (patents convey information about an inventor to the capital markets); Jorge L. Con-

Harvard Journal of Sports & Entertainment Law / Vol. 14

In a similar vein, life story acquisitions, the general parameters of which are often made public in the trade press, blogs and social media, send various signals to the market. First, they generate positive "buzz" for a project, thus building public interest and, presumably, greater viewership and reviews once it is released. Second, the execution of a life story acquisition by a producer signals to other producers that a project covering a particular story is in the works, potentially dissuading others from pursuing a competing project of their own.²⁵² Finally, a subject's sale of his or her life story to a producer can signal to the public the value and authenticity of the subject's story, potentially leading to interviews, guest appearances, endorsement deals, book contracts and other related gains for the subject.

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CONCLUSION

We began this article by pointing out that life story rights are a fiction. There is no legally cognizable interest in the events that occur during our lives, however influential, emotional or formative they may be to us. Yet Hollywood has filled this gap with a contractual construct – the life story right. The conceptualization of life story rights in this manner yields transactional efficiencies by reducing information costs, enabling signaling and avoiding costly litigation. Thus, while acquiring life story rights may not be legally necessary, such deals today form an essential feature of the entertainment industry.

treras, *Patent Pledges*, 47 ARIZONA ST. L.J. 543, 573–92 (2015) (identifying motives for unilateral pledges of patent rights including attempts to influence product markets, regulators and the public); Clark D. Asay, *The informational effects of patent pledges, in* PATENT PLEDGES: GLOBAL PERSPECTIVES ON PATENT LAW'S PRIVATE ORDERING FRONTIER (Jorge L. Contreras & Meredith Jacob eds., 2017) (analyzing signaling function of patent pledges).

²⁵² Anonymous Interview #10. This form of signaling can be especially important when multiple sources exist for a particular story, such as the Wilson article telling Anna Sorokin's story that HBO Max optioned in competition with Sorokin's own account sold to Netflix. *See* Part II.B.2.a, *supra*.

DUSTIN HOFFMAN, Plaintiff-Appellee, v. CAPITAL CITIES/ABC, INCORPORATED, Defendant, and L.A. MAGAZINE, INC., Defendant-Appellant.

Nos. 99-55563, 99-55686

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

255 F.3d 1180; 2001 U.S. App. LEXIS 15085; 59 U.S.P.Q.2D (BNA) 1363; 29 Media L. Rep. 1993; 2001 Cal. Daily Op. Service 5695; 2001 Daily Journal DAR 6987

October 10, 2000, Argued and Submitted, Pasadena, California July 6, 2001, Filed

BOOCHEVER, Circuit Judge:

In 1982, actor Dustin Hoffman starred in the movie "Tootsie," playing a male actor who dresses as a woman to get a part on a television soap opera. One memorable still photograph from the movie showed Hoffman in character in a red long-sleeved sequined evening dress and high heels, posing in front of an American flag. The still carried the text, "What do you get when you cross a hopelessly straight, starving actor with a dynamite [*1183] red sequined dress? You get America's hottest new actress."

In March 1997, Los Angeles Magazine ("LAM") published the "Fabulous Hollywood Issue!" An article from this issue entitled "Grand Illusions" used computer technology to alter famous film stills to make it appear that the actors were wearing Spring 1997 fashions. The sixteen familiar scenes included movies and actors such as "North by Northwest" (Cary Grant), "Saturday Night Fever" (John Travolta), "Rear Window" (Grace Kelly and Jimmy Stewart), "Gone with the Wind" (Vivian Leigh and Hattie McDaniel), "Jailhouse Rock" (Elvis Presley), "The Seven Year Itch" (Marilyn Monroe), "Thelma and Louise" (Susan Sarandon and Geena Davis), and even "The Creature from the Black Lagoon" (with the Creature in Nike shoes). The final shot was the "Tootsie" still. The American flag and Hoffman's head remained as they appeared in the original, but Hoffman's body and his long-sleeved red sequined dress were replaced by the body of a male model in the same pose, wearing a spaghetti-strapped, cream-colored, silk evening dress and high-heeled sandals. LAM omitted the original caption. The text on the page identified the still as from the movie "Tootsie," and read, "Dustin Hoffman isn't a drag in a butter-colored silk gown by Richard Tyler and Ralph Lauren heels."

LAM did not ask Hoffman for permission to publish the altered photograph. Nor did LAM secure permission from Columbia Pictures, the copyright holder. In April 1997, Hoffman filed a complaint in California state court against LAM's parent company, Capital Cities/ABC, Inc. (now ABC, Inc. or "ABC"). The complaint alleged that LAM's publication of the altered photograph misappropriated Hoffman's name and likeness in violation of (1) the California common law right of publicity; (2) the California statutory right of publicity, Civil Code ß 3344; (3) the California unfair competition statute, Business and Professions Code β 17200; and (4) the federal Lanham Act, 15 U.S.C. β 1125(a).

ABC removed the case to federal court. Hoffman added LAM as a defendant. After a bench trial, the district court found for Hoffman and against LAM on all of Hoffman's claims, rejecting LAM's defense that its use of the photograph was protected by the First Amendment. The court awarded Hoffman \$ 1,500,000 in compensatory damages, and held that Hoffman was entitled to punitive damages as well. *Hoffman v. Capital Cities/ABC, Inc.*, 33 F. Supp. 2d 867 (C.D. Cal. 1999). After a hearing, the court awarded Hoffman \$ 1,500,000 in punitive damages. It also held that ABC was not liable for any of LAM's actions.

Hoffman moved for an award of \$ 415,755.41 in attorney fees. The district court granted the motion, but reduced the amount to \$ 269,528.50.

In these appeals, LAM appeals the district court's judgment in Hoffman's favor, and the court's award of attorney fees.

ANALYSIS

California recognizes, in its common law and its statutes, "the right of a person whose identity has commercial value--most often a celebrity--to control the commercial use of that identity." *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1098 (9th Cir. 1992) (as amended). Hoffman claims that LAM violated his state right of publicity by appropriating his name and likeness. He also claims that LAM violated his rights under the federal Lanham Act.

LAM replies that its challenged use of the "Tootsie" photo is protected under the First Amendment. We evaluate this defense aware of "the careful balance that courts have gradually constructed between [*1184] the right of publicity and the First Amendment and federal intellectual property laws." *Landham v. Lewis Galoob Toys, Inc.*, 227 F.3d 619, 626 (6th Cir. 2000).

LAM argues that the "Grand Illusions" article and the altered "Tootsie" photograph contained therein are an expression of editorial opinion, entitled to protection under the First Amendment. Hoffman, a public figure,¹ must therefore show that LAM, a media defendant, acted with "actual malice," that is, with knowledge that the photograph was false, or with reckless disregard for its falsity. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80, 11 L. Ed. 2d 686, 84 S. Ct. 710 (1964). Because Hoffman did not produce clear and convincing evidence that LAM acted with actual malice, LAM contends that all Hoffman's claims are barred by the First Amendment.

The district court rejected this argument. First, it concluded that the magazine article was commercial speech not entitled to constitutional protection: "the First Amendment does not protect the exploitative commercial use of Mr. Hoffman's name and likeness." *Hoffman*, 33 F. Supp. 2d at 874. Second, the court found that LAM acted with actual malice, and "the First Amendment does not protect knowingly false speech." *Id.* at 875.²

¹ Hoffman does not contest that he is a public figure. In fact, Hoffman alleges that he is a readily-identifiable individual whose persona has commercial value under his right of publicity claim.

² In *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 25 Cal. 4th 387, 21 P.3d 797 (Cal. 2001), the California Supreme Court held that there was no First Amendment defense to a California right of publicity claim when "artistic expression takes the form of a literal depiction or imitation of a celebrity for commercial gain." 21 P.3d at 808. An artist who added "significant transformative elements" could still invoke First Amendment protection. *Id.*

Commercial speech

The district court concluded that LAM's alteration of the "Tootsie" photograph was an "exploitative commercial" use not entitled to First Amendment protection. We disagree.

"Commercial speech" has special meaning in the First Amendment context. Although the boundary between commercial and noncommercial speech has yet to be clearly delineated, the "core notion of commercial speech" is that it "does no more than propose a commercial transaction." Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 66, 77 L. Ed. 2d 469, 103 S. Ct. 2875 (1983) (quotations omitted). Such speech is entitled to a measure of First Amendment protection. See, e.g., Greater New Orleans Broad. Ass'n, Inc. v. United States, 527 U.S. 173, 183, 144 L. Ed. 2d 161, 119 S. Ct. 1923 (1999) (setting out four-part test to evaluate constitutionality of governmental regulation of "speech that is commercial in nature"). Commercial messages, however, do not receive the same level of constitutional protection as other types of protected expression. See 44 Liquormart, Inc. v. *Rhode Island*, 517 U.S. 484, 498, 134 L. Ed. 2d 711, 116 S. Ct. 1495 (1996). False or misleading commercial speech is not protected. See Florida Bar v. Went For It, Inc., 515 U.S. 618, 623-24, [*1185] 132 L. Ed. 2d 541, 115 S. Ct. 2371 (1995) (commercial speech receives limited amount of protection compared to speech at core of First Amendment and may freely be regulated if it is misleading). When speech is properly classified as commercial, a public figure plaintiff does not have to show that the speaker acted with actual malice. See Procter & Gamble Co. v. Amway Corp., 242 F.3d 539, 556 (5th Cir. 2001) ("Supreme Court precedent prevents us from importing the actual-malice standard into cases involving false commercial speech.").

In many right of publicity cases, the question of actual malice does not arise, because the challenged use of the celebrity's identity occurs in an advertisement that" does no more that propose a commercial transaction" and is clearly commercial speech. *See, e.g., Newcombe v. Adolph Coors Co.*, 157 F.3d 686, 691 (9th Cir. 1998) (use of pitcher's image in printed beer advertisement); *Ab-dul-Jabbar v. Gen. Motors Corp.*, 85 F.3d 407, 409 (9th Cir. 1996) (use of basketball star's former name in television car commercial); *Waits*, 978 F.2d at 1097-98 (use of imitation of singer's voice in radio snack-food commercial); *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395, 1396 (9th Cir. 1992) (as amended) (use of game-show hostess's "identity" in print advertisements for electronic products); *Midler v. Ford Motor Co.*, 849 F.2d 460, 461 (9th Cir. 1988) (use in television car commercial of "sound-alike" rendition of song singer had recorded). In all these cases, the defendant used an aspect of the celebrity's identity entirely and directly for the purpose of selling a product. Such uses do not implicate the First Amendment's protection of expressions of editorial opinion. *Cf. White*, 971 F.2d at 1401 (advertisement in which "spoof" is entirely subservient to primary message to "buy" identified product not protected by First Amendment).

Even if we were to consider LAM an "artist" and the altered "Tootsie" photograph "artistic expression" subject to the *Comedy III* decision, there is no question that LAM's publication of the "Tootsie" photograph contained "significant transformative elements." Hoffman's body was eliminated and a new, differently clothed body was substituted in its place. In fact, the entire theory of Hoffman's case rests on his allegation that the photograph is not a "true" or "literal" depiction of him, but a false portrayal. Regardless of the scope of *Comedy III*, it is clear to us that it does not strip LAM of First Amendment protection.

Hoffman points out that the body double in the "Tootsie" photograph was identified as wearing Ralph Lauren shoes and that there was a Ralph Lauren advertisement (which does not feature shoes) elsewhere in the magazine. (Insofar as the record shows, Richard Tyler, the designer of the gown, had never advertised in LAM.) Hoffman also points to the" Shopper's Guide" in the back of the magazine, which provided stores and prices for the shoes and gown.

These facts are not enough to make the "Tootsie" photograph pure commercial speech. If the altered photograph had appeared in a Ralph Lauren advertisement, then we would be facing a case much like those cited above. But LAM did not use Hoffman's image in a traditional advertisement printed merely for the purpose of selling a particular product. Insofar as the record shows, LAM did not receive any consideration from the designers for featuring their clothing in the fashion article containing the altered movie stills. Nor did the article simply advance a commercial message. "Grand Illusions" appears as a feature article on the cover of the magazine and in the table of contents. It is a complement to and a part of the issue's focus on Hollywood past and present. Viewed in context, the article as a whole is a combination of fashion photography, humor, and visual and verbal editorial comment on classic films and famous actors. Any commercial aspects are "inextricably entwined" with expressive elements, and so they cannot be separated out "from the fully protected whole." Gaudiya Vaishnava Soc'y v. City & County of San Francisco, 952 F.2d 1059, 1064 (9th Cir. 1991) (as amended); see Riley v. Nat'l Fed'n of the Blind, 487 U.S. 781, 796, 101 L. Ed. 2d 669, 108 S. Ct. 2667 (1988). "There are commonsense differences between speech that does no more than propose [*1186] a commercial transaction and other varieties," Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 771 n.24, 48 L. Ed. 2d 346, 96 S. Ct. 1817 (1976) (quotations and citation omitted), and common sense tells us this is not a simple advertisement.

The district court also concluded that the article was not protected speech because it was created to "attract attention." 33 F. Supp. 2d at 874. A printed article meant to draw attention to the for-profit magazine in which it appears, however, does not fall outside of the protection of the First Amendment because it may help to sell copies. *Cf. Dworkin v. Hustler Magazine, Inc.*, 867 F.2d 1188, 1197-98 (9th Cir. 1989) (although defendant may have published feature solely or primarily to increase circulation and therefore profits, article is not thereby purely commercial or for purposes of advertising); *Leidholdt v. L.F.P. Inc.*, 860 F.2d 890, 895 (9th Cir. 1988) (same). While there was testimony that the Hollywood issue and the use of celebrities was intended in part to" rev up" the magazine's profile, that does not make the fashion article a purely "commercial" form of expression.

We conclude that LAM's publication of the altered "Tootsie" photograph was not commercial speech.

Actual malice

The district court went on to state that even if LAM could raise a First Amendment defense, LAM acted with actual malice, and "the First Amendment does not protect knowingly false speech," 33 F. Supp. 2d at 875 (citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 11 L. Ed. 2d 686, 84 S. Ct. 710 (1964)). The court found that the magazine altered Hoffman's image, and then published that image knowing it was false and intending that the readers believe the falsehood:

[LAM] knew that Mr. Hoffman had never worn the designer clothes he was depicted as wearing, and that what they were showing was not even his body. Moreover, [LAM] admitted that it intended to create the false impression in the minds of the public" that they were seeing Mr. Hoffman's body."

Id.

We have concluded that LAM is entitled to the full First Amendment protection accorded noncommercial speech. Because a public figure such as Hoffman can recover damages for noncommercial speech from a media organization such as LAM only by proving "actual malice," we now must determine whether the district court was correct in concluding that LAM acted with "reckless disregard for the truth" or a "high degree of awareness of probable falsity. "*Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 667, 105 L. Ed. 2d 562, 109 S. Ct. 2678 (1989) (quotations omitted).

We review the district court's finding of actual malice de novo. *Eastwood v. Nat'l Enquirer*, *Inc.*, 123 F.3d 1249, 1252 (9th Cir. 1997) ("First Amendment questions of constitutional fact compel us to conduct a de novo review. We ourselves must be convinced that the defendant acted with malice.") (quotations, alterations, and citation omitted); *see Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 508 n.27, 80 L. Ed. 2d 502, 104 S. Ct. 1949 (1984). We give to "credibility determinations the special deference to which they are entitled," and then "determine whether the believed evidence establishes actual malice." *Eastwood*, 123 F.3d at 1252. We must "satisfy ourselves that plaintiff proved malice by clear and convincing evidence, which we have described as a heavy burden, far in excess of the preponderance sufficient for [*1187] most civil litigation." *Id.* (citations and quotations omitted).

We must first identify the purported false statement of fact in issue. Hoffman alleged, and the district court found, that the altered "Tootsie" photograph and the accompanying text were "false" because they created the impression that Hoffman himself posed for the altered photograph (that is, that Hoffman was wearing the Richard Tyler dress and the Ralph Lauren shoes which replaced the red sequined dress and the shoes Hoffman wore in the original photograph). To show actual malice, Hoffman must demonstrate by clear and convincing evidence that LAM intended to create the false impression in the minds of its readers that when they saw the altered "Tootsie" photograph they were seeing Hoffman's body. See id. It is not enough to show that LAM unknowingly misled readers into thinking Hoffman had actually posed for the altered photograph. Mere negligence is not enough to demonstrate actual malice. Dodds v. American Broad. Co., 145 F.3d 1053, 1063 (9th Cir. 1998) (citing Masson v. New Yorker Magazine, Inc., 501 U.S. 496, 510, 115 L. Ed. 2d 447, 111 S. Ct. 2419 (1991)). "Subjective or actual intent is required and ... 'there is no actual malice where journalists unknowingly mislead the public." 145 F.3d at 1064 (quoting Eastwood, 123 F.3d at 1256). The evidence must clearly and convincingly demonstrate that LAM knew (or purposefully avoided knowing) that the photograph would mislead its readers into thinking that the body in the altered photograph was Hoffman's. See Eastwood, c 123 F.3d at 1256.

The altered photograph retains Hoffman's head and the American flag background from the "Tootsie" still, but grafts onto it a body dressed in different clothing. The body is similar in appearance to Hoffman's in the original. On the page directly facing the altered "Tootsie" photograph the magazine printed small copies of all sixteen original, unaltered stills, including the original "Tootsie" photograph. By providing a point of comparison to the original, this next page made it clear that LAM had altered the film still. This direct comparison does not, however, alert the reader that Hoffman did not participate in the alteration.

We must go beyond the altered photograph itself and examine the "totality of [LAM's] presentation, "to determine whether it "would inform the average reader (or the average browser)" that the altered "Tootsie" photograph was not a photograph of Hoffman's body. *See id.* The article is featured on the magazine cover as "The Ultimate Fashion Show Starring Grace Kelly, Marilyn Monroe and Darth Vader. "The table of contents describes the "Grand Illusions "article: "By using state-of-the-art digital magic, we clothed some of cinema's most enduring icons in fashions by the hottest designers." The accompanying full-page photo is of Humphrey Bogart and Ingrid Bergman as they appeared in "Casablanca," wearing current designer clothing, with a caption stating, "Digital composite by ZZYZX."

A few pages later, the "editor's note" describes the article:

The movie stills in our refashioned fashion spectacular, "Grand Illusions" (page 104) *have* appeared before--in fact, they're some of the most famous images in Holly-wood history. But you've never seen them quite like this. Cary Grant, for example, is still ducking that pesky plane in *North by Northwest*, but now he is doing it as a runway model, wearing a suit from Moschino's spring collection.

We know purists will be upset, but who could resist the opportunity to produce a 1997 fashion show with mannequins who have such classic looks?

[*1188] The Contributors page states: "With computers, 'says Elisabeth Cotter of ZZYZX, 'you can transform anything--even the past. 'She proved it by using the latest in computer software to give old movie stars makeovers for 'Grand Illusions. "

The "Grand Illusions" article itself states on the title page, "With the help of digital magic and today's hottest designers, we present the ultimate Hollywood fashion show--starring Cary Grant, Marilyn Monroe, Rita Hayworth and the Creature from the Black Lagoon. Photographs by Alberto Tolot. Digital Composites by ZZYZX." Each photograph that follows identifies the actor whose "body" is clothed in designer clothing with a reference to the featured film. Representative captions read "Cary Grant is dashing in" (as he runs from the cropduster in "North by Northwest"), "Harold Lloyd looks timely in" (as he hangs from the clock in" Safety Last"), "Marilyn Monroe cools off in" (as she stands on the grate in "The Seven Year Itch"), "Jimmy Stewart likes to watch in" (as he looks at Grace Kelly in" Rear Window"), "Susan Sarandon takes on mankind in ?." (as she aims a gun in "Thelma and Louise"), and "Judy Garland hits the bricks in" (as she runs through a field in "The Wizard of Oz" with the Cowardly Lion, the Tin Man, and the Scarecrow, "who is stuffed into" a designer suit printed with bricks). Finally, the "Tootsie" photograph appears, with its caption "Dustin Hoffman isn't a drag in a butter-colored silk gown by Richard Tyler and Ralph Lauren heels," immediately followed by the page showing all the original stills. The only remaining reference to the article is the "shopping guide," which, almost twenty pages later, provides prices and the names of stores carrying some of the clothing featured in the photographs.

We do not believe that the totality of LAM's presentation of the article and the "Tootsie" photograph provides clear and convincing evidence that the editors intended to suggest falsely to the ordinary reader that he or she was seeing Hoffman's body in the altered "Tootsie" photograph. All but one of the references to the article in the magazine make it clear that digital techniques were used to substitute current fashions for the clothes worn in the original stills. Although nowhere does the magazine state that models' bodies were digitally substituted for the actors' bodies, this would be abundantly clear given that the vast majority of the featured actors were deceased. While LAM never explicitly told its readers that the living actors did not pose for the altered photographs in the article, there is certainly no clear and convincing evidence in the magazine itself that LAM intended to suggest the opposite--that it convinced Hoffman (or, for that matter, John Travolta, Elizabeth Taylor, Susan Sarandon, and Geena Davis) to recreate poses from their past roles for this fashion article.

The district court stated that LAM "admitted that it intended to create the false impression in the minds of the public 'that they were seeing Mr. Hoffman's body." This is a quotation from a portion of the style editor's testimony, in which she explained that she wanted the male model whose body would appear in the altered "Tootsie" photograph to have Hoffman's body type. She later explained, however, that she did not intend to convey to readers that Hoffman had participated in some way in the article's preparation, and never thought that readers would believe Hoffman posed for the photograph in the new dress.

We defer to the district court when it makes a credibility determination. *See Eastwood*, 123 F.3d at 1252. In this [*1189] case, the district court made no express credibility finding, as it did not state that it believed this one statement and disbelieved the remainder of the editor's testimony. But even if the district court had determined that only this quoted portion of her testimony were worthy of belief, it does not constitute clear and convincing evidence that LAM intended to *mislead* its readers. This single statement, whose meaning is ambiguous in the context of other testimony, the text of the article, and the entire magazine, is not sufficient to strip the magazine of its First Amendment protection. *See Newton v. Nat'l Broad. Co.*, 930 F.2d 662, 671 (9th Cir. 1991) (as amended) (in evaluating claims of actual malice, "even when we accord credibility determinations the special deference to which they are entitled, we must nevertheless examine for ourselves the factual record in full") (quotations omitted).³

We conclude that LAM is entitled to the full First Amendment protection awarded noncommercial speech. We also conclude that Hoffman did not show by clear and convincing evidence, which is "far in excess of the preponderance sufficient for most civil litigation," *Eastwood*, 123 F.3d at 1252, that LAM acted with actual malice in publishing the altered "Tootsie" photograph. Because there is no clear and convincing evidence of actual malice, we must reverse the district court's judgment in Hoffman's favor and the court's award of attorney fees to Hoffman, and direct that judgment be entered for LAM.⁴

REVERSED.

³ Hoffman also argues that the photograph created the false implication that he approved the use of his name and likeness in the altered photograph or that he was somehow associated with the designers. The district court did not address this claim in making its determination that LAM acted with actual malice. At any rate, Hoffman does not explain how the evidence or testimony shows that LAM subjectively intended that the reader believe Hoffman had endorsed the use of his name or likeness or the selection of the clothes, and we see no clear and convincing evidence of such intent.

⁴ Because we conclude that the First Amendment protects LAM's use of the "Tootsie" photograph, we need not address LAM's argument that Hoffman's state law claims are preempted by the federal Copyright Act, 17 U.S.C. ß 301.

Porco v Lifetime Entertainment Servs., LLC
2017 NY Slip Op 01421
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Decided and Entered: February 23, 2017

522707

[*1]CHRISTOPHER PORCO, Appellant,

V

LIFETIME ENTERTAINMENT SERVICES, LLC, Respondent.

Calendar Date: January 18, 2017 Before: McCarthy, J.P., Garry, Lynch, Devine and Mulvey, JJ.

Christopher Porco, Dannemora, appellant pro se.

David A. Schulz, New York City, for respondent.

Davis Wright Tremaine, LLP, New York City (Robert Balin of counsel), for The Reporters Committee for Freedom of the Press and others, amici curiae.

McCarthy, J.P.

MEMORANDUM AND ORDER

Appeal from an order of the Supreme Court (Muller, J.), entered April 20, 2015 in Clinton County, which granted defendant's motion to dismiss the complaint.

In 2006, plaintiff was convicted of the murder of his father and the attempted murder of his mother (*see generally People v Porco*, 71 AD3d 791, 792 [2010], *affd* 17 NY3d 877 [2011]). In December 2012, plaintiff discovered that defendant intended to broadcast a film entitled "Romeo Killer: The Christopher Porco Story" (hereinafter the film). On January 29, 2013, plaintiff commenced this action pursuant to Civil Rights

Law §§ 50 and 51, seeking a preliminary injunction to prevent the airing of the film. Plaintiff's subsequent motion for a temporary restraining order to prevent the film's broadcast pending a decision on his motion for a preliminary injunction was granted by Supreme Court. Defendant appealed and this Court granted emergency relief to defendant by vacating the temporary restraining order pending an appeal on the merits and, as planned, the film was nationally televised on March 23, 2013. Supreme Court's order was ultimately reversed and vacated by this Court (116 AD3d 1264 [2014]). Thereafter, Supreme Court granted defendant's motion to dismiss the complaint for failure to state a cause of action. Plaintiff now appeals, and we reverse.

On a motion pursuant to CPLR 3211 (a) (7) to dismiss a complaint for failure to state a cause of action, this Court "must afford the complaint a liberal construction, accept as true the allegations contained therein, accord the plaintiff the benefit of every favorable inference and [*2] determine only whether the facts alleged fit within any cognizable legal theory" (<u>He v</u> <u>Realty USA, 121 AD3d 1336</u>, 1339 [2014] [internal quotation marks and citations omitted], lv dismissed and denied 25 NY3d 1018 [2015]). New York provides a limited statutory right of privacy. Pursuant to Civil Rights Law § 50, it is a misdemeanor when a firm or corporation "uses for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such a person" (Civil Rights Law § 50). Similarly, Civil Rights Law § 51 allows a plaintiff to "maintain an equitable action in the supreme court of this state against the [firm or corporation] so using his [or her] name, portrait, picture or voice, to prevent and restrain the use thereof; and may also sue and recover damages for any injuries sustained by reason of such use" (Civil Rights Law § 51). The Legislature intended for this statutory protection of privacy to be "strictly limited to nonconsensual commercial appropriations of the name, portrait or picture of a living person" (Finger v Omni Publs. Intl., 77 NY2d 138, 141 [1990]), and these statutory provisions "do not apply to reports of newsworthy events or matters of public interest" (Messenger v Gruner + Jahr Print. & Publ., 94 NY2d 436, 441 [2000], cert denied 531 US 818 [2000]).

Porco v Lifetime Entertainment Servs., LLC (2017 NY Slip Op 01421)

The scope of the newsworthiness exception to liability, however, must be construed in accordance with binding Court of Appeals precedent. The Court of Appeals has held that statutory liability applies to a materially and "substantially fictitious biography" (Spahn v Julian Messner, Inc., 18 NY2d 324, 329 [1966], vacated 387 US 239 [1967], adhered to on remand and rearg 21 NY2d 124 [1967], appeal dismissed 393 US 1046 [1969]) where a "knowing fictionalization" amounts to an "all-pervasive" use of imaginary incidents (Spahn v Julian Messner, Inc., 21 NY2d 124 127-129 [1967], appeal dismissed 393 US 1046 [1969]) and a biography that is "nothing more than [an] attempt[] to trade on the persona" of the plaintiff (Messenger v Gruner + Jahr Print. & Publ., 94 NY2d at 446; see generally Lerman v Flynt Distributing Co., Inc., 745 F2d 123, 131-132 [2d Cir 1984]). When it most recently addressed the aforementioned principles, the Court of Appeals explained that a work "may be so infected with fiction, dramatization or embellishment that it cannot be said to fulfill the purpose of the newsworthiness exception" (Messenger v Gruner + Jahr Print. & Publ., 94 NY2d at 446). As further binding Court of Appeals precedent makes clear, the fact that a film revolves around a "true occurrence" (id. at 445), such as a rescue of passengers from a shipwreck, does not invoke the newsworthiness exception in the event that the entire account remains "mainly a product of the imagination" (Binns v Vitagraph Co. of Am., 210 NY 51, 56 [1913]). Finally, the Court of Appeals has directly passed on the issue of whether extending liability in the aforementioned manner violated constitutional protections of freedom of speech and has found no such violation (see Spahn v Julian Messner, Inc., 21 NY2d at 129).

Thus, the issue before this Court is whether plaintiff's complaint, when given the benefit of every favorable inference, alleges facts suggesting that defendant knowingly produced a materially and substantially fictitious biography that violates the statutory right of privacy **[FN1]**. **[*3]**Turning to the record, plaintiff alleges that the film is a "knowing and substantially fictionalized account" about plaintiff "and the events that led to his incarceration," and that it appropriates his name without his consent "for purposes of profit." In support of this claim, plaintiff offered a letter written by a producer associated with the film to his mother before the film's release. The producer indicated that she was involved in the production of a documentary intended to accompany the film that the producer "hope[d]... [would] provide the platform for [the mother's] family to state their position in a non-fictional program after the [film] airs." Viewing the producer's correspondence in the light most favorable to plaintiff and according plaintiff the benefit of every favorable inference, it is reasonable to infer that the producer indicated that the film was considered to be a fictitious program. Considering the foregoing and the standard of review on a motion to dismiss, we cannot say that plaintiff

has failed to sufficiently allege the same degree of fictionalization or the same degree of defendant's knowledge of such fictionalization as that which has been found to violate the statutory right to privacy without running afoul of constitutional protections of speech (*see Spahn v Julian Messner; Inc.*, 21 NY2d at 129; *see also Binns v Vitagraph Co. of Am.*, 210 NY at 56)^[FN2]. Accordingly, defendant's motion to dismiss for failure to state a cause of action should have been denied.

Garry, Lynch, Devine and Mulvey, JJ., concur.

ORDERED that the order is reversed, on the law, with costs, and motion denied.

Footnotes

Footnote 1: The Court of Appeals has made clear that the aforementioned line of cases dealing with "invented biographies of plaintiffs' lives" relate to "strikingly different" scenarios from those cases where the Court has addressed "the unauthorized, and allegedly false and damaging, use of plaintiffs' photographs to illustrate newsworthy articles" (*Messenger v Gruner + Jahr Print. & Publ.*, 94 NY2d at 446). The Court of Appeals has also offered the guidance that courts, in addressing alleged violations of the statutory right of privacy, ought to resort to precedent "directly on point" for the governing rules, which, here, are cases such as *Spahn v Julian Messner, Inc.* (21 NY2d 124 [1967], *supra*) and *Binns v Vitagraph Co. of Am.* (*supra*) that regard biographies (*Messenger v Gruner + Jahr Print. & Publ.*, 94 NY2d at 446).

Footnote 2: We emphasize that, at this procedural stage, the film is not before this Court, and "[w]hether an item is newsworthy

depends solely on [its] content" (*Messenger v Gruner + Jahr Print. & Publ.*, 94 NY2d at 442 [internal quotation marks and citation omitted]).

Return to Decision List

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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

OLIVIA DE HAVILLAND,

B285629

Plaintiff and Respondent,

v.

FX NETWORKS, LLC et al., Defendants and Appellants. (Los Angeles County Super. Ct. No. BC667011)

APPEAL from an order of the Superior Court of Los Angeles County, Holly E. Kendig, Judge. Reversed with directions.

Munger, Tolles & Olson, Glenn D. Pomerantz, Kelly M. Klaus, Fred A. Rowley, Jr., and Mark R. Yohalem for Defendants and Appellants.

Horvitz & Levy, Frederic D. Cohen and Mark A. Kressel for Motion Picture Association of America, Inc. and Netflix, Inc. as Amici Curiae on behalf of Defendants and Appellants. Davis Wright Tremaine, Kelli L. Sager and Rochelle L. Wilcox for A&E Television Networks, LLC, Discovery Communications, LLC, Imperative Entertainment, LLC, Urban One, Inc., Critical Content, LLC, Reporters' Committee for Freedom of the Press, and First Amendment Coalition as Amici Curiae on behalf of Defendants and Appellants.

Jennifer E. Rothman and Eugene Volokh for Intellectual Property and Constitutional Law Professors as Amici Curiae on behalf of Defendants and Appellants.

Daniel K. Nazer for Electronic Frontier Foundation, Organization for Transformative Works, and Wikimedia Foundation as Amici Curiae on behalf of Defendants and Appellants.

Jack Lerner, UCI Intellectual Property, Arts, and Technology Clinic, for International Documentary Association as Amicus Curiae on behalf of Defendants and Appellants.

Howarth & Smith, Don Howarth, Suzelle M. Smith, and Zoe E. Tremayne for Plaintiff and Respondent.

Duncan W. Crabtree-Ireland and Danielle S. Van Lier for Screen Actors Guild-American Federation of Television and Radio Artists as Amicus Curiae on behalf of Plaintiff and Respondent. Authors write books. Filmmakers make films. Playwrights craft plays. And television writers, directors, and producers create television shows and put them on the air -- or, in these modern times, online. The First Amendment protects these expressive works and the free speech rights of their creators. Some of these works are fiction. Some are factual. And some are a combination of fact and fiction. That these creative works generate income for their creators does not diminish their constitutional protection. The First Amendment does not require authors, filmmakers, playwrights, and television producers to provide their creations to the public at no charge.

Books, films, plays, and television shows often portray real people. Some are famous and some are just ordinary folks. Whether a person portrayed in one of these expressive works is a world-renowned film star -- "a living legend" -- or a person no one knows, she or he does not own history. Nor does she or he have the legal right to control, dictate, approve, disapprove, or veto the creator's portrayal of actual people.

In this case, actress Olivia de Havilland sues FX Networks, LLC and Pacific 2.1 Entertainment Group, Inc. (collectively FX), the creators and producers of the television miniseries *Feud*: *Bette and Joan*. In the docudrama about film stars Bette Davis and Joan Crawford, an actress plays de Havilland, a close friend of Davis. De Havilland alleges causes of action for violation of the statutory right of publicity and the common law tort of misappropriation. De Havilland grounds her claims on her assertion -- which FX does not dispute -- that she "did not give [her] permission to the creators of 'Feud' to use [her] name, identity[,] or image in any manner." De Havilland also sues for false light invasion of privacy based on FX's portrayal in the docudrama of a fictitious interview and the de Havilland character's reference to her sister as a "bitch" when in fact the term she used was "dragon lady." De Havilland seeks to enjoin the distribution and broadcast of the television program and to recover money damages.

The trial court denied FX's special motion to strike the complaint. The court concluded that, because *Feud* tried to portray de Havilland as realistically as possible, the program was not "transformative" under *Comedy III Productions*¹ and therefore not entitled to First Amendment protection. As appellants and numerous amici point out, this reasoning would render actionable all books, films, plays, and television programs that accurately portray real people. Indeed, the more realistic the portrayal, the more actionable the expressive work would be. The First Amendment does not permit this result. We reverse.

FACTUAL AND PROCEDURAL BACKGROUND 1. Feud *airs and de Havilland sues*

In March 2017, FX began airing its eight-part docudrama, *Feud: Bette and Joan.* The docudrama portrays the rivalry between actresses Joan Crawford and Bette Davis. The central theme of the program is that powerful men in Hollywood pressured and manipulated women in the industry into very public feuds with one another to advance the economic interests of those men and the institutions they headed. A secondary theme -- as timely now as it was in the 1960's -- is the poor treatment by Hollywood of actresses as they age.

¹ Comedy III Productions, Inc. v. Gary Saderup, Inc. (2001) 25 Cal.4th 387 (Comedy III).

Academy-Award-winning actress Catherine Zeta-Jones portrays de Havilland in the docudrama. The de Havilland role is a limited one, consuming fewer than 17 minutes of the 392-minute, eight-episode miniseries. The role consists essentially of two parts: (1) a fictitious interview in which Zeta-Jones -- often accompanied by Academy-Award-winning actress Kathy Bates playing actress Joan Blondell -- talks to an interviewer (a young man named "Adam") about Hollywood, its treatment of women, and the Crawford/Davis rivalry; and (2) scenes in which Zeta-Jones interacts with Academy-Awardwinning actress Susan Sarandon playing Bette Davis. These scenes portray the close friendship between Davis and de Havilland. As played by Zeta-Jones, the de Havilland character is portrayed as beautiful, glamorous, self-assured, and considerably ahead of her time in her views on the importance of equality and respect for women in Hollywood. Feud was nominated for 18 Emmy awards.

On June 30, 2017, de Havilland filed this lawsuit. Her Third Amended Complaint, filed in September 2017, alleges four causes of action: (1) the common law privacy tort of misappropriation; (2) violation of Civil Code section 3344, California's statutory right of publicity; (3) false light invasion of privacy; and (4) "unjust enrichment." De Havilland asks for damages for emotional distress and harm to her reputation; "past and future" "economic losses"; FX's "profits gained . . . from and attributable to the unauthorized use of [her] name, photograph,² or likeness"; punitive damages; attorney fees; and a permanent injunction prohibiting the "broadcast and distribution" of the series.³

 $[\]mathbf{2}$ There seems to be only one photograph to which de Havilland could be referring. At the end of the miniseries, just before the credits, *Feud* displays side-by-side photographs of the real people who had some involvement in the story and the actor who played each. These include director Robert Aldrich (played by Alfred Molina), Jack Warner of Warner Brothers (played by Stanley Tucci), Joan Crawford (played by Jessica Lange), Victor Buono (played by Dominic Burgess), Bette Davis's daughter B.D. Merrill (played by Kiernan Shipka), and Hedda Hopper (played by Judy Davis), as well as Davis and de Havilland, played, as noted, by Sarandon and Zeta-Jones, respectively. A short blurb tells the viewer what became of each person. For de Havilland, the blurb states, "Olivia de Havilland made her screen debut in Max Reinhardt's A Midsummer Night's Dream in 1935. She retired from film acting in 1988. She continues to enjoy her retirement in Paris. On July 1, 2016, she turned 100 years old." De Havilland attached a copy of the side-by-side photographs of her and Zeta-Jones to her complaint.

³ On July 25, 2017, de Havilland filed a motion for trial setting preference. De Havilland submitted a declaration stating she lives in Paris and is 101 years old. She also submitted a declaration by a Los Angeles physician stating that any person of that age "will not survive for any extended period of time."

2. FX's special motion to strike

a. FX's motion, declarations, and exhibits

On August 29, 2017, FX filed a motion to strike the complaint under California's anti-SLAPP⁴ law, Code of Civil Procedure section 425.16. FX submitted declarations from Ryan Murphy, a co-creator, executive producer, writer, and director of *Feud*; Michael Zam, a screenwriter who co-wrote a script called *Best Actress* on which *Feud* was based in part; and Timothy Minear, an executive producer and writer for *Feud*. Minear explained the writers on the project created "imagined interviews" conducted at the 1978 Academy Awards as a "framing device" to introduce viewers to *Feud*'s themes such as the unfair treatment of women in Hollywood. Minear stated *Feud*'s writers based the imagined interview on actual interviews de Havilland had given over the years. Minear also explained that a "docudrama" is a "dramatized retelling of history."

FX also submitted a declaration from Stephanie Gibbons, its president of marketing and promotion. Gibbons stated FX had not used de Havilland's photograph in any advertising or promotion for the miniseries. Six of 44 video advertisements included pictures of Zeta-Jones; none of these used de Havilland's name. Gibbons explained that Zeta-Jones is a famous actress whom FX thought viewers would want to watch.

⁴ SLAPP is an acronym for strategic lawsuit against public participation. (*Christian Research Institute v. Alnor* (2007) 148 Cal.App.4th 71, 76, fn. 1 (*Christian Research*).)

FX submitted the declaration of James Berkley, a research analyst for FX's law firm, together with 59 exhibits. These included books, newspaper and magazine articles, and videos of de Havilland appearing as a guest on talk shows. In a number of the articles and video clips, de Havilland granted interviews and made statements about other actors, including her sister Joan Fontaine. In a July 2016 Associated Press interview -- on the occasion of her one hundredth birthday -- de Havilland said this about her sister: "Dragon Lady, as I eventually decided to call her, was a brilliant, multi-talented person, but with an astigmatism in her perception of people and events which often caused her to react in an unfair and even injurious way."

b. De Havilland's opposition, declarations, and exhibits

De Havilland filed an opposition on September 15, 2017. She asserted *Feud* was a "commercial production." De Havilland attached a declaration from Mark Roesler, the chairman of Celebrity Valuations. Roesler declared he had represented many celebrities over the years, including Richard Nixon. Roesler calculated the fair market value of FX's "use" in *Feud* of de Havilland's "rights" to be between 1.38 and 2.1 million dollars. This works out to between approximately \$84,000 and \$127,000 per minute of time that Zeta-Jones appears on screen.

De Havilland also submitted declarations from David Ladd and Cort Casady. Both men stated they have many years of experience in the entertainment business. In nearly identical language both Ladd and Casady declared the "standard practice" in the film and television industry is to obtain consent from any "well-known living person" before her or his "name, identity, character[,] or image" can be used in a film or television program.⁵ In addition, de Havilland submitted a declaration from her attorney attaching posts from Instagram and Facebook with photographs of Zeta-Jones as de Havilland.

c. FX's reply

FX filed a reply on September 22, 2017. FX submitted a declaration from Casey LaLonde, Joan Crawford's grandson. LaLonde stated an actor portraying him as a child appears in *Feud*. LaLonde neither granted consent nor received any compensation for this portrayal. LaLonde described the experience of seeing an actor portraying him in the docudrama as "a wonderful surprise." LaLonde also made available to *Feud*'s producers home movies of Crawford. He stated the producers did not pay any compensation to Crawford's family for their portrayal of her. LaLonde declared that de Havilland's attorney's statement to *USA Today* that *Feud*'s producers had compensated Crawford's family for the use of her identity was untrue.

d. The hearing on the motion and the trial court's ruling

On September 29, 2017, the parties argued the motion. The superior court issued a 16-page written decision. The court denied the anti-SLAPP motion as to all four causes of action. The court first found the docudrama constitutes speech in a public forum, involving an issue of public concern. Noting the burden then shifts to the plaintiff to show a probability of prevailing on her claims, the court concluded de Havilland had sufficiently met

⁵ Casady stated consent "must be obtained." Ladd stated consent "should be obtained." Ladd added that, "[i]f consent could not be obtained," then the producers could use only "authenticated facts previously disclosed" by the person herself or himself.

her burden of proof. The court stated de Havilland had to show only that her lawsuit had minimal merit.

The trial court said de Havilland had met her burden on her right of publicity claims "because no compensation was given despite using her name and likeness." The court, citing Ladd's declaration, stated, "[I]t is standard in the industry, according to Plaintiff, to negotiate compensation prior to the use of a person's likeness." The court said there was "nothing transformative about [*Feud*]" within the meaning of *Comedy III* because FX admitted it "wanted to make the appearance of [de Havilland] as real as possible."

On de Havilland's false light claim, the court noted de Havilland asserted (1) she had not given an interview at the 1978 Academy Awards; (2) she had not referred to her sister Joan Fontaine as "my bitch sister"; (3) she never told a director she didn't "play bitches" and he should call her sister; and (4) when asked where the alcohol in Frank Sinatra's dressing room had gone, she never said "Frank must have drunk it all." Rejecting FX's argument that these portrayals are not defamatory, the court said, "[I]n considering the show as a whole, the Court finds [de Havilland] has sufficiently met her burden of proof in that a viewer of the television show, which is represented to be based on historical facts, may think [de Havilland] to be a gossip who uses vulgar terms about other individuals, including her sister." Citing the Casady declaration, the court stated, "For a celebrity, this could have a significant economic impact."

As to actual malice (de Havilland did not dispute she is a public figure),⁶ the court concluded de Havilland had "submitted

⁶ De Havilland again concedes on appeal that she is a public figure.

sufficient evidence that [FX] presented scenes 'with knowledge that [they were] false or with reckless disregard of whether [they were] false or not.' " The court seemed unreceptive to FX's argument that "false" is different from "dramatized." Finally, the trial court rejected FX's argument that de Havilland's fourth cause of action for "unjust enrichment" was not a cause of action.

DISCUSSION

1. California's anti-SLAPP statute and our standard of review on appeal

A special motion to strike under the anti-SLAPP statute, Code of Civil Procedure section 425.16, "'is a procedural remedy to dispose of lawsuits brought to chill the valid exercise of a party's constitutional right of petition or free speech. [Citation.] The purpose of the anti-SLAPP statute is to encourage participation in matters of public significance and prevent meritless litigation designed to chill the exercise of First Amendment rights. [Citation.] The Legislature has declared that the statute must be "construed broadly" to that end." (Hawran v. Hixson (2012) 209 Cal.App.4th 256, 268; see also Code Civ. Proc., § 425.16(a); cf. Bradbury v. Superior Court (1996) 49 Cal.App.4th 1108, 1114, fn. 3 [an appellate court, whenever possible, should interpret the First Amendment and section 425.16 in a manner "favorable to the exercise of freedom of speech, not its curtailment"].) This legislative directive "is expressed in unambiguous terms." (Briggs v. Eden Council for Hope & Opportunity (1999) 19 Cal.4th 1106, 1119.) "[T]he broad construction expressly called for in subdivision (a) of section 425.16 is desirable from the standpoint of judicial efficiency." (*Id.* at pp. 1121-1122.)

"Resolution of an anti-SLAPP motion 'requires the court to engage in a two-step process." (Jarrow Formulas, Inc. v. LaMarche (2003) 31 Cal.4th 728, 733.) First, the defendant must show the conduct underlying the plaintiff's cause of action arises from the defendant's constitutional rights of free speech or petition in connection with a public issue. (Equilon Enterprises v. Consumer Cause, Inc. (2002) 29 Cal.4th 53, 67.) If the defendant satisfies this prong, the burden shifts to the plaintiff to prove she has a legally sufficient claim and to prove with admissible evidence a probability that she will prevail on the claim. (Wilson v. Parker, Covert & Chidester (2002) 28 Cal.4th 811, 821; see also HMS Capital, Inc. v. Lawyers Title Co. (2004) 118 Cal.App.4th 204, 212 ["In opposing an anti-SLAPP motion, the plaintiff cannot rely on the allegations of the complaint, but must produce evidence that would be admissible at trial."].) "In deciding the question of potential merit, the trial court considers the pleadings and evidentiary submissions of both the plaintiff and the defendant (§ 425.16, subd. (b)(2)); though the court does not *weigh* the credibility or comparative probative strength of competing evidence, it should grant the motion if, as a matter of law, the defendant's evidence supporting the motion defeats the plaintiff's attempt to establish evidentiary support for the claim." (Wilson v. Parker, at p. 821; see also Jackson v. Mayweather (2017) 10 Cal.App.5th 1240, 1251 (*Jackson*).) "[O]n its face the [anti-SLAPP] statute contemplates consideration of the substantive merits of the plaintiff's complaint, as well as all available defenses to it, including, but not limited to, constitutional defenses. This broad approach is required not only by the language of the statute, but by the policy reasons [that]

gave rise to our anti-SLAPP statute." (*Traditional Cat Assn., Inc.* v. *Gilbreath* (2004) 118 Cal.App.4th 392, 398.)

To satisfy this prong-two showing, the plaintiff must present credible evidence that satisfies the standard of proof required by the substantive law of the cause of action the anti-SLAPP motion challenges. Generally, a plaintiff's claims need only have "'minimal merit'" to survive an anti-SLAPP motion. (Navellier v. Sletten (2002) 29 Cal.4th 82, 95, fn. 11.) But when the plaintiff is a public figure, to establish a prima facie case she must demonstrate by clear and convincing evidence that the defendant acted with "actual malice." (Annette F. v. Sharon S. (2004) 119 Cal.App.4th 1146, 1162, 1169-1172 [trial court should have granted anti-SLAPP motion where limited purpose public figure plaintiff "failed to show a probability of proving actual malice by clear and convincing evidence"]; Conroy v. Spitzer (1999) 70 Cal.App.4th 1446, 1451, 1454 [to meet anti-SLAPP] statute's requirement that he show he would "probably" prevail on his claim, public figure plaintiff "was required to 'show a likelihood that he could produce clear and convincing evidence'" that defendant made statements with actual malice]; Beilenson v. Superior Court (1996) 44 Cal.App.4th 944, 950 ["The clear and convincing standard requires that the evidence be such as to command the unhesitating assent of every reasonable mind. [Citation.] Actual malice cannot be implied and must be proven by direct evidence"]; see also *Makaeff v. Trump University*, *LLC* (9th Cir. 2013) 715 F.3d 254, 271 [whether plaintiff has "reasonable probability of proving, by clear and convincing evidence, that [defendant] made her critical statements with actual malice" is "inherently fact-intensive question"].) "The requirement that a public figure plaintiff prove malice by clear

and convincing evidence arises from First Amendment concerns that freedom of expression be provided 'the "breathing space" that [it] "need[s] . . . to survive" '" (*Christian Research*, *supra*, 148 Cal.App.4th at p. 82, quoting *New York Times Co. v. Sullivan* (1964) 376 U.S. 254, 272 [11 L.Ed. 2d 686].)

"An order denying an anti-SLAPP special motion to strike is appealable under [Code of Civil Procedure] sections 425.16, subdivision (i), and 904.1." (*Christian Research, supra,* 148 Cal.App.4th at p. 79.) Our review of the trial court's order denying FX's motion "is de novo, and entails an independent review of the entire record." (*City of Costa Mesa v. D'Alessio Investments, LLC* (2013) 214 Cal.App.4th 358, 371; see also *Mundy v. Lenc* (2012) 203 Cal.App.4th 1401, 1408 ["An appellate court reviews an order denying an anti-SLAPP motion from a clean slate"].)

2. De Havilland concedes FX met the first prong of the twostep process

The trial court found that de Havilland's lawsuit arises from FX's exercise of its free speech rights on a topic of public interest in a public forum. De Havilland presented no argument on that issue in her opposition brief. At oral argument, her counsel conceded FX has met the first prong of the anti-SLAPP analysis.

3. The First Amendment protects FX's portrayal of de Havilland in a docudrama without her permission

a. We question whether a docudrama is a product or merchandise within the meaning of Civil Code section 3344

As noted, de Havilland alleges causes of action for violation of the statutory right of publicity, Civil Code section 3344, and for the common law tort of misappropriation. Section 3344,

subdivision (a) provides, in part, "Any person who knowingly uses another's name, voice, signature, photograph, or likeness, in any manner, on or in *products*, *merchandise*, or goods, or for purposes of advertising or selling, or soliciting purchases of, *products*, merchandise, goods, or services, without such person's prior consent, . . . shall be liable for any damages sustained by the person or persons injured as a result thereof." (Italics added.) Misappropriation is one of the four branches of the privacy tort identified by Dean William Prosser. (Prosser, *Privacy* (1960) 48 Cal. L.Rev. 383, 389; see generally 5 Witkin, Summary of Cal. Law (11th ed. 2017) Torts, § 756, p. 1043.) The Restatement Second of Torts adopted Prosser's classification. (Hill v. National Collegiate Athletic Assn. (1994) 7 Cal.4th 1, 24.) "California common law has generally followed Prosser's classification of privacy interests as embodied in the Restatement." (Ibid.) The Restatement defines the misappropriation tort: "One who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy." (Rest.2d Torts § 652C.)

De Havilland's statutory claim raises a preliminary question of whether the portrayal of a real person in a television program (or a book, play, or film) constitutes the "use" of that person's name or "likeness" "on or in" a product, merchandise, or good. Books, films, and television shows are "things" but are they "merchandise" or "products"? Many of the cases in this area involve products and merchandise such as T-shirts and lithographs (*Comedy III, ante*), greeting cards (*Hilton v. Hallmark Cards* (9th Cir. 2010) 599 F.3d 894), and video games (*Davis v. Elec. Arts, Inc.* (9th Cir. 2015) 775 F.3d 1172; *In re NCAA Student-Athlete Name & Likeness* (9th Cir. 2013) 724 F.3d 1268; *Kirby v. Sega of America, Inc.* (2006) 144 Cal.App.4th 47), or advertisements for products and merchandise. (See, e.g., *Newcombe v. Adolf Coors Co.* (9th Cir. 1998) 157 F.3d 686, 691-694 [beer advertisement]; *Waits v. Frito-Lay, Inc.* (9th Cir. 1992) 978 F.2d 1093 [advertisement for SalsaRio Doritos]; *Midler v. Ford Motor Co.* (9th Cir. 1988) 849 F.2d 460 [advertisement for Ford Lincoln Mercury]; cf. CACI No. 1804A [to establish violation of Civil Code section 3344, plaintiff must prove (among other elements) that defendant knowingly used plaintiff's name or likeness "on merchandise/[or] to advertise or sell [*describe what is being advertised or sold*]" and that defendant's use of plaintiff's name or likeness "was directly connected to [defendant's] commercial purpose."].)

The United States Court of Appeals for the Ninth Circuit addressed this question in a recent case, Sarver v. Chartier (9th Cir. 2016) 813 F.3d 891 (Sarver). A United States Army sergeant who had served in Iraq sued the screenwriter, director, and producer of the motion picture *The Hurt Locker*. The plaintiff alleged "he did not consent to [the] use [of his life and experiences in the film] and that several scenes in the film falsely portray him in a way that has harmed his reputation." (Id. at p. 896.) He asserted causes of action for (among other torts) misappropriation of his likeness and violation of the right of publicity, false light invasion of privacy, and defamation. (*Ibid.*) The appellate court affirmed the district court's dismissal of the lawsuit under our anti-SLAPP statute. The court observed "The *Hurt Locker* is not speech proposing a commercial transaction." (Id. at p. 905.) The court discussed Zacchini v. Scripps-Howard Broadcasting Co. (1977) 433 U.S. 562 [53 L.Ed.2d 965] (Zacchini), the only United States Supreme Court case to "review[] the

constitutionality of a state's right of publicity law." (Sarver, at p. 903.) An Ohio television station broadcast 15 seconds of Zacchini performing his "human cannonball" act. Zacchini sued for violation of his right of publicity under Ohio law. The Court concluded the First Amendment interests in broadcasting Zacchini's *entire* act -- rather than, for example, his name or picture -- was minimal. (Zacchini, at pp. 563-564, 573.) The Sarver court noted that, in the intervening forty years, the "Court has not revisited the question of when a state's right of publicity law is consistent with the First Amendment." (Sarver, at p. 904; see also Matthews v. Wozencraft (5th Cir. 1994) 15 F.3d 432, 439 (Matthews) [" 'Courts long ago recognized that a celebrity's right of publicity does not preclude others from incorporating a person's name, features, or biography in a literary work, motion picture, news or entertainment story. Only the use of an individual's identity in advertising infringes on the persona."].)

We need not decide this question, however, because *Feud* is constitutionally protected in any event.

b. Assuming a docudrama is a "use" for purposes of the right of publicity, the First Amendment protects Feud

Assuming for argument's sake that a television program is a "product, merchandise, or good" and that Zeta-Jones's portrayal of de Havilland constitutes a "use" of de Havilland's name or likeness within the scope of both the right of publicity statute and the misappropriation tort, we come to FX's First Amendment defense. Nearly 40 years ago, the Chief Justice of our Supreme Court addressed this issue in *Guglielmi v. Spelling-Goldberg Productions* (1979) 25 Cal.3d 860 (*Guglielmi*). The case involved a television program that was a "fictionalized version" of the life of actor Rudolph Valentino. Valentino had died years earlier and his nephew Guglielmi sued, alleging misappropriation of Valentino's right of publicity and seeking damages and injunctive relief. The Court affirmed the dismissal of the complaint on the ground that, at the time, the right of publicity was not descendible to heirs.

In a concurring opinion joined by three other justices, the Chief Justice framed the issue as whether the use of a celebrity's "name and likeness in a fictional film exhibited on television constitutes an actionable infringement of that person's right of publicity." (Guglielmi, supra, 25 Cal.3d at p. 862.) She concluded, "It is clear that [Guglielmi's] action cannot be maintained." (Ibid.) The Chief Justice noted Guglielmi alleged the television production company "knew that the film did not truthfully portray Valentino's life." (Ibid.) She summarized Guglielmi's contentions: the film was not entitled to constitutional protection because the producers "incorporated Valentino's name and likeness in: (1) a work of fiction, (2) for financial gain, (3) knowing that such film falsely portrayed Valentino's life." (Id. at p. 865.) The Chief Justice noted Guglielmi's argument "reveal[ed] a fundamental misconception of the nature of the constitutional guarantees of free expression," adding, "Our courts have often observed that entertainment is entitled to the same constitutional protection as the exposition of ideas." (Id. at pp. 865-867.) "Thus," the justice said, "no distinction may be drawn in this context between fictional and factual accounts of Valentino's life." (Id. at p. 868.) "[T]ruthful and fictional accounts" "have equal constitutional stature." (Id. at p. 871.) The Chief Justice "readily dismissed" Guglielmi's next argument, stating, "The First Amendment is not limited to those who publish without charge." (Id. at p. 868.)

The Chief Justice wrote, "Valentino was a Hollywood star. His life and career are part of the cultural history of an era. . . . His lingering persona is an apt topic for poetry or song, biography or fiction. Whether [the producers'] work constitutes a serious appraisal of Valentino's stature or mere fantasy is a judgment left to the reader or viewer, not the courts." (*Guglielmi, supra*, 25 Cal.3d at pp. 869-870.)

In the nearly four decades since, our Supreme Court and courts of appeal have continued to cite *Guglielmi* with approval. (See, e.g., *Comedy III, supra*, 25 Cal.4th at pp. 396-398, 401-402, 406; *Winter v. DC Comics* (2003) 30 Cal.4th 881, 887-888, 891 (*Winter*); *Tamkin v. CBS Broadcasting, Inc.* (2011) 193 Cal.App.4th 133, 145 (*Tamkin*); *Dyer v. Childress* (2007) 147 Cal.App.4th 1273, 1280; *Polydoros v. Twentieth Century Fox Film Corp.* (1997) 67 Cal.App.4th 318, 324-325 (*Polydoros*).) Federal courts applying California law have as well. (See, e.g., *Sarver, supra*, 813 F.3d at p. 905, fn. 9 [noting *Guglielmi* postdated *Zacchini* and the four justices "cautioned that the defendants' fictionalized portrayal of Valentino's life was entitled to greater First Amendment protection than the conduct in *Zacchini*"].)

Feud is as constitutionally protected as was the film in Sarver, The Hurt Locker. As with that expressive work, Feud "is speech that is fully protected by the First Amendment, which safeguards the storytellers and artists who take the raw materials of life -- including the stories of real individuals, ordinary or extraordinary -- and transform them into art, be it articles, books, movies, or plays." (Sarver, supra, 813 F.3d at p. 905; see also Dora v. Frontline Video, Inc. (1993) 15 Cal.App.4th 536, 542 [producer of documentary about surfers in Malibu was entitled to judgment on surfer's claims for violation of common law and statutory right of publicity; "[w]hether [Dora] is considered a celebrity or not, whether he is seeking damages for injury to his feelings or for the commercial value of his name and likeness, . . . the public interest in the subject matter of the program gives rise to a constitutional protection against liability"]; cf. Polydoros, supra, 67 Cal.App.4th at pp. 322-325 ["Guglielmi unequivocally prevent[ed] [plaintiff] from proceeding on his claim for commercial appropriation of identity" against writer and director of fictional film with character that resembled plaintiff as a child; "[t]o succeed in his claims, [plaintiff] must establish a direct connection between the use of his name or likeness and a *commercial* purpose"]; The Institute v. Target Corp. (11th Cir. 2016) 812 F.3d 824, 826 (Rosa & Raymond Parks) [books, movie, and plaque depicting civil rights pioneer Rosa Parks were protected under Michigan's constitution]; Seale v. Gramercy Pictures (E.D. Pa. 1996) 949 F.Supp. 331 (Seale) [First Amendment protected filmmakers' use of name and likeness of Black Panther Party's co-founder; "the creation, production, and promotion of a motion picture and history book [that] integrate[d] fictitious people and events with the historical people and events surrounding the emergence of the Black Panther Party in the late 1960's" constituted First Amendment expression and was not for a commercial purpose]; Matthews, supra, 15 F.3d at p. 440 [First Amendment protected] book and movie about narcotics officers from misappropriation and false light claims; "[i]t is immaterial whether [the book] 'is viewed as an historical or a fictional work,' [citation], so long as it is not 'simply a disguised commercial advertisement for the sale of goods or services' "].)⁷

That *Feud*'s creators did not purchase or otherwise procure de Havilland's "rights" to her name or likeness does not change this analysis. Producers of films and television programs may enter into agreements with individuals portrayed in those works for a variety of reasons, including access to the person's recollections or "story" the producers would not otherwise have, or a desire to avoid litigation for a reasonable fee. But the First Amendment simply does not require such acquisition agreements. (*Polydoros, supra,* 67 Cal.App.4th at p. 326 ["[t]]he industry custom of obtaining 'clearance' establishes nothing, other than the unfortunate reality that many filmmakers may deem it wise to pay a small sum up front for a written consent to avoid later having to spend a small fortune to defend unmeritorious lawsuits such as this one"]; cf. *Rosa & Raymond*

 $[\]mathbf{7}$ De Havilland relies on *Eastwood v. Superior Court* (1983) 149 Cal.App.3d 409. That case -- which arose from an unusual set of facts -- does not assist our analysis. A tabloid published an article about the supposed involvement of famous actor Clint Eastwood in a "love triangle." Eastwood alleged the article was entirely false. (Id. at p. 414.) The court of appeal, citing Zacchini, held that Eastwood could proceed with his right of publicity claims. (Id. at p. 423.) Here, by contrast, the expressive work at issue is an eight-hour docudrama of which the de Havilland character is but a small part. Moreover, as discussed below, the scenes and lines of which de Havilland complains are permissible literary license and, in any event, not highly offensive to a reasonable person. Unlike *Eastwood*, *Feud*'s creators did not make out of whole cloth an entirely false "article" for economic gain.

Parks, supra, 812 F.3d at p. 832 [privilege based on state constitution's free speech guarantee was not "contingent on paying a fee"].) The creators of *The People v. O.J. Simpson: American Crime Story* can portray trial judge Lance Ito without acquiring his rights. *Fruitvale Station*'s writer and director Ryan Coogler can portray Bay Area Rapid Transit officer Johannes Mehserle without acquiring his rights. HBO can portray Sarah Palin in *Game Change* without acquiring her rights. There are myriad additional examples.

De Havilland also contends the fictitious interview "is structured as an endorsement of [*Feud*]." The miniseries itself does not support this contention. Nothing Zeta-Jones says or does as de Havilland in the docudrama suggests -- much less constitutes -- an "endorsement" of the work by de Havilland. De Havilland's argument seems to be that, whenever a filmmaker includes a character based on a real person, that inclusion implies an "endorsement" of the film or program by that real person. We have found no case authority to support this novel argument.

Nor does the use of de Havilland's name -- along with photographs of Zeta-Jones -- in social media promotion for the miniseries support de Havilland's claims for violation of her right of publicity. Constitutional protection for an expressive work such as *Feud* " 'extends to the truthful use of a public figure's name and likeness in advertising [that] is merely an adjunct of the protected publication and promotes only the protected publication.' " (*Montana v. San Jose Mercury News, Inc.* (1995) 34 Cal.App.4th 790, 797 [First Amendment protected posters that reproduced newspaper stories and photographs of famous quarterback "for two distinct reasons: first, because the posters themselves report newsworthy items of public interest, and second, because a newspaper has a constitutional right to promote itself by reproducing its originally protected articles or photographs"].) "[U]se of a person's name and likeness to advertise a novel, play, or motion picture concerning that individual is not actionable as an infringement of the right of publicity." (*Seale, supra,* 949 F.Supp. at p. 336; see also *Guglielmi, supra,* 25 Cal.3d at pp. 872-873.)

c. In any event, Feud's portrayal of de Havilland is transformative

The parties spend considerable time discussing the "transformative" test set forth in *Comedy III*. There, a company that owns the rights under Civil Code section 990⁸ to The Three Stooges (all three are deceased) sued an artist who had made a charcoal drawing of The Three Stooges, put it on T-shirts and lithographs, and sold those items. The Supreme Court noted the statute imposes liability on a person who uses a deceased personality's name or likeness "either (1) 'on or in' a product, or (2) in 'advertising or selling' a product." (*Comedy III, supra*, 25 Cal.4th at p. 395.) The T-shirts and lithographs were, the Court said, "tangible personal property," "consisting of fabric and

⁸ Civil Code section 990 has since been renumbered as Civil Code section 3344.1. Enacted in 1984, the statute essentially provides a descendible right of publicity. In language similar to section 3344 governing the rights of living persons, section 3344.1 gives a "deceased personality's" heirs and their assignees a cause of action against someone who uses the deceased person's "name, voice, signature, photograph, or likeness . . . on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods, or services, without prior consent."

ink" and "paper and ink." (*Ibid.*) The Court found the artist's drawing was an "expressive work[] and not an advertisement for or endorsement of a product." (*Id.* at p. 396.) But, the Court continued, "[A] celebrity's heirs and assigns have a legitimate protectable interest in exploiting the value to be obtained from *merchandising* the celebrity's image." (*Id.* at p. 400, italics added.)

To resolve this "difficult issue" (Comedy III, supra, 25 Cal.4th at p. 396), the Court borrowed a concept from copyright law: "'whether and to what extent the new work [the product bearing the deceased personality's likeness] is "transformative." '" (Id. at p. 404.) The Court held: "When artistic expression takes the form of a literal depiction or imitation of a celebrity for commercial gain, directly trespassing on the right of publicity without adding significant expression beyond that trespass, the state law interest in protecting the fruits of artistic labor outweighs the expressive interests of the imitative artist." (Id. at p. 405.) The Court continued, "Another way of stating the inquiry is whether the celebrity likeness is one of the 'raw materials' from which an original work is synthesized, or whether the depiction or imitation of the celebrity is the very sum and substance of the work in question." (Id. at p. 406.) The Court identified a "useful . . . subsidiary inquiry:" "does the marketability and economic value of the challenged work derive primarily from the fame of the celebrity depicted? If this question is answered in the negative, then there would generally be no actionable right of publicity. When the value of the work comes principally from some source other than the fame of the celebrity -- from the creativity, skill, and reputation of the artist -- it may be presumed that sufficient transformative

elements are present to warrant First Amendment protection." (*Id.* at p. 407.) Applying its "transformative" test to the sketch artist's T-shirts and lithographs, the Court concluded the charcoal drawing on the shirts and prints was a "literal, conventional depiction[] of The Three Stooges" and therefore not constitutionally protected. (*Id.* at p. 409.)

Comedy III's "transformative" test makes sense when applied to products and merchandise -- "tangible personal property," in the Supreme Court's words. Lower courts have struggled mightily, however, to figure out how to apply it to expressive works such as films, plays, and television programs. ⁹ The trial court's analysis here is a good example.¹⁰ The court wrote, "[H]ere, because [FX] admit[s] that [it] wanted to make the appearance of [de Havilland] as real as possible . . . , there is nothing transformative about the docudrama. Moreover, even if [FX] imagined conversations for the sake of being creative, such does not make the show transformative."

We disagree. The fictitious, "imagined" interview in which Zeta-Jones talks about Hollywood's treatment of women and the

⁹ Cf. *Sarver, supra*, 813 F.3d at p. 904, fn. 6 [unnecessary in *Hurt Locker* case to reach affirmative defense of "transformative use"].

¹⁰ Amici, 22 constitutional law and intellectual property law professors, note they "have serious reservations about the [*Comedy III*] test [as the appropriate test for deciding the federal question of whether and when the First Amendment protects against right of publicity claims] -- highlighted by the trial court's struggle to understand what was meant by a transformative use, and its . . . reading of that test to devalue realistic uses in works of historical fiction and biography."

Crawford/Davis rivalry is a far cry from T-shirts depicting a representational, pedestrian, uncreative drawing of The Three Stooges. The de Havilland role, performed by Zeta-Jones, constitutes about 4.2 percent of *Feud*. The docudrama tells the story, in nearly eight hours, of the competition between Hollywood's leading ladies of the day, Bette Davis and Joan Crawford, for film roles, attention, awards, and acclaim. The miniseries tells many stories within the story as well: Jack Warner's demeaning and dismissive treatment of director Robert Aldrich; Crawford's and Davis's struggles with their personal relationships: husbands, partners, and children; the obstacles faced by capable women like Aldrich's assistant Pauline Jameson who want to direct motion pictures; and the refusal of powerful men in the entertainment business to take women seriously, even when their movies make money.

In the words of the *Comedy III* Court, Zeta-Jones's "celebrity likeness [of de Havilland] is one of the 'raw materials from which [the] original work [*Feud*] is synthesized." (*Comedy III, supra,* 25 Cal.4th at p. 406.) Applying *Comedy III*'s "useful subsidiary inquiry" here, we conclude as a matter of law that *Feud*'s "marketability and economic value" does not "derive primarily from [de Havilland's] fame" but rather "comes principally from . . . the creativity, skill, and reputation" of *Feud*'s creators and actors. Ryan Murphy is a successful screenwriter, director, and producer who counts among his credits the television series *Glee* and the Emmy-award-winning miniseries *The People v. O.J. Simpson: American Crime Story*. Accomplished writers contributed to the script. Highly-regarded and award-winning actors including Susan Sarandon, Jessica Lange, Catherine Zeta-Jones, Stanley Tucci, Alfred Molina, Judy Davis, and Kathy Bates performed in *Feud*. In short, *Feud* constitutes "significant expression" -- a story of two Hollywood legends -- of which the de Havilland character is but a small part. While viewers may have "tuned in" to see these actors and watch this Hollywood tale, there is no evidence that de Havilland as a character was a significant draw. (Cf. *Johnson v. Harcourt, Brace, Jovanovich, Inc.* (1974) 43 Cal.App.3d 880, 895 [use in textbook of article about janitor who found and returned large sum of money was not actionable misappropriation; article was neither "a primary reason for the textbook" "nor was it a substantial factor in the students' purchases of the book"].)
4. *De Havilland has not carried her burden of proving*

with admissible evidence that she will probably prevail on her false light claim

a. The allegations of de Havilland's complaint

In her third cause of action, de Havilland alleges false light invasion of privacy. Though not entirely clear,¹¹ the complaint

¹¹ De Havilland's complaint blends the allegations concerning her right of publicity claims with those concerning her false light claim. For example, de Havilland alleges the "fake interview" "put[] false words [in her] mouth," "misappropriated [her] name, likeness[,] and identity without her permission and used them falsely in order to exploit their own commercial interests," and "create[d] the public impression that she was a hypocrite, selling gossip in order to promote herself at the Academy Awards." In her third cause of action for false light, de Havilland alleges that she "benefits financially from the authorized use of her own name, likeness, and identity" and that FX's "misappropriation caused" her harm, and she prays for a permanent injunction restraining FX "from continuing to infringe [her] right of publicity." To assist our analysis, we separate de Havilland's legal theories and address each one separately.

seems to ground this claim in four scenes or lines in *Feud*: (1) a fictionalized interview at the 1978 Academy Awards; (2) a reference by the de Havilland character to her "bitch sister" in a private conversation with the Bette Davis character; (3) a remark to the Aldrich character that she "do[esn't] do bitches" and he should "call [her] sister" about a film role; and (4) a response to the Davis character's question ("where's the booze?") when the two are alone in Frank Sinatra's dressing room that "Frank must've drunk it all."

b. False light invasion of privacy and de Havilland's required showing

"'False light is a species of invasion of privacy, based on publicity that places a plaintiff before the public in a false light that would be highly offensive to a reasonable person, and where the defendant knew or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the plaintiff would be placed.'" (Jackson, supra, 10 Cal.App.5th at p. 1264.) "'A "false light" claim, like libel, exposes a person to hatred, contempt, ridicule, or obloguy and assumes the audience will recognize it as such." (Brodeur v. Atlas Entertainment, Inc. (2016) 248 Cal.App.4th 665, 678 (Brodeur).) "In order to be actionable, the false light in which the plaintiff is placed must be highly offensive to a reasonable person." (Fellows v. National Enquirer, Inc. (1986) 42 Cal.3d 234, 238 (Fellows), citing Rest.2d Torts § 652E, p. 394.) "'A "false light" cause of action is in substance equivalent to a libel claim, and should meet the same requirements of the libel claim, including proof of malice." (Brodeur, at p. 678, quoting Aisenson v. American Broadcasting *Co.* (1990) 220 Cal.App.3d 146,161 (*Aisenson*).)

To defeat FX's anti-SLAPP motion on her false light claim, de Havilland, as a public figure, must demonstrate a reasonable probability she can prove FX broadcast statements that are (1) assertions of fact, (2) actually false or create a false impression about her, (3) highly offensive to a reasonable person or defamatory, and (4) made with actual malice. (Brodeur, supra, 248 Cal.App.4th at p. 678; see also *Dodds v. American* Broadcasting Co. (9th Cir. 1998) 145 F.3d 1053 (Dodds); cf. Fellows, supra, 42 Cal.3d at p. 239 ["Although it is not necessary that the plaintiff be defamed, publicity placing one in a highly offensive false light will in most cases be defamatory as well"].) We decide as a matter of law whether a reasonable viewer would interpret *Feud* as conveying (a) statements of fact that are (b) defamatory or highly offensive to a reasonable person and (c) actually false or that convey a false impression of de Havilland. (Couch v. San Juan Unified School Dist. (1995) 33 Cal.App.4th 1491, 1497, 1500-1501 (Couch) [" 'the proper focus of judicial inquiry in [defamation and false light cases] is simply whether the communication in question could be reasonably understood in a defamatory sense by those who received it'"; "[t]his question must be resolved by considering whether the reasonable or 'average' reader would so interpret the material"]; Moyer v. Amador Valley J. Union High School Dist. (1990) 225 Cal.App.3d 720, 724; see also Ollman v. Evans (D.C. Cir. 1984) 750 F.2d 970, 978 [questions as to privileges derived from the First Amendment are to be decided as matters of law].) "The Supreme Court and other courts have emphasized that one must analyze a statement in its broad context to determine whether it implies the assertion of an objective fact." (Partington v. Bugliosi (9th Cir. 1995) 56 F.3d 1147, 1153 (*Partington*).)

Accordingly, de Havilland must offer admissible evidence that the average, reasonable viewer of *Feud*, watching the scenes in their original context, would have understood them to convey statements of fact that she is "a hypocrite, selling gossip" and a person who "speak[s] in crude and vulgar terms about others." (*Couch, supra*, 33 Cal.App.4th at p. 1501.) She also must demonstrate that these scenes and lines in *Feud* "would be highly offensive to a reasonable person," (*Sarver, supra*, 813 F.3d 891 at p. 907) a person "of ordinary sensibilities." (*Aisenson, supra*, 220 Cal.App.3d at p. 161.) In light of the actual docudrama itself -- which we have viewed in its entirety -- de Havilland cannot meet her burden.

c. The fictitious interview and the light-hearted reference to Frank Sinatra's drinking are neither reasonably susceptible to a defamatory meaning nor highly offensive to a reasonable person

First, we question whether a reasonable viewer would interpret *Feud* -- a docudrama -- as entirely factual. Viewers are generally familiar with dramatized, fact-based movies and miniseries in which scenes, conversations, and even characters are fictionalized and imagined. (See *Masson v. New Yorker Magazine, Inc.* (1991) 501 U.S. 496, 512-513 [111 S.Ct. 2419, 115 L.Ed.2d 447] (*Masson*) ["[A]n acknowledgement that the work is so-called docudrama or historical fiction . . . might indicate that the quotations should not be interpreted as the actual statements of the speaker to whom they are attributed"]; *Partington, supra,* 56 F.3d at pp. 1154-1155 ["the general tenor of the docudrama also tends to negate the impression that the statements involved represented a false assertion of objective fact"; docudramas "often rely heavily upon dramatic interpretations of events and dialogue filled with rhetorical flourishes"; most viewers of docudramas "are aware by now that parts of such programs are more fiction than fact"].)

In any event, assuming for argument's sake that the average, reasonable viewer would see the scenes in question as literal statements of actual fact, de Havilland's false light claim fails nevertheless because *Feud*'s depiction of her is not defamatory nor would it "highly offend" a reasonable person. Granting an interview at the Academy Awards is not conduct that would subject a person to hatred, contempt, ridicule, or obloquy. (Cf. Jackson, supra, 10 Cal.App.5th at pp. 1264-1265 famous boxer's social media postings that he broke up with his girlfriend because she had an abortion "did not expose [girlfriend] to 'hatred, contempt, ridicule, or obloguy'"].) Feud's writers explained in their declarations that they employed the fictitious interview as a "framing device." In the interview, Zeta-Jones as de Havilland introduces the theme of powerful men misusing women in Hollywood. She says she was "furious" when she learned how Crawford and Davis had been pitted against one another. *Feud*'s producers wove this theme throughout the miniseries, culminating in the title of the final episode: "You Mean All This Time We Could Have Been Friends?" From time to time in the docudrama -- in brief segments¹² -- Zeta-Jones acts as a guide for the viewer through the tale, a Beatrice to the viewer's Dante.¹³

¹² The "interview" segments consume fewer than seven minutes of the 392-minute miniseries, about 1.8 percent of the total work.

¹³ Aligheri, The Divine Comedy (1320).

Zeta-Jones plays de Havilland as a wise, witty, sometimes playful woman. That wit is the same as that displayed by the real de Havilland when she appeared in November 1973 on Merv Griffin's talk show. When Griffin asked de Havilland whether the relationship between a talented director and a talented actress was like that of husband and wife, de Havilland responded, "No. It's like lovers. It's the next best thing to sex." (On the talk show, de Havilland also told Griffin that when she and Bette Davis were both at Warner Brothers Davis "got all the interesting parts" and that Davis deserved them.) De Havilland's wit and playfulness also are evident in her book *Every* Frenchman Has One, published in 1961 and reissued in 2016 with an added "Q and A" with de Havilland. De Havilland includes an entire chapter on the habit of French men of urinating by the side of the road, in public. Taken in its entirety and in context, Zeta-Jones's portrayal of de Havilland is overwhelmingly positive. Indeed, with possible exception of Aldrich's assistant, aspiring director Pauline Jameson (played by Alison Wright), *Feud*'s portrayal of de Havilland is the most favorable of any character in the docudrama. The work itself belies de Havilland's contention that Zeta-Jones portrays de Havilland as a "vulgar gossip" and "hypocrite."

Nor is Zeta-Jones's light-hearted, offhand remark as de Havilland to her good friend Bette Davis while they are alone in Sinatra's dressing room that he must have drunk the liquor defamatory or highly offensive to a reasonable person. FX submitted evidence in support of its motion that Sinatra's fondness for alcohol was well known, and Zeta-Jones's comment to Sarandon would not subject de Havilland to hatred, contempt, ridicule, or obloquy. (*Jackson, supra*, 10 Cal.App.5th at pp. 1264-1265; see also *Sarver, supra*, 813 F.3d at pp. 906-907 ["a reasonable viewer of the film would be left with the conclusion that the character [Sarver says is him] was a heroic figure, albeit one struggling with certain internal conflicts"; "even if the film's portrayal of Sarver were somehow false, such depiction certainly would not 'highly offend' a reasonable person"].)

d. The "bitch" remarks -- when de Havilland's actual words were "dragon lady" -- are not highly offensive to a reasonable person and are, in addition, substantially truthful characterizations of her actual words

"'California law permits the defense of substantial truth,' and thus a defendant is not liable '"if the substance of the charge be proved true"' 'Put another way, the statement is not considered false unless it "would have a different effect on the mind of the reader from that which the . . . truth would have produced."'" (*Carver v. Bonds* (2005) 135 Cal.App.4th 328, 344-345, quoting *Masson, supra*, 501 U.S. at pp. 516-517; see also *Jackson, supra*, 10 Cal.App.5th at p. 1262; *Gilbert v. Sykes* (2007) 147 Cal.App.4th 13, 28 [" '"it is sufficient if the substance, the gist, the sting of the libelous charge be justified" '"].)

In *Feud*, Zeta-Jones uses the word "bitch" twice. In the fifth episode, Sarandon, as Davis, calls Zeta-Jones, as de Havilland, who is living in Paris. The two close friends have a private telephone conversation. Sarandon complains that Crawford "sets [her] off," and then refers to de Havilland's wellknown estrangement from her sister Joan Fontaine. Zeta-Jones tells Sarandon her "bitch sister" has started telling the press that she broke Fontaine's collarbone when they were children. The second use of the word comes in the seventh episode when Sarandon and Alfred Molina, playing Robert Aldrich, call de Havilland in Paris to ask her to replace Crawford as cousin Miriam in *Hush*...*Hush*, *Sweet Charlotte*. Molina tells Zeta-Jones that the role is not a victim but a "villainess." Zeta-Jones responds, "Oh, no. I don't do bitches. They make me so unhappy." She then adds, "You should call my sister."¹⁴

In its motion to strike, FX submitted declarations from Ryan Murphy and Timothy Minear, who both wrote parts of *Feud*. Both men were familiar with the well-publicized life-long animosity between de Havilland and her sister Joan Fontaine. Murphy wrote the scene in which Zeta-Jones uses the words "my bitch sister" on the telephone with Sarandon. Ryan declared he used the word "bitch" "because, in [his] mind, the terms *dragon lady* and *bitch* generally have the same meaning, but 'bitch' would be more recognizable to the audience than 'Dragon Lady.'" Similarly, Minear declared *Feud*'s writers "thought 'bitch' was more mainstream and would be better understood by the modern audiences than 'Dragon Lady.'"

Had *Feud*'s creators had Zeta-Jones refer to Fontaine as "my dragon lady sister," the "effect on the mind of the reader" would not have been appreciably different. Nor would a line by the de Havilland character, "Oh, no. I don't do dragon ladies. They make me so unhappy. You should call my sister."¹⁵ "[W]e decline ' "to dissect the creative process." '" (*Brodeur, supra,*

¹⁴ De Havilland eventually accepted the role of cousin Miriam in $Hush \ldots Hush$.

¹⁵ Feud writer Minear notes the first part of de Havilland's telephone conversation with Aldrich was reported in Shaun Considine's book, *Bette & Joan: The Divine Feud*, first published in 1989 and reissued twice since.

248 Cal.App.4th at p. 677, quoting Tamkin, supra,

193 Cal.App.4th at p. 144.) "'"We must not permit juries to dissect the creative process in order to determine what was *necessary* to achieve the final product and what was not, and to impose liability . . . for that portion deemed unnecessary. Creativity is, by its nature, creative."'" (*Brodeur* at p. 675, quoting *Tamkin, supra*, 193 Cal.App.4th at pp. 144-145.)

e. De Havilland has not demonstrated she can prove by clear and convincing evidence that Feud's creators acted with actual malice

De Havilland does not dispute that she is a public figure. Her attorneys describe her as "a living legend" and "an internationally-known celebrity." Accordingly, the Constitution requires de Havilland to prove by clear and convincing evidence that FX "knew the [docudrama] would create a false impression about [her] or acted with reckless disregard for the truth." (CACI No. 1802.)

When the expressive work at issue is fiction, or a combination of fact and fiction, the "actual malice" analysis takes on a further wrinkle. De Havilland argues that, because she did not grant an interview at the 1978 Academy Awards or make the "bitch sister" or "Sinatra drank the alcohol" remarks to Bette Davis, *Feud*'s creators acted with actual malice. But fiction is by definition untrue. It is imagined, made-up. Put more starkly, it is false. Publishing a fictitious work about a real person cannot mean the author, by virtue of writing fiction, has acted with actual malice.

Recognizing this, in cases where the claimed highly offensive or defamatory aspect of the portrayal is implied, courts have required plaintiffs to show that the defendant " 'intended to convey the defamatory impression.'" (*Dodds, supra*, 145 F.3d at pp. 1063-1064.) De Havilland must demonstrate "that [FX] either deliberately cast [her] statements in an equivocal fashion in the hope of insinuating a defamatory import to the reader, or that [it] knew or acted in reckless disregard of whether [its] words would be interpreted by the average reader as defamatory statements of fact." (*Good Government Group of Seal Beach, Inc. v. Superior Court* (1978) 22 Cal.3d 672, 684 (*Good Government Group*).) Moreover, because actual malice is a "deliberately subjective" test, liability cannot be imposed for an implication that merely " 'should have been foreseen.'" (*Newton v. National Broadcasting Co., Inc.* (9th Cir. 1990) 930 F.2d 662, 680.)

As discussed above, we conclude Zeta-Jones's portrayal of de Havilland in *Feud* is not highly offensive to a reasonable person as a matter of law. Even if it were, however, de Havilland has not demonstrated that she can prove actual malice by clear and convincing evidence. In his sworn declaration, Murphy stated he intended Zeta-Jones's portrayal of de Havilland to be that of "a wise, respectful friend and counselor to Bette Davis, and a Hollywood icon with a unique perspective on the past."

5. De Havilland's cause of action for unjust enrichment cannot proceed

De Havilland's fourth cause of action, entitled "Unjust Enrichment," alleges FX has "received unjust financial and economic benefits at [her] expense," including "the value of the use of [her] name, image[,] and identity for [FX's] commercial purposes." De Havilland asks for FX's "gross revenues" and a constructive trust. "Unjust enrichment is not a cause of action." It is "just a restitution claim." (*Hill v. Roll Internat. Corp.* (2011) 195 Cal.App.4th 1295, 1307.) Because de Havilland's right of publicity and false light claims fail, her unjust enrichment claim fails as well. "There being no actionable wrong, there is no basis for the relief." (*Ibid.*)

CONCLUSION

The trial court's ruling leaves authors, filmmakers, playwrights, and television producers in a Catch-22.¹⁶ If they portray a real person in an expressive work accurately and realistically without paying that person, they face a right of publicity lawsuit. If they portray a real person in an expressive work in a fanciful, imaginative -- even fictitious and therefore "false" -- way, they face a false light lawsuit if the person portrayed does not like the portrayal. "[T]he right of publicity cannot, consistent with the First Amendment, be a right to control the celebrity's image by censoring disagreeable portrayals." (Comedy III, supra, 25 Cal.4th at p. 403.) FX's evidence here -- especially the docudrama itself -- establishes as a matter of law that de Havilland cannot prevail. (Hall v. Time Warner, Inc. (2007) 153 Cal.App.4th 1337, 1346.) "'[B]ecause unnecessarily protracted litigation would have a chilling effect upon the exercise of First Amendment rights, speedy resolution of cases involving free speech is desirable." (Winter, supra, 30 Cal.4th at p. 891, quoting Good Government Group, supra, 22 Cal.3d at p. 685.)

¹⁶ Heller, Catch-22 (1961).

DISPOSITION

The order denying the motion to strike is reversed. The trial court is directed to enter a new and different order granting the motion and awarding defendants their attorney fees and costs. (Code Civ. Proc., § 425.16, subd. (c).) Defendants shall recover their costs on appeal.

CERTIFIED FOR PUBLICATION

EGERTON, J.

We concur:

EDMON, P. J.

DHANIDINA, J.*

^{*} Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

19-135-cv *Greene v. Paramount Pictures, et al.*

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007 IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 11th day of June, two thousand twenty.

PRESENT: DENNIS JACOBS, GUIDO CALABRESI, DENNY CHIN,

Circuit Judges.

-----X

ANDREW GREENE,

Plaintiff-Appellant,

v.

19-135-cv

PARAMOUNT PICTURES CORPORATION, A Delaware Corporation, RED GRANITE PICTURES, INC., A California Corporation, APPIAN WAY, LLC, A California Limited Liability Company, SIKELIA PRODUCTIONS, INC., JOHN AND JANE DOES 1 THROUGH 10, Defendants-Appellees.

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Case 19-135, Document 103-1, 06/11/2020, 2859092, Page2 of 8

FOR PLAINTIFF-APPELLANT:	AARON M. GOLDSMITH, Law Office of Aaron M. Goldsmith, P.C., New York, New York.
FOR DEFENDANTS-APPELLEES:	VINCENT COX (Louis P. Petrich, <i>on the brief</i>), Ballard Spahr, LLP, Los Angeles, California.

Appeal from the United States District Court for the Eastern District of New York (Seybert, J.).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED,

ADJUDGED, AND DECREED that the judgment of the district court is AFFIRMED.

Plaintiff-appellant Andrew Greene appeals from a judgment of the district court entered December 13, 2018, dismissing with prejudice his libel claim against defendants-appellees Paramount Pictures Corporation ("Paramount Pictures"), Red Granite Pictures, Inc. ("Red Granite"), and Appian Way, LLC ("Appian Way") (collectively, "defendants"). By memorandum and order entered the same day, the district court granted defendants' motion for summary judgment.¹ Greene sued in connection with the depiction of a character in *The Wolf of Wall Street* (the "Film"), a movie based on the activities of Stratton Oakmont, Inc. ("Stratton Oakmont"), a securities firm based in Long Island. Greene, who was a director, general counsel, and head of the corporate finance department at Stratton Oakmont between 1993 and 1996,

¹ The claims against defendant Sikelia Productions, Inc. were dismissed earlier in the case for lack of subject matter jurisdiction.

alleged that one of the characters in the Film presented a defamatory portrayal of him. We assume familiarity with the facts, procedural history, and issues presented for review.

DISCUSSION

On appeal, Greene argues that the district court erred in holding that he failed to raise a genuine issue of material fact as to whether defendants acted with the "actual malice" required to prevail on a libel claim brought by a public figure. We review a decision granting summary judgment *de novo*. *See Terry v. Ashcroft,* 336 F.3d 128, 137 (2d Cir. 2003).

The Film was based on a memoir entitled *The Wolf of Wall Street* (the "Book") written by Jordan Belfort, one of Stratton Oakmont's co-founders. Belfort wrote about various criminal and other unsavory activities at Stratton Oakmont in the 1990s. Belfort was charged with and pled guilty to, *inter alia*, securities fraud and money laundering, for which he served time in prison and was ordered to pay over \$100 million in restitution. Greene is discussed extensively in the Book both under his full name, Andrew Greene, as well as his nickname "Wigwam" (a reference to his toupee). The Book describes Greene as engaging in illegal conduct at Stratton Oakmont. Despite his awareness of the contents of the Book, Greene never sought any legal redress with respect to its depiction of him.

Case 19-135, Document 103-1, 06/11/2020, 2859092, Page4 of 8

The Film featured a character named Nicky Koskoff, who wore a toupee and went by the nickname "Rugrat." Greene contends that Koskoff is recognizable as him, and is depicted as engaging in behavior that defames his character. In particular, Greene argues that in the Film the Koskoff character engages in "adulterous/sexual acts at work" and "participate[d] in Mr. Belfort's criminal money laundering scheme," conduct he denies. Appellant's Brief at 7. Koskoff, however, was a fictitious character based on three different individuals, including Greene, who worked either at or with Stratton Oakmont. Nicky Koskoff is the real name of the husband of one of the Film's producers.

Greene has acknowledged for purposes of his libel claim that he is a public figure. To prevail on a defamation claim as a public figure, a plaintiff must demonstrate by clear and convincing evidence that the defendant acted with "actual malice," which has been defined as "knowledge that [the statement in question] was false or with reckless disregard of whether it was false or not." *New York Times v. Sullivan*, 376 U.S. 254, 279-80, 286 (1964). This Circuit has held that

[A] finding of actual malice cannot be predicated merely on a charge that a reasonable publisher would have further investigated before publishing. . . . Rather, a public figure defamation plaintiff must show either that the publisher actually entertained serious doubts about the veracity of the publication, or that there are "*obvious* reasons to doubt the veracity of the informant or the accuracy of his reports."

Case 19-135, Document 103-1, 06/11/2020, 2859092, Page5 of 8

Herbert v. Lando, 781 F.2d 298, 308 (2d Cir. 1986) (internal citation omitted) (emphasis in original); *see also Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 510 (1991) (holding that "plaintiff must demonstrate that the author in fact entertained serious doubts as to the truth of his publication"); *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968) (holding that to show actual malice, plaintiff must show "high degree of awareness of probably falsity"). This heavy burden of proof is designed to "assure to the freedoms of speech and press that 'breathing space' essential to their fruitful exercise." *Gertz v. Welch*, 418 U.S. 323, 342 (1974).

To prevail on a libel claim, a plaintiff must show that the libelous statements were "of and concerning" him. *Sullivan*, 376 U.S. at 288; *see also Dalbec v*. *Gentleman's Companion, Inc.*, 828 F.2d 921, 925 (2d Cir. 1987) ("A statement is not libelous unless it is 'of and concerning' the plaintiff."). To be "of and concerning" the plaintiff, a statement must "reasonably be read as accusing [plaintiff] of personal involvement in the acts in question." *Sullivan*, 376 U.S. at 288-89; *see also Springer v. Viking Press*, 90 A.D.2d 315, 320 (1st Dep't 1982) ("[T]o be actionable[,] the description of the fictional character must be so closely akin to the real person claiming to be defamed that a reader of the book, knowing the real person, would have no difficulty linking the two."). Accusations based on "unsupported assumption[s]" that the statements pertain to the plaintiff are insufficient to sustain a libel claim. *Sullivan*, 376 U.S. at 289. While this Court has not spoken definitively on defamation in the context of fictious characters,

Case 19-135, Document 103-1, 06/11/2020, 2859092, Page6 of 8

our First Amendment jurisprudence requires a plaintiff to show both that the character is similar enough to him to be "of and concerning" him, and that the portrayal is false and defamatory. *See id.* at 288; *see also Dalbec*, 828 F.2d at 925 ("The test is whether the libel designates the plaintiff in such a way as to let those who knew [the plaintiff] understand that [s]he was the person meant.") (internal quotation marks omitted).

Here, the district court held that Greene failed to raise a genuine issue of material fact as to whether defendants acted with knowledge or reckless disregard in making defamatory statements "of and concerning" him. We agree, as Greene's claims fail as a matter of law for several reasons.

First, as a reasonable jury could only find, defendants took appropriate steps to ensure that no one would be defamed by the Film. Defendants vetted the Film to ensure that it did not violate any third parties' reputational rights. In that respect, defendants' representatives spoke to a number of people, including Belfort, and read the Book and numerous news accounts of the events depicted in the Film. They spoke to screenwriter Terence Winter, who advised that he had reduced "the number of characters [featured in the Book] by creating various composite characters who did not correspond to any single human being." Supp. App'x at 829, 837. Winter also advised that several characters in the Film, including Koskoff, were assigned fictitious names and were designed to "convey[] the atmosphere of Belfort's financial empire, but were not characters with a specific real life analogue." *Id.* at 830. Second, no reasonable viewer of the Film would believe that defendants intended the Koskoff character to be a depiction of Greene. The most obvious point is that there is no character named Andrew Greene or Wigwam in the Film. Moreover, the record shows that defendants knew that the Koskoff character was a fictitious character who was a composite of three different people depicted in the Book. For example, in the Film the Koskoff character worked as a broker at Stratton who works on the trading floor. Greene, on the other hand, was the head of the Corporate Finance Department who did not work on the trading floor.

Third, the Film included a disclaimer making clear that characters in the Film are fictionalized. The following disclaimer was shown at the start of the end credits for the Film:

While this story is based on actual events, certain characters, characterizations, incidents, locations and dialogue were fictionalized or invented for purposes of dramatization. With respect to such fictionalization or invention, any similarity to the name or to the actual character or history of any person, living or dead, or any product or entity or actual incident, is entirely for dramatic purpose and not intended to reflect on an actual character, history, product or entity.

Supp. App'x at 830.

On this record, a reasonable jury could only find that defendants did not act with actual malice. Accordingly, the district court did not err in granting summary judgment dismissing Greene's claim.

* * *

Case 19-135, Document 103-1, 06/11/2020, 2859092, Page8 of 8

We have considered Greene's remaining arguments and conclude they are

without merit. Accordingly, we **AFFIRM** the judgment of the district court.

FOR THE COURT: Catherine O'Hagan Wolfe, Clerk

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United States Court of Appeals for the Second Circuit Thurgood Marshall U.S. Courthouse 40 Foley Square New York, NY 10007

ROBERT A. KATZMANN CHIEF JUDGE

Date: June 11, 2020 Docket #: 19-135cv Short Title: Greene v. Paramount Pictures Corporation

CATHERINE O'HAGAN WOLFE CLERK OF COURT

DC Docket #: 14-cv-1044 DC Court: EDNY (CENTRAL ISLIP) DC Judge: Seybert DC Judge: Locke

VERIFIED ITEMIZED BILL OF COSTS

Counsel for

respectfully submits, pursuant to FRAP 39 (c) the within bill of costs and requests the Clerk to prepare an itemized statement of costs taxed against the

and in favor of

for insertion in the mandate.

Docketing	Fee	

Costs of	printing appendix	(necessary copies	s)	
			/	

Costs of printing brief (necessary copies _____) ____)

Costs of printing reply brief (necessary copies _____) _____

(VERIFICATION HERE)

Signature

UNITED STATES DISTRICT COURT CENTRAL DISTRICT OF CALIFORNIA

Nona Gaprindashvili,

Plaintiff,

V.

Netflix, Inc.; Does 1–50

Defendants.

Case No. 2:21-cv-07408-VAP-SKx

Order DENYING Motion to Dismiss and DENYING Motion to Strike (Dkt. 21)

Before the Court is Defendant Netflix, Inc.'s Motion to Dismiss or Strike ("Motion") Plaintiff Nona Gaprindashvili's First Amended Complaint ("FAC") pleading claims of false light or in the alternative, defamation. (Dkt. 11).

After considering all the papers filed in support of, and in opposition to, the Motion, the Court deems this matter appropriate for resolution without a hearing pursuant to Local Rule 7-15. The Court **DENIES** the Motion.

I. BACKGROUND

This action arises from a statement made about Plaintiff Nona
Gaprindashvili in the popular Netflix miniseries, *The Queen's Gambit*("Series"). (FAC ¶ 1). The Court bases the following summary on the allegations in Plaintiff's complaint.

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Plaintiff is a trailblazing woman chess player, who throughout her career won many championships, defeated some of the best male chess players in the world, and became the first woman in history to achieve the status of international chess grandmaster among men. (*Id.* ¶ 2).

In 1983, author Walter Tevis wrote a novel entitled *The Queen's Gambit* ("Novel"), on which the Series is based. (*Id.* ¶¶ 3, 5). The Novel's main characters are fictional, but it references a few real chess players, including a passing reference to Plaintiff in the context of the fictional Moscow Invitational chess tournament. (*Id.* ¶ 3). The Series, like the Novel, tells the story of a fictional American woman named Elizabeth Harmon ("Beth Harmon" or "Harmon"), an orphan who rises from humble beginnings to become a great chess player. (*Id.* ¶¶ 3, 5). The story, set in the 1960s, portrays the systemic sexism of the time and the "prevailing view of the era that there was no place for women at the highest echelons of chess." (*Id.* ¶¶ 4, 38). The Series culminates in a fictional chess tournament, the Moscow Invitational, which Harmon receives an invitation to participate in after her triumph in the U.S. Championship. (*Id.* ¶ 41; Motion at 3). Significantly, the fictional Moscow Invitational takes place in 1968. (FAC ¶ 7).

In the first round of the tournament, Harmon plays against fictional
chess player Victor Laev, an older male player who Harmon had long
admired. (*Id.* ¶ 41). After the match between Harmon and Laev ends, the
announcer for the tournament, in a voice-over commentary, comments on
Harmon's gender to make the point that the male players in the tournament

did not take Harmon seriously as an opponent. (*Id.* \P 42). The announcer states the following:

[The male players believe] Harmon's level of play wasn't at theirs. Someone like Laev probably didn't spend a lot of time preparing for their match. Elizabeth Harmon's not at all an important player by their standards. The only unusual thing about her, really, is her sex. And even that's not unique in Russia. *There's Nona Gaprindashvili, but she's the female world champion and has never faced men*. My guess is Laev was expecting an easy win, and not at all the 27-move thrashing Beth Harmon just gave him.

(*Id.* ¶ 42 (emphasis in original)). As Plaintiff's name is mentioned, an actor is shown sitting in the audience who is obviously meant to be Plaintiff. (*Id.* ¶ 43). This language, particularly the line referencing Plaintiff ("but [Nona Gaprindashvili] . . . has never faced men") ("Line") is the subject of the lawsuit.

The Line appears to be based on similar text from the Novel, which reads:

As far as they knew, [Harmon's] level of play was roughly that of Benny Watts, and men like Laev would not devote much time to preparation for playing Benny. She was not an important player by their standards; the only unusual thing about her was her sex; and even that wasn't unique in Russia. *There was Nona Gaprindashvili, not up to the level of this tournament, but a player who had met all these Russian Grandmasters many times before*. Laev would be expecting an easy win.

(*Id.* ¶ 62).

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1 2 The statement that Plaintiff herself had "never faced men," even by 3 1968, is inaccurate.¹ (*Id.* ¶ 18; Motion at 3). Beginning in 1962 and 1963, 4 Plaintiff competed against and frequently defeated male chess players. In 1965, "she played 28 male players at once."² (FAC ¶ 18). Plaintiff began 5 playing chess at the age of thirteen and proceeded to have an extraordinary 6 7 and successful career. She won the semi-final of the Women's Soviet Union 8 Championship at the age of fourteen. In 1961, she became female World 9 Champion at the age of 20. (*Id.* ¶ 16). She participated in and won medals 10 in Chess Olympiads internationally and faced and defeated men in 11 significant chess tournaments, many of which garnered international 12 attention. (Id. ¶¶ 17, 21–26; Decl. of Gaprindashvili ("Gaprindashvili Decl."), 13 Dkt. 28-1 at 4–7 (enumerating accomplishments)). In fact, by 1968, the 14 year in which the episode is set, she had competed against at least 59 male 15 chess players, at least ten of which were Grandmasters of that time, 16 including Dragoljub Velimirovich, Svetozar Gligoric, Paul Keres, Bojan 17 Kurajica, Boris Spassky and Mikhail Tal. The last three were also world 18 champions during their careers. (FAC ¶ 7). Plaintiff later became the first 19 woman in history to be awarded the honor and rank of International Chess 20 Grandmaster among men. (Id. ¶ 28).

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¹ Netflix concedes as much but argues that the Line is fiction and thus not understood to be conveying a fact. (Motion at 2). Netflix additionally argues for a substantial truth defense because the difference between having faced men by 1963 versus 1968 amounts to only a minor inaccuracy. (*Id.* at 3). Both these issues are discussed *infra*.

² The FAC shows an image of Plaintiff on one side of a row of men, playing individual chess games down the row of men.

During Plaintiff's career, she encountered severe prejudice because she was a woman—and often the only woman—competing amongst men. (*Id.* ¶ 19). In 1976, Plaintiff wrote a book in which she described her devotion to chess, the difficulty she faced in overcoming barriers as a woman in that world, and her pride for the part she played in advancing gender equality in the chess world. (*Id.* ¶ 20 ("The term 'Women's chess' has expired. I am proud that I have my share in promoting the creative emancipation of women in chess. I had my share in helping women to overcome psychological barriers separating them from 'man's chess.'")). Plaintiff is well-known in the chess world and was the subject of many news stories about her accomplishments in tournaments. (*Id.* ¶¶ 24, 25). Plaintiff also alleges she is the subject of a film that portrayed her as a "woman who helped revolutionize female chess by taking on male competitors across the globe" and in which she "became a Georgian icon of female emancipation." (*Id.* ¶ 30).

Netflix released all seven episodes of the Series on October 23, 2020.
The final episode, "End Game," contains the scene that features the Line.
(*Id.* ¶ 34). On November 23, 2020, Netflix announced that the Series had
been watched by 62 million households since its release. The Series
topped the United States television Nielsen's streaming rankings for three
straight weeks, the first series in history to do so. (*Id.*).

When the Series aired, multiple news outlets and various individual
internet users commented on the inaccuracy of the Line. (*Id.* ¶¶ 48–58).
Plaintiff states that the Line "misrepresented one of [her] most significant

United States District Court Central District of California

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1 career achievements . . . before millions of viewers worldwide" and 2 "tarnished [her] personal and professional reputation." (Gaprindashvili Decl. 3 at 9).³ To this day, Plaintiff continues to compete in chess tournaments and receive accolades for her accomplishments. (FAC ¶ 31). Plaintiff's life-long 4 5 career is in the world of competitive chess, in which she remains an active leader, role-model, and competitor. (Id. ¶ 77). Plaintiff contends that the 6 7 Line cuts to the heart of her hard-won standing in her profession and as a 8 result, injures her current participation in the chess world and ability to earn 9 income from that participation. This "remains tied to her historical success 10 and accomplishments. The professional reputation and brand of 11 Gaprindashvili was inextricably bound up with her courageous efforts to face 12 and defeat estimable male opponents when chess was overwhelmingly a 13 man's world." (Id. ¶ 77).

15 Plaintiff filed suit against Netflix and Does 1–50 on September 16, 2021 16 and filed the First Amended Complaint ("FAC") on September 20, 2021. 17 (Compl., Dkt. 1; FAC, Dkt. 11). Plaintiff brings claims for false light invasion 18 of privacy (FAC ¶¶ 69–75), or in the alternative, defamation per se (FAC 19 ¶¶ 76–81). Netflix moved to dismiss under Federal Rule of Civil Procedure 20 Rule 12(b)(6), or to strike under California's anti-SLAPP statute, California 21 Code of Civil Procedure section 425.16. (Def. Mot. to Dismiss or Strike 22 ("Motion"), Dkt. 21). Plaintiff opposed the Motion, and Netflix filed a Reply. 23 (Pl. Opp. ("Opp."), Dkt. 28; Def. Reply ("Reply"), Dkt. 29).

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³ For ease of reference, the Court uses the page numbering given by the electronic filing system for the Gaprindashvili Declaration. All other page references utilize internal page numbering.

II. MOTION TO DISMISS

A. Legal Standard

Federal Rule of Civil Procedure 12(b)(6) allows a party to bring a motion to dismiss for failure to state a claim upon which relief can be granted. Rule 12(b)(6) is read along with Rule 8(a), which requires a short, plain statement upon which a pleading shows entitlement to relief. Fed. R. Civ. P. 8(a)(2); Conley v. Gibson, 355 U.S. 41, 47 (1957) (holding that the Federal Rules require a plaintiff to provide "a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests" (quoting Fed. R. Civ. P. 8(a)(2)).); Bell Atl. Corp. v Twombly, 550 U.S. 544, 555 (2007). When evaluating a Rule 12(b)(6) motion, a court must accept all material allegations in the complaint—as well as any reasonable inferences to be drawn from them—as true and construe them in the light most favorable to the non-moving party. See Doe v. United States, 419 F.3d 1058, 1062 (9th Cir. 2005); ARC Ecology v. U.S. Dep't of Air Force, 411 F.3d 1092, 1096 (9th Cir. 2005); Moyo v. Gomez, 32 F.3d 1382, 1384 (9th Cir. 1994). "The court need not accept as true, however, allegations that contradict facts that may be judicially noticed by the court." Schwarz v. United States, 234 F.3d 428, 435 (9th Cir. 2000).

"While a complaint attacked by a Rule 12(b)(6) motion to dismiss
does not need detailed factual allegations, a plaintiff's obligation to provide
the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will

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1 not do." Twombly, 550 U.S. at 555 (citations omitted). Rather, the allega-2 tions in the complaint "must be enough to raise a right to relief above the 3 speculative level." Id. To survive a motion to dismiss, a plaintiff must allege 4 "enough facts to state a claim to relief that is plausible on its face." 5 Twombly, 550 U.S. at 570; Ashcroft v. Igbal, 556 U.S. 662, 697 (2009). 6 "The plausibility standard is not akin to a 'probability requirement,' but it 7 asks for more than a sheer possibility that a defendant has acted unlawfully. 8 Where a complaint pleads facts that are 'merely consistent with' a defend-9 ant's liability, it stops short of the line between possibility and plausibility of 10 'entitlement to relief." Igbal, 556 U.S. at 678 (quoting Twombly, 550 U.S. at 11 556).

The Ninth Circuit has clarified that: (1) a complaint must "contain sufficient allegations of underlying facts to give fair notice and to enable the opposing party to defend itself effectively" and (2) "the factual allegations that are taken as true must plausibly suggest an entitlement to relief, such that it is not unfair to require the opposing party to be subjected to the expense of discovery and continued litigation." Starr v. Baca, 652 F.3d 1202, 1216 (9th Cir. 2011). Although the scope of review is limited to the contents of the 20 complaint, the Court may also consider exhibits submitted with the complaint, Hal Roach Studios, Inc. v. Richard Feiner & Co., 896 F.2d 1542, 1555 n.19 (9th Cir. 1990), and "take judicial notice of matters of public record outside the pleadings," Mir v. Little Co. of Mary Hosp., 844 F.2d 646, 649 (9th Cir. 1988).

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To state a claim for false light invasion of privacy, Plaintiff must demonstrate: (1) disclosure to one or more persons (2) information about or concerning Plaintiff presented as factual but that was actually false or created a false impression about him; (3) that was highly offensive and would injure Plaintiff's reputation; (4) constitutional malice; and (5) Plaintiff suffered damages as a result. Solano v. Playgirl, Inc., 292 F.3d 1078, 1082 (9th Cir. 2002) (applying California law). California courts have taken the view that since false light is a division of invasion of privacy tort, the claim must relate to the plaintiff's interest in privacy, and hence cannot involve matters, however offensively misrepresented to the public, which are in 10 essence "public" themselves. Patton v. Royal Indus., Inc., 263 Cal.App.2d 760, 768 (1968). Here, where the challenged statements were exclusively related to Plaintiff's public professional life, she fails to plead that the publication of these statements "intrudes into [her] private li[fe]." Id. Because Plaintiff fails to state a claim for false light invasion of privacy, that claim is **DISMISSED** with prejudice.⁴

C. Defamation Per Se

To establish a claim for defamation, Plaintiff must plead (a) a publication that is (b) false, (c) defamatory, and (d) unprivileged and that (e) has a

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⁴ Plaintiff pleads false light as an alternative theory of liability to the second cause of action for defamation per se. (FAC ¶ 21). Plaintiff's defamation claim, based on the same facts, provides a complete remedy for any damages Plaintiff suffered by the alleged conduct. See Selleck v. Globe Int'l, Inc., 166 Cal. App. 3d 1123, 1129, 1136 (1985) (affirming denial of false light claim which was in substance equivalent to libel claim). Further, given the claims are entirely based on Plaintiff's public, rather than private, life, amendment would be futile. See Foman v. Davis, 371 U.S. 178, 182.

1 natural tendency to injure or that causes special damage. Taus v. Loftus, 40 2 Cal. 4th 683, 720 (2007). As a public figure, Plaintiff must also plead the 3 requisite constitutional malice. *Reader's Dig. Assn. v. Superior Ct.*, 37 Cal. 4 3d 244, 256 (1984) (citing New York Times Co. v. Sullivan, 376 U.S. 254, 5 280 (1964)). "Defamation is effected by either of the following: (a) Libel. (b) Slander." Cal Civ. Code § 44. In California, defamation in a television 6 7 broadcast is treated as slander. Arno v. Stewart, 245 Cal. App. 2d 955, 961 8 (1966). Slander per se is actionable without proof of special damages. Cal. 9 Civ. Code § 46. Slander per se includes such publications which tend to injure a plaintiff with respect to their "office, profession, trade or business, 10 11 either by imputing to [plaintiff] general disgualification in those respects 12 which the office or other occupation peculiarly requires, or by imputing 13 something with reference to his office, profession, trade, or business that 14 has a natural tendency to lessen its profits." Cal. Civ. Code § 46(3). If a 15 plaintiff establishes the Line injured her with respect to her profession or 16 trade, this is sufficient to establish slander per se under section 46(3) and 17 does not require proof of actual damage. Id.

19 Netflix contends that Plaintiff fails to plead the elements of this claim. 20 specifically arguing that: (1) Plaintiff fails to plead falsity because a 21 reasonable viewer would not believe the Line conveyed an objective fact: 22 (2) the Line is not defamatory because it contains no defamatory 23 implication, or because a reasonable viewer would not see the defamatory 24 implication because it relies on information that is not common knowledge; 25 (3) the Line falls under the "substantial truth" defense; and (4) Plaintiff 26 cannot plead the requisite "actual malice." (Motion at 3).

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United States District Court Central District of California

1. Falsity – Whether the Line Conveyed Objective Fact

To state a defamation claim, a plaintiff must present a statement of fact that is provably false. *Seelig v. Infinity Broad. Corp.*, 97 Cal. App. 4th 798, 809 (2002) (citing *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20 (1990)). "Whether published material is reasonably susceptible of an interpretation which implies a provably false assertion of fact . . . is a question of law for the court." *Couch v. San Juan Unified Sch. Dist.*, 33 Cal. App. 4th 1491, 1500 (1995). "This question must be resolved by considering whether the reasonable or 'average' reader would so interpret the material." *Id.* "Statements do not imply a provably false factual assertion and thus cannot form the basis of a defamation action if they cannot reasonably [be] interpreted as stating actual facts about an individual." *Nygard, Inc. v. Uusi-Kerttula*, 159 Cal. App. 4th 1027, 1048 (2008) (internal quotations omitted).

Netflix argues that no reasonable viewer would have understood the
Line to convey a statement of fact because the Series is an entirely fictional
work. (Motion at 12). Netflix points to various cases for the proposition that
"[f]ictional works have no obligation to the truth." (Motion at 12 (quoting *Sarver v. Hurt Locker LLC*, No. 2:10-CV-09034-JHN (JCx), 2011 WL
11574477, at *8 (C.D. Cal. Oct. 13, 2011), *aff'd sub nom. Sarver v. Chartier*,
813 F.3d 891 (9th Cir. 2016))).

As an initial matter, Netflix does not cite, and the Court is not aware, of any cases precluding defamation claims for the portrayal of real persons in otherwise fictional works. On the contrary, the fact that the Series was a

1 fictional work does not insulate Netflix from liability for defamation if all the 2 elements of defamation are otherwise present. See Bindrim v. Mitchell, 92 3 Cal. App. 3d 61, 73 n.2, 76 (1979), cert. denied, 444 U.S. 984 (1979), 4 disapproved of on other grounds by McCoy v. Hearst Corp., 42 Cal. 3d 835 5 (1986) (fictional character in the novel was identifiable as the real person); see also Partington v. Bugliosi, 56 F.3d 1147, 1155 (9th Cir. 1995) (creators 6 7 of docudramas that mix fact and fiction "must attempt to avoid creating the 8 impression that they are asserting objective facts"). The test is whether a 9 reasonable viewer would understand the character to be the person 10 identified and to have the characteristics as described. See Sarver, 2011 11 WL 11574477, at *8. Courts "must look to the specific context in which the 12 statements were made and to the content of the statements themselves" to determine whether the speaker "creat[ed] the impression that they [were] 13 14 asserting objective facts." Partington, 56 F.3d at 1155.

16 In the last episode, the Series identifies Plaintiff in dialogue by a fictional 17 commentator analyzing fictional character Beth Harmon's likelihood of 18 defeating a fictional chess champion. (FAC ¶¶ 41–42). Despite the 19 presence of fiction surrounding the Line, however, the Court cannot ignore 20 that the Series does reference real people and events and most importantly, 21 the Line identifies a real person, Plaintiff, by name, references her real career, and then shows an actor sitting in the audience who resembles Plaintiff. (*Id.* ¶ 43). In other words, a "physical description," "biographical references" and unique identifying characteristics which "would allow a reasonable person to conclude that the fictional [Nona Gaprindashvili] was in fact the real [Nona Gaprindashvili]" accompany the Line. Tamkin v. CBS

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1 Broad., Inc., 193 Cal. App. 4th 133, 147 (2011). Not only does this close the 2 gap between associating the supposedly fictional character with the real 3 person, but regardless of whether viewers recognized Plaintiff's name (as 4 indeed, some did), viewers may reasonably have believed the comment to 5 be one of these historical details incorporated into the Series.

The Court also considers the presence of the disclaimer that the Series is a work of fiction as a factor in this analysis, albeit not a dispositive one. Mossack Fonseca & Co. v. Netflix, Inc., No. 19-CV-9330-CBM (ASx), 2020 WL 8510342, at *4 (C.D. Cal. Dec. 23, 2020). The cases that Defendant cites on this point are distinguishable.

13 In *Mossack*, the court considered a film portraying a law firm that represented clients involved with money laundering, tax evasion, and other 14 15 criminal conduct. 2020 WL 8510342, at *4. The court found that no 16 reasonable viewer would believe the film was making "assertions of 17 objective fact," rather than a dramatization, "particularly given the statement 18 at the beginning of the Film 'BASED ON ACTUAL SECRETS' which sets the 19 stage and the disclaimer at the end of the Film that states the Film is 20 fictionalized...." Id. Here, the Series includes a similar disclaimer, but the Line resembles one of those factual details incorporated into the Series for 22 believability more than it resembles the main plot devices, such as Beth 23 Harmon, or the law firm, which are clearly fictional or at least dramatized. In 24 De Havilland v. FX Networks, LLC, the court found that fictionalized 25 interviews portrayed in the work would not reasonably be interpreted as 26

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literal statements of the actual person, which has little bearing on the issues here. 21 Cal. App. 5th 845, 867–68.

Moreover, the Series purports to be set in a historical setting and does reference real people and events. (Decl. of Scott Frank ("Frank Decl."), Dkt. 21-7 ¶ 6). In context, therefore, Netflix "creat[ed] the impression that [it] was asserting objective facts." *Partington*, 56 F.3d at 1155. Plaintiff sufficiently pleads falsity because the Line is "reasonably susceptible of an interpretation which implies a provably false assertion of fact." *Couch*, 33 Cal. App. 4th at 1500.

2. <u>Defamatory Meaning – Whether the Line Carries a Defamatory</u> <u>Implication and Whether a Reasonable Viewer Would Have</u> <u>Understood a Defamatory Implication</u>

Netflix next argues that even if believed, the Line is not defamatory because a reasonable viewer would not conclude that the Line "never faced men" carries the implication of Plaintiff's inferiority, the defamatory meaning attributed by Plaintiff. (Motion at 15).⁵ Netflix contends that this implication is inconsistent with the "Series' portrayal of the structural barriers that impeded women's advancement in elite chess during the 1960s." (Motion at 15). In other words, Netflix advances an interpretation that Nona Gaprindashvili "never faced men" not because she was inferior, but rather

⁵ In the alternative, Netflix argues that even if the Line implies inferiority, that implication is statement of opinion rather than a "provably false factual assertion." Motion 16–17. In doing so, Netflix confuses the question of defamatory meaning with the element of falsity. The line between a statement of fact versus opinion is relevant for the latter. If Netflix concedes the Line carries the implication of inferiority, Plaintiff has adequately pleaded the element of defamatory meaning.

because she had simply been impeded by the structural barriers depicted in the Series.

Defamation is an invasion of the interest in reputation. *Gilbert v. Sykes*, 147 Cal. App. 4th 13, 27 (2007). A falsehood is defamatory if it "attribute[es] to a person specific misdeeds or certain unfavorable characteristics or qualities, or uttering certain other derogatory statements regarding a person, constitutes slander." Nguyen-Lam v. Cao, 171 Cal. App. 4th 858, 867 (2009). In addition to false statements that cause actual damage, the California Legislature has specified slander per se categories, which include false and unprivileged publications that "tend[] directly to injure [a plaintiff] with respect to [her] profession, trade, or business." Cal. Civ. Code § 46.

14 "If it is determined that the publication is susceptible of a defamatory meaning and also of an innocent and nondefamatory meaning it is for the jury to determine which meaning would be given to it by the average reader." Patton v. Royal Indus., Inc., 263 Cal. App. 2d 760, 765 (1968). "The fact that an applied defamatory charge or insinuation leaves room for an innocent interpretation as well does not establish that the defamatory 20 meaning does not appear from the language itself." O'Connor v. McGraw-Hill, Inc., 159 Cal. App. 3d 478, 485 (1984); see also Solano, 292 F.3d at 1084 ("[O]ur inquiry is not to determine whether the publication may have an innocent meaning but rather to determine if it reasonably conveys a defamatory meaning.").

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1 Here, the Line in context discusses why a male Russian chess master 2 underestimated Beth Harmon. The commentator delivering the Line 3 explains that Harmon's gender is her most noteworthy characteristic but 4 adds: "even [her gender is] not unique in Russia. There's Nona 5 Gaprindashvili, but she's the female world champion and has never faced men. My guess is Laev was expecting an easy win" (FAC 6 7 ¶ 63). The Line clearly conveys an import to the very feat of playing chess 8 against men—not only because men were believed to be better at chess, 9 but also because it was a monumental achievement to break into that world. 10 Breaking these gender barriers is a primary theme of the Series, which 11 celebrates Harmon for doing just that. The Line also uses Plaintiff as a 12 comparison point to Harmon, one with lesser achievements. An average 13 viewer easily could interpret the Line, as Plaintiff contends, as "disparaging 14 the accomplishments of Plaintiff" and "carr[ying] the stigma that women bear 15 a badge of inferiority" that fictional American woman Harmon, but not 16 Plaintiff, could overcome. (Opp. at 11). At the very least, the line is 17 dismissive of the accomplishments central to Plaintiff's reputation. Given 18 Plaintiff's allegations about the role Plaintiff's reputation plays as a matter 19 not merely of personal pride, but in her ongoing professional pursuits, such 20 a falsehood "constitutes an injury to reputation," that "tends directly to injure 21 [Plaintiff] with respect to [her] profession, trade, or business." Nauven-Lam, 22 171 Cal. App. 4th at 867; Cal. Civ. Code § 46.

Plaintiff further alleges that viewers did in fact attribute a defamatory
meaning to the Line. (FAC ¶¶ 51–57). Such evidence, while not dispositive,
supports how a "reasonable" viewer might have understood the Line. See

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1 Tah v. Global Witness Publishing, Inc., 413 F. Supp. 3d 1, 11–12 (D.D.C. 2 2019), aff'd, 991 F.3d 231 (D.C. Cir. 2021), cert. denied, 2021 WL 5043599 3 (Nov. 1, 2021). Because this falsehood tends to "directly to injure [her] in 4 respect to [her] office, profession, trade, or business," it qualifies as 5 defamation per se. Balla v. Hall, 59 Cal. App. 5th 652, 675 (2021), review denied (Apr. 14, 2021) (quoting Civ. Code § 46(3)). 6

Netflix next argues that Plaintiff cannot establish defamation per se because understanding the alleged defamatory implication requires knowledge of competitive Soviet chess in the 1960s. (Motion at 19). Netflix argues that the audience "would be able to recognize a defamatory meaning only by virtue of his or her knowledge of specific facts and circumstances, extrinsic to the publication, which are not matters of common knowledge rationally attributable to all reasonable persons," making the claim defamation *per quod*, which unlike defamation per se, requires proof of special damages. McGarry v. Univ. of San Diego, 154 Cal. App. 4th 97, 112 (2007).

Netflix cites Balla v. Hall to no avail. (Motion at 18 (citing Balla, 59 Cal. App. 5th 652)). In that case, the court held that a campaign advertisement for a politician implying that one of the council members supported the defendant candidate was not per se defamatory because for readers to perceive the advertisement as harmful, they would need to know who the defendant candidate was and his views within that specific community. Balla, 59 Cal. App. 5th at 690. The Court disagrees that understanding the 26 negative implication of the Line requires any specific knowledge of chess

United States District Court Central District of California

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history. The statement that a politician supports another political candidate
is neutral unless one understands details about both politicians' positions
and their constituencies. In contrast, the defamatory implication of a
statement denying a person's notable accomplishments in the world of their
profession requires no specific knowledge. Moreover, injury to one's
professional reputation is an enumerated per se category in the California
Civil Code. Cal. Civ. Code § 46(3).

3. Substantial Truth Defense

The substantial truth defense protects allegedly defamatory speech where "the imputation is substantially true so as to justify the 'gist or sting' of the remark," even if there is "slight inaccuracy in the details." *Heller v. NBCUniversal, Inc.*, No. 15-CV-09631-MWF (KSx), 2016 WL 6583048, at *4 (C.D. Cal. June 29, 2016) (citing *Summit Bank v. Rogers*, 206 Cal. App. 4th 669, 697 (2012)). An allegedly defamatory statement "is not considered false unless it would have a different effect on the mind of the reader from that which the pleaded truth would have produced." *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 516–17 (1991).

Netflix argues the substantial truth defense bars Plaintiff's claims because "[a] reasonable viewer would have interpreted the Line in context to refer to Plaintiff's never facing male players at significant tournaments in the Soviet Union before 1968." (Motion at 21). Even if the Line would be interpreted in this fashion, Plaintiff alleges her "notable successes against men began with her successful entry into the Challengers Section of the Hastings International Chess Congress in England in 1963, which she won,

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1 defeating several male players." (FAC ¶ 21). Plaintiff further alleges 2 multiple other notable successes against men in significant tournaments 3 before 1968. (*Id.* ¶¶ 22–24). The pleaded truth would have an entirely 4 different "effect on the mind of the reader," Masson, 501 U.S. at 516-17, as 5 the truth would have portrayed Plaintiff as a trailblazer that Beth Harmon followed, or another woman chess player on a parallel path. Instead, the 6 7 reference to Plaintiff serves to elevate Harmon as being peerless in her 8 achievement of "facing men."

Actual Malice Requirement 4.

As a public figure, Plaintiff must plead "actual malice," that is, that Netflix published the defamatory statement "with knowledge that it was false or with reckless disregard of whether it was false or not." Reader's Dig. Ass'n. v. Superior Ct., 37 Cal. 3d 244, 256 (1984) (citing New York Times Co. v. Sullivan, 376 U.S. 254, 280 (1964)).

17 "When the expressive work at issue is fiction, or a combination of fact and fiction, the 'actual malice' analysis takes on a further wrinkle." De 18 *Havilland*, 21 Cal. App. 5th at 870. After all, "[p]ublishing a fictitious work about a real person cannot mean the author, by virtue of writing fiction, has acted with actual malice." Id. Recognizing this, California courts require plaintiffs to demonstrate "that [the defamatory statement] either deliberately cast [plaintiff] . . . in an equivocal fashion in the hope of insinuating a defamatory import to the reader, or that [defendant] knew or acted in reckless disregard of whether [its] words would be interpreted by the average reader as defamatory statements of fact." Id. (quoting Good

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Government Group of Seal Beach, Inc. v. Superior Court, 22 Cal.3d 672, 684 (1978)).

4 Plaintiff alleges the text on which the Line was based adapted from the Tevis Novel states: "There was Nona Gaprindashvili, not up to the level of this tournament, but a player who had met all these Russian Grandmasters many times before." (FAC ¶ 62). In the declaration of show creator Frank Scott, attached to the Motion, Frank concedes to altering the Line from this text on which he based the plot of the Series. (Frank Decl. ¶¶ 17–18). The fact that the creators based the Line on text which states that Plaintiff had not only faced the male Russian Grandmasters, but had in fact faced them "many times before," strongly indicates actual knowledge of the falsity of the statement. Particularly in light of the text from the Novel, Netflix's argument that it conducted diligent research and "believed [the Line] to be accurate," (Frank Decl. ¶ 15), is unavailing because either the show creator knew the truth and ignored it, or he "deliberately decided not to acquire knowledge off acts that might confirm the probable falsity of [the Line]." *McGarry*, 154 Cal. App. 4th at 114. For this reason, Netflix's argument that it relied on two chess experts to confirm the historical chess details of the screenplay adaptation is also unavailing. (Motion at 3). Plaintiff's allegations and submitted declarations demonstrate that "[a]nyone who is at all familiar with the game [of chess] and its history knows of Nona Gaprindashvili" and that "[a]ny simple Google search" would have revealed the truthful information. (Decl. of Nicholas Carlin ("Carlin Decl."), Dkt. 28-2 ¶¶ 6, 7).

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Even considering the fictional nature of the novel and the Series, the decision to use the Line at best demonstrates "that [Netflix] knew or acted in reckless disregard of whether [its] words would be interpreted by the average reader as defamatory statements of fact." *De Havilland*, 21 Cal. App. 5th at 870 (quoting Good Government Group, 22 Cal.3d at 684). Although Frank declares he "believed [the Line] to be accurate" and 6 "intended to honor [Plaintiff], not disparage her," (Frank Decl. ¶ 15), the inclusion of the Line evinces a reckless disregard that viewers would interpret the Line as defamatory. See supra section II.C.2.

III. **MOTION TO STRIKE**

Netflix moves to strike the FAC on the grounds that it attacks Netflix's constitutionally protected free speech rights in violation of California's anti-SLAPP statute. Cal. Civ. P. § 425.16.

A. Legal Standard

17 California's anti-SLAPP statute "provides for the early dismissal of 18 certain unmeritorious claims that are brought to thwart constitutionally 19 protected speech or petitioning activity." *Robinzine v. Vicory*, 143 Cal. App. 20 4th 1416, 1420–21 (2006). An anti-SLAPP motion is available to 21 defendants in federal court. Graham-Sult v. Clainos, 756 F.3d 724, 735 (9th 22 Cir. 2014).

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exercise of First Amendment rights." Paul v. Friedman, 95 Cal. App. 4th

853, 861 (2002). California's anti-SLAPP statute allows a defendant to

A SLAPP suit is "a meritless lawsuit filed primarily to chill the defendant's

United States District Court Central District of California 1

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move to dismiss "certain unmeritorious claims that are brought to thwart constitutionally protected speech or petitioning activity." Robinzine, 143 Cal. App. 4th at 1420–21. To prevail on such a motion, Netflix must make a threshold showing that the challenged cause of action in fact "arise[s] from an act in furtherance of the defendant's rights of petition or free speech." Graham-Sult, 756 F.3d at 735 (internal quotations and citation omitted). If Netflix makes that showing, the burden shifts to plaintiff to show that it has "a reasonable probability of prevailing in its claims for those claims to survive dismissal." Id.; Cal. Code Civ. P. § 425.16(b)(1). "In making its determination [on an anti-SLAPP motion], the court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based." Cal. Civ. Proc. Code § 425.16(b)(2). The plaintiff must meet its burden of proving a prima facie case "with admissible evidence." Metabolife Int'l, Inc. v. Wornick, 264 F.3d 832, 840 (9th Cir. 2001); see also Sweetwater Union High Sch. Dist. v. Gilbane Bldg. Co., 6 Cal. 5th 931, 940 (2019).

B. Evidentiary Objections

Netflix submitted two evidentiary objections to the additional exhibit submitted by Plaintiff (Dkt. 30) in support of her opposition to Netflix's Motion to Strike. (Dkt. 33). The Court has not found it necessary to rely on those statements for purposes of this Order, and therefore declines to rule on the objections.

C. Arises from Protected Activity

A cause of action arises from protected activity within the meaning of section 425.16 if: "(1) defendants' acts underlying the cause of action, and on which the cause of action is based, (2) were acts in furtherance of defendants' right of petition or free speech (3) in connection with a public issue." *Tamkin v. CBS Broad., Inc.*, 193 Cal. App. 4th 133, 142–43 (2011). Plaintiff does not contest the first prong, and Netflix has made the required showing that its speech arises form protected activity. First, the act that forms the basis of the claim is the Line in the Series. Second, this act was in furtherance of Netflix's right of free speech. *See id.* at 143 ("The creation of a television show is an exercise of free speech."). Third, the speech was in connection with a public issue, as it features a portrayal of historical gender inequality in the chess world. Accordingly, the cause of action arises from protected activity and falls under California's anti-SLAPP protections, which requires the Court to consider the second prong, Plaintiff's reasonable probability of success on the merits.

D. Plaintiff's Reasonable Probability of Success on Merits

A court's inquiry at the second prong "is limited to whether the plaintiff has stated a legally sufficient claim and made a prima facie factual showing sufficient to sustain a favorable judgment." *Med. Marijuana, Inc. v. ProjectCBD.com*, 46 Cal. App. 5th 869, 882 (2020). For the reasons discussed above in section II.C., Plaintiff states a legally sufficient claim of defamation per se. The Court next considers whether Plaintiff has made a sufficient prima facie factual showing of admissible evidence.

United States District Court Central District of California 1

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Plaintiff submits admissible evidence sufficient to demonstrate falsity of the Line and to defeat Netflix's defense of substantial truth. (*See* Gaprindashvili. Decl.). As to evidence of the Line's defamatory meaning, along with allegations of the Line in context, Plaintiff submits evidence that viewers did in fact interpret the Line as defamatory. (Declaration of Alexander Rufus-Isaacs ("Rufus-Isaac's Decl.") Dkt. 28-6 ¶¶ 3–10; Rufus-Isaac's Decl. Ex. 6–11, Dkts. 28-7–28-14). This evidence, though not dispositive, supports the allegation that a "reasonable" viewer would believe the line to be defamatory. *See Tah*, 413 F. Supp. 3d at 11–12.

11 Plaintiff further submits evidence supporting the element of actual 12 malice, including a declaration by chess master Nicholas Carlin that 13 "[a]nyone who is at all familiar with the game [of chess] and its history 14 knows of Nona Gaprindashvili. She was very famous for the fact that she 15 was one of the few women . . . who played in tournaments with men at the 16 top level." (Carlin Decl. ¶ 6). As discussed above, Netflix's own evidence 17 demonstrates knowledge of the truth in its choice to deviate from the text of 18 the Novel, which states that Plaintiff had faced the male Russian 19 Grandmasters "many times before." (See Frank Decl. ¶ 15). Plaintiff further 20 refutes evidence that Netflix relied on chess experts and conducted good 21 faith research, because (1) Plaintiff was well-known in the chess world such 22 that the information would be common knowledge; (2) "[a]ny simple Google 23 search" would reveal the truthful information; and (3) the information was 24 readily available on multiple common websites, as well as common chess-25 related sites. (Carlin Decl. ¶ 7; Carlin Decl. Ex. 2, Dkt. 28-4 (Nona 26 Gaprindashvili's Wikipedia page). Plaintiff has made a prima facie factual

showing sufficient to sustain a favorable judgment; evidence that Netflix fails to overcome at this stage. Accordingly, the Court **DENIES** Netflix's motion to strike. CONCLUSION IV. The Court therefore **DENIES** Netflix's Motion to Dismiss and **DENIES** Netflix's Motion to Strike. IT IS SO ORDERED. 1/27/22 Dated: Virginia A. Phillips United States District Judge

SEC Charges Kim Kardashian for Unlawfully Touting Crypto Security U.S. SECURITIES AND EXCHANGE COMMISSION FOR IMMEDIATE RELEASE 2022-183

Washington D.C., Oct. 3, 2022 — The Securities and Exchange Commission today announced charges against Kim Kardashian for touting on social media a crypto asset security offered and sold by EthereumMax without disclosing the payment she received for the promotion. Kardashian agreed to settle the charges, pay \$1.26 million in penalties, disgorgement, and interest, and cooperate with the Commission's ongoing investigation.

The SEC's order finds that Kardashian failed to disclose that she was paid \$250,000 to publish a post on her Instagram account about EMAX tokens, the crypto asset security being offered by EthereumMax. Kardashian's post contained a link to the EthereumMax website, which provided instructions for potential investors to purchase EMAX tokens.

"This case is a reminder that, when celebrities or influencers endorse investment opportunities, including crypto asset securities, it doesn't mean that those investment products are right for all investors," said SEC Chair Gary Gensler. "We encourage investors to consider an investment's potential risks and opportunities in light of their own financial goals."

"Ms. Kardashian's case also serves as a reminder to celebrities and others that the law requires them to disclose to the public when and how much they are paid to promote investing in securities," Chair Gensler added.

"The federal securities laws are clear that any celebrity or other individual who promotes a crypto asset security must disclose the nature, source, and amount of compensation they received in exchange for the promotion," said Gurbir S. Grewal, Director of the SEC's Division of Enforcement. "Investors are entitled to know whether the publicity of a security is unbiased, and Ms. Kardashian failed to disclose this information."

The SEC's order finds that Kardashian violated the anti-touting provision of the federal securities laws. Without admitting or denying the SEC's findings, Kardashian agreed to pay the aforementioned \$1.26 million, including approximately \$260,000 in disgorgement, which represents her promotional payment, plus prejudgment interest, and a \$1,000,000 penalty. Kardashian also agreed to not promote any crypto asset securities for three years.

The SEC's investigation, which is continuing, is being conducted by Jon A. Daniels, Alison R. Levine, and Pamela Sawhney of the Enforcement Division's Crypto Assets and Cyber Unit, and Kerri Palen, Lisa Knoop and Victor Suthammanont of the New York Regional Office. The case was supervised by Mark R. Sylvester of the Crypto Assets and Cyber Unit and Carolyn Welshhans.

The SEC's statement urging caution regarding potentially unlawful celebrity-backed crypto asset offerings can be found here. SEC Chair Gensler today published a video warning investors not to make investment decisions based solely on the recommendations of a celebrity or influencer.

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Celebrities Shilling Crypto Face More Than Just Mockery

As FTX implodes, leaving investors searching for ways to recover their losses, star promoters like Larry David and Tom Brady are being dragged into litigation over their role in endorsing the crypto exchanges.

By Winston Cho

December 16, 2022

To the uninitiated, the world of cryptocurrency exists on the outskirts of traditional finance. But every once in a while, more people catch a glimpse. This year's coveted commercial breaks during the Super Bowl fit the bill, as several now-infamous ads featured stars hawking crypto. Larry David appeared in a spot for FTX, as did Matt Damon and LeBron James in Crypto.com clips.

By showing up in the most premium real estate in all of TV, and partnering with some of Hollywood's most trusted brand ambassadors, the crypto firms bought themselves an air of credibility on the path toward legitimacy. Or, at least it appeared they were on their way there, until FTX — one of the world's top digital currency-exchange platforms that also issues its own token called FTT — collapsed when customers made a run on the exchange amid a months-long crypto sell-off. On Dec. 12, FTX founder Sam Bankman-Fried was charged and arrested for violations of securities laws, a month after he was sued in a proposed class action alongside stars who promoted the company.

FTX account holders, in addition to those who bought now-worthless crypto from other issuers that filed for bankruptcy, are likely to recoup pennies on the dollar on their investments. FTX's new chief executive John J. Ray III told a House committee Dec. 13, "We're not going to be able to recover all the losses here." They sit in line behind a host of creditors with higher priority.

Now, new scrutiny is on the A-listers to whom FTX turned to launder its reputation. While they might not have knowingly committed fraud, they could be on the hook for promoting unregistered securities. "The people who have the most liability happen to be billionaires," says Adam Moskowitz, who is representing FTX and Voyager customers in proposed class actions against the crypto exchange firms.

Bankman-Fried leveraged the world of entertainment and celebrity to grow his businesses, lure in new crypto buyers and establish FTX as an island of legitimacy in a sea of scams. His aggressive marketing strategy featured partnerships with NBA teams, patches on Major League Baseball umpire uniforms and splashy TV ads of stars touting the exchange as a safe place to invest money.

"People generally hesitate when it comes to the unknown," said former FTX U.S. executive Sina Nader, who led partnerships for the exchange, when speaking with *The Hollywood Reporter* for <u>a story</u> just over a year ago. "Working with trusted people and institutions, people will look and say, oh, if Stephen Curry, or Tom Brady, or Gisele, or Trevor Lawrence, or the entire MLB are comfortable with crypto and FTX, then maybe I can get comfortable with it too."

In a lawsuit filed Nov. 15, FTX account holders sued Bankman-Fried and stars who endorsed the platform, including David, and others like Tom Brady and Stephen Curry. They allege the company was a "Ponzi scheme" that used funds obtained through new investments to pay off old investments and maintain the appearance of liquidity. The suit claims that FTX's interest-bearing accounts were securities, which would obligate promoters to disclose compensation from the company.

Other celebrities named in the complaint include Gisele Bündchen, Shaquille O'Neal and Naomi Osaka. They all appeared in ads for FTX. The suit claims Osaka was paid an equity stake in the company and undisclosed amounts of crypto. So were FTX ambassadors Brady, Bündchen and MLB All-Star Shohei Ohtani — all of whom neglected to disclose payments from the company, the suit says. Similar accusations were lodged in a lawsuit Dec. 8 against stars including Jimmy Fallon, Gwyneth Paltrow and Justin Bieber, who promoted Bored Ape Yacht Club nonfungible tokens.

It's a lucrative game. *Shark Tank* star Kevin O'Leary, also a paid ambassador to FTX, testified before the Senate Banking Committee on Dec. 14, telling them FTX paid him an astonishing \$18 million to promote the exchange, including \$3 million to cover taxes, \$1 million in FTX equity (now "most likely worthless," he said), and \$10 million in crypto tokens held in FTX wallets ("I have written them off to zero," he told the committee).

A-list promoters of crypto and other digital assets already have run into legal trouble — a key consideration in civil suits alleging fraud. On Oct. 3, the Securities and Exchange Commission charged Kim Kardashian for endorsing on Instagram EthereumMax without disclosing a \$250,000 payment she received for the promotion. She settled the case for \$1.3 million. Floyd Mayweather Jr. and DJ Khaled have resolved similar suits filed by the SEC over failing to disclose payments they received for promoting investments in an initial coin offering.

"The federal securities laws are clear that any celebrity or other individual who promotes a crypto asset security must disclose the nature, source, and amount of compensation they received in exchange for the promotion," said Gurbir S. Grewal, director of the SEC's Division of Enforcement, in a statement over Kardashian's settlement.

But there's a ruling challenging the notion that stars can be held liable for their alleged complicity in peddling crypto. On Dec. 7, a federal judge dismissed <u>a lawsuit</u> against endorsers of EthereumMax accusing them of fraudulently misleading their millions of followers into buying EMAX tokens, only to sell their own stakes once its value was inflated. While the case raises "legitimate concerns" over the ability of celebrities to persuade undiscerning followers to buy "snake oil with unprecedented ease and reach," U.S. District Judge Michael Fitzgerald found that there's an expectation for "investors to act reasonably before basing their bets on the zeitgeist of the moment."

"This is a volatile area, and people need to do their own research," says Daniel Dubin, an attorney at Alston & Bird, who is skeptical that stars face much legal exposure. "[This ruling] sets the right tone for this type of litigation. You don't want to excuse someone for investing in something they should've known to be a bad investment."

The FTX litigation takes a different approach. Moskowitz, the lawyer repping FTX account holders, seeks a court order in a separate class action filed in Florida state court that FTX offered unregistered securities in the form of interest-bearing accounts. A judge will consider the issue through the Howey Test, a standard that emerged in a 1946 Supreme Court case for determining whether a transaction qualifies as an investment contract.

Max Dilendorf, an attorney specializing in crypto, stresses that FTX's interest-bearing accounts are securities because they require investment of money into a common enterprise where there's an expectation of profits from the efforts of third parties. "If I'm buying something like a digital token or an NFT, I'm buying an investment contract," Dilendorf says. "The only reason I'm buying is because I expect a profit."

Dilendorf stresses the SEC's stance that most crypto are securities and subject to disclosure and registration requirements, backed up in suits filed by the agency in which courts applied the Howey test. In 2020, a New York federal judge ruled in favor of the SEC in its suit against Kik and found that the company illegally sold unregistered securities through an initial coin offering. The order was followed by an identical ruling in another suit against Telegram, which was forced to surrender \$1.2 billion in ill-gotten gains and pay a fine of \$18.5 million.

Even if they didn't knowingly participate in the alleged scheme, celebrity promoters may be on the hook for damages if it's found that the exchange sold unregistered securities. The so-called "blue sky" law — enacted by various states to protect consumers from securities fraud — that the suit is claiming a violation of is the vehicle that allowed courts to claw back money from investors who profited off of Bernie Madoff's Ponzi scheme even though they weren't aware of the fraud. While O'Neal may be trying to distance himself from FTX by saying Dec. 15 that he was "just a paid spokesperson," that question will be decided by the courts in pending litigation.

The FTC's Endorsement Guides: What People Are Asking **FEDERAL TRADE COMMISSION**

September 2017 (updated August 2020)

Suppose you meet someone who tells you about a great new product. She tells you it performs wonderfully and offers fantastic new features that nobody else has. Would that recommendation factor into your decision to buy the product? Probably.

Now suppose the person works for the company that sells the product – or has been paid by the company to tout the product. Would you want to know that when you're evaluating the endorser's glowing recommendation? You bet. That common-sense premise is at the heart of the Federal Trade Commission's (FTC) Endorsement Guides.

The Guides, at their core, reflect the basic truth-in-advertising principle that endorsements must be honest and not misleading. An endorsement must reflect the honest opinion of the endorser and can't be used to make a claim that the product's marketer couldn't legally make.

In addition, the Guides say, if there's a connection between an endorser and the marketer that consumers would not expect and it would affect how consumers evaluate the endorsement, that connection should be disclosed. For example, if an ad features an endorser who's a relative or employee of the marketer, the ad is misleading unless the connection is made clear. The same is usually true if the endorser has been paid or given something of value to tout the product. The reason is obvious: Knowing about the connection is important information for anyone evaluating the endorsement.

Say you're planning a vacation. You do some research and find a glowing review on someone's blog that a particular resort is the most luxurious place he has ever stayed. If you knew the hotel had paid the blogger hundreds of dollars to say great things about it or that the blogger had stayed there for several days for free, it could affect how much weight you'd give the blogger's endorsement. The blogger should, therefore, let his readers know about that relationship.

Another principle in the Guides applies to ads that feature endorsements from people who achieved exceptional, or even above average, results. An example is an endorser who says she lost 20 pounds in two months using the advertised product. If the advertiser doesn't have proof that the endorser's experience represents what people will generally achieve using the product as described in the ad (for example, by just taking a pill daily for two months), then an ad featuring that endorser must make clear to the audience what the generally expected results are.

Here are answers to some of our most frequently asked questions from advertisers, ad agencies, bloggers, and others.

About the Endorsement Guides:

Do the Endorsement Guides apply to social media?

Yes. Truth in advertising is important in all media, whether they have been around for decades (like television and magazines) or are relatively new (like blogs and social media).

Isn't it common knowledge that bloggers are paid to tout products or that if you click a link on a blogger's site to buy a product, the blogger will get a commission?

No. Some bloggers who mention products in their posts have no connection to the marketers of those products – they don't receive anything for their reviews or get a commission. They simply recommend those products to their readers because they believe in them.

Moreover, the financial arrangements between some bloggers and advertisers may be apparent to industry insiders, but not to everyone else who reads a particular blog. Under the law, an act or practice is deceptive if it misleads "a significant minority" of consumers. Even if some readers are aware of these deals, many readers aren't. That's why disclosure is important.

Are you monitoring bloggers?

Generally not, but if concerns about possible violations of the FTC Act come to our attention, we evaluate them case by case. If law enforcement becomes necessary, our focus usually will be on advertisers or their ad agencies and public relations firms. Action against an individual endorser, however, might be appropriate in certain circumstances, such as if the endorser has continued to fail to make required disclosures despite warnings.

Does the FTC hold bloggers to a higher standard than reviewers for traditional media outlets?

No. The FTC Act applies across the board. The issue is – and always has been – whether the audience understands the reviewer's relationship to the company whose products are being recommended. If the audience understands the relationship, a disclosure isn't needed. If you're employed by a newspaper or TV station to give reviews – whether online or offline – your audience probably understands that your job is to provide your personal opinion on behalf of the newspaper or television station. In that situation, it's clear that you did not buy the product yourself – whether it's a book or a car or a movie ticket. On a personal blog, a social networking page, or in similar media, the reader might not realize that the reviewer has a relationship with the company whose products are being recommended. Disclosure of that relationship helps readers decide how much weight to give the review.

What is the legal basis for the Guides?

The FTC conducts investigations and brings cases involving endorsements made on behalf of an advertiser under Section 5 of the FTC Act, which generally prohibits deceptive advertising. The Guides are intended to give insight into what the FTC thinks about various marketing activities involving endorsements and how Section 5 might apply to those activities. The Guides themselves don't have the force of law. However, practices inconsistent with the Guides may result in law enforcement actions alleging violations of the FTC Act. Law enforcement actions can result in orders requiring the defendants in the case to give up money they received from their violations and to abide by various requirements in the future. Despite inaccurate news reports, there are no "fines" for violations of the FTC Act.

I'm a blogger. I heard that every time I mention a product on my blog, I have to say whether I got it for free or paid for it myself. Is that true?

No. If you mention a product you paid for yourself, there isn't an issue. Nor is it an issue if you get the product for free because a store is giving out free samples to its customers. The FTC is only concerned about endorsements that are made on behalf of a sponsoring advertiser. For example, an endorsement would be covered by the FTC Act if an advertiser – or someone working for an advertiser – pays you or gives you something of value to mention a product. If you receive free products or other perks with the expectation that you'll promote or discuss the advertiser's products in your blog, you're covered. Bloggers who are part of network marketing programs, where they sign up to receive free product samples in exchange for writing about them, also are covered.

What if all I get from a company is a \$1-off coupon, an entry in a sweepstakes or a contest, or a product that is only worth a few dollars? Does that still have to be disclosed?

The question you need to ask is whether knowing about that gift or incentive would affect the weight or credibility your readers give to your recommendation. If it could, then it should be disclosed. For example, being entered into a sweepstakes or a contest for a chance to win a thousand dollars in exchange for an endorsement could very well affect how people view that endorsement. Determining whether a small gift would affect the weight or credibility of an endorsement could be difficult. It's always safer to disclose that information.

Also, even if getting one free item that's not very valuable doesn't affect your credibility, continually getting free stuff from an advertiser or multiple advertisers could suggest you expect future benefits from positive reviews. If a blogger or other endorser has a relationship with a marketer or a network that sends freebies in the hope of positive reviews, it's best to let readers know about the free stuff.

Even an incentive with no financial value might affect the credibility of an endorsement and would need to be disclosed. The Guides give the example of a restaurant patron being offered the opportunity to appear in television advertising before giving his opinion about a product. Because the chance to appear in a TV ad could sway what someone says, that incentive should be disclosed.

My company makes a donation to charity anytime someone reviews our product. Do we need to make a disclosure?

Some people might be inclined to leave a positive review in an effort to earn more money for charity. The overarching principle remains: If readers of the reviews would evaluate them differently knowing that they were motivated in part by charitable donations, there should be a disclosure. Therefore, it might be better to err on the side of caution and disclose that donations are made to charity in exchange for reviews.

What if I upload a video to YouTube that shows me reviewing several products? Should I disclose that I got them from an advertiser?

Yes. The guidance for videos is the same as for websites or blogs.

What if I return the product after I review it? Should I still make a disclosure?

That might depend on the product and how long you are allowed to use it. For example, if you get free use of a car for a month, we recommend a disclosure even though you have to return it. But even for less valuable products, it's best to be open and transparent with your readers.

I have a website that reviews local restaurants. It's clear when a restaurant pays for an ad on my website, but do I have to disclose which restaurants give me free meals?

If you get free meals, you should let your readers know so they can factor that in when they read your reviews.

I'm opening a new restaurant. To get feedback on the food and service, I'm inviting my family and friends to eat for free. If they talk about their experience on social media, is that something that should be disclosed?

You've raised two issues here. First, it may be relevant to readers that people endorsing your restaurant on social media are related to you. Therefore, they should disclose that personal relationship. Second, if you are giving free meals to anyone and seeking their endorsement, then their reviews in social media would be viewed as advertising subject to FTC jurisdiction. But even if you don't specifically ask for their endorsement, there may be an expectation that attendees will spread the word about the restaurant. Therefore, if someone who eats for free at your invitation posts about your restaurant, readers of the post would probably want to know that the meal was on the house.

I have a YouTube channel that focuses on hunting, camping, and the outdoors. Sometimes I'll do a product review. Knife manufacturers know how much I love knives, so they send me knives as free gifts, hoping that I will review them. I'm under no obligation to talk about any knife and getting the knives as gifts really doesn't affect my judgment. Do I need to disclose when I'm talking about a knife I got for free?

Even if you don't think it affects your evaluation of the product, what matters is whether knowing that you got the knife for free might affect how *your audience* views what you say about the knife. It doesn't matter that you aren't required to review every knife you receive. Your viewers may assess your review differently if they knew you got the knife for free, so we advise disclosing that fact.

Several months ago a manufacturer sent me a free product and asked me to write about it in my blog. I tried the product, liked it, and wrote a favorable review. When I posted the review, I disclosed that I got the product for free from the manufacturer. I still use the product. Do I have to disclose that I got the product for free every time I mention it in my blog?

It might depend on what you say about it, but each new endorsement made without a disclosure could be deceptive because readers might not see the original blog post where you said you got the product free from the manufacturer.

A trade association hired me to be its "ambassador" and promote its upcoming conference in social media, primarily on Facebook, Twitter, and in my blog. The association is only hiring me for five hours a week. I disclose my relationship with the association in my blogs and in the tweets and posts I make about the event during the hours I'm working. But sometimes I get questions about the conference in my off time. If I respond via Twitter when I'm not officially working, do I need to make a disclosure? Can that be solved by placing a badge for the conference in my Twitter profile?

You have a financial connection to the company that hired you and that relationship exists whether or not you are being paid for a particular tweet. If you are endorsing the conference in your tweets, your audience has a right to know about your relationship. That said, some of your tweets responding to questions about the event might not be endorsements, because they aren't communicating your opinions about the conference (for example, if someone just asks you for a link to the conference agenda).

Also, if you respond to someone's questions about the event via email or text, that person probably already knows your affiliation or they wouldn't be asking you. You probably wouldn't need a disclosure in that context. But when you respond via social media, all your followers see your posts and some of them might not have seen your earlier disclosures.

With respect to posting the conference's badge on your Twitter profile page, a disclosure on a profile page isn't sufficient because many people in your audience probably won't see it. Also, depending upon what it says, the badge may not adequately inform consumers of your connection to the trade association. If it's simply a logo or hashtag for the event, it won't tell consumers of your relationship to the association.

I'm a blogger and a company wants me to attend the launch of its new product. They will fly me to the launch and put me up in a hotel for a couple of nights. They aren't paying me or giving me anything else. If I write a blog sharing my thoughts about the product, should I disclose anything?

Yes. Knowing that you received free travel and accommodations could affect how much weight your readers give to your thoughts about the product, so you should disclose that you have a financial relationship with the company.

I share in my social media posts about products I use. Do I actually have to say something positive about a product for my posts to be endorsements covered by the FTC Act?

Simply posting a picture of a product in social media, such as on Pinterest, or a video of you using it could convey that you like and approve of the product. If it does, it's an endorsement. You don't necessarily have to use words to convey a positive message. If your audience thinks that what you say or otherwise communicate about a product reflects your opinions or beliefs about the product, and you have a relationship with the company marketing the product, it's an endorsement subject to the FTC Act.

Of course, if you don't have any relationship with the advertiser, then your posts simply are not subject to the FTC Act, no matter what you show or say about the product. The FTC Act covers only endorsements made on behalf of a sponsoring advertiser.

If I post a picture of myself to Instagram and tag the brand of dress I'm wearing, but don't say anything about the brand in my description of the picture, is that an endorsement? And, even if it is an endorsement, wouldn't my followers understand that I only tag the brands of my sponsors?

Tagging a brand you are wearing is an endorsement of the brand and, just like any other endorsement, could require a disclosure if you have a relationship with that brand. Some influencers only tag the brands of their sponsors, some tag brands with which they don't have relationships, and some do a bit of both. Followers might not know why you are tagging a dress and some might think you're doing it just because you like the dress and want them to know.

Say a car company pays a blogger to write that he wants to buy a certain new sports car and he includes a link to the company's site. But the blogger doesn't say he's going to actually buy

the car – or even that he's driven it. Is that still an endorsement subject to the FTC's Endorsement Guides?

Yes, an endorsement can be aspirational. It's an endorsement if the blogger is explicitly or implicitly expressing his or her views about the sports car (*e.g.*, "I want this car"). If the blogger was paid, it should be disclosed.

I'm a book author and I belong to a group where we agree to post reviews in social media for each other. I'll review someone else's book on a book review site or a bookstore site if he or she reviews my book. No money changes hands. Do I need to make a disclosure?

It sounds like you have a connection that might materially affect the weight or credibility of your endorsements (that is, your reviews), since bad reviews of each others' books could jeopardize the arrangement. There doesn't have to be a monetary payment. The connection could be friendship, family relationships, or strangers who make a deal.

My Facebook page identifies my employer. Should I include an additional disclosure when I post on Facebook about how useful one of our products is?

It's a good idea. People reading your posts in their news feed – or on your profile page – might not know where you work or what products your employer makes. Many businesses are so diversified that readers might not realize that the products you're talking about are sold by your company.

A famous athlete has thousands of followers on Twitter and is well-known as a spokesperson for a particular product. Does he have to disclose that he's being paid every time he tweets about the product?

It depends on whether his followers understand that he's being paid to endorse that product. If they know he's a paid endorser, no disclosure is needed. But if a significant portion of his followers don't know that, the relationship should be disclosed. Determining whether followers are aware of a relationship could be tricky in many cases, so we recommend disclosure.

A famous celebrity has millions of followers on Twitter. Many people know that she regularly charges advertisers to mention their products in her tweets. Does she have to disclose when she's being paid to tweet about products?

It depends on whether her followers understand that her tweets about products are paid endorsements. If a significant portion of her followers don't know that, disclosures are needed. Again, determining that could be tricky, so we recommend disclosure.

I'm a video blogger who lives in London. I create sponsored beauty videos on YouTube. The products that I promote are also sold in the U.S. Am I under any obligation to tell my viewers that I have been paid to endorse products, considering that I'm not living in the U.S.?

To the extent it is reasonably foreseeable that your YouTube videos will be seen by and affect U.S. consumers, U.S. law would apply and a disclosure would be required. Also, the U.K. and many other countries have similar laws and policies, so you'll want to check those, too.

Product Placements:

What does the FTC have to say about product placements on television shows?

Federal Communications Commission law (FCC, not FTC) requires TV stations to include disclosures of product placement in TV shows.

The FTC has expressed the opinion that under the FTC Act, product placement (that is, merely showing products or brands in third-party entertainment content – as distinguished from sponsored content or disguised commercials) doesn't require a disclosure that the advertiser paid for the placement.

What if the host of a television talk show expresses her opinions about a product – let's say a videogame – and she was paid for the promotion? The segment is entertainment, it's humorous, and it's not like the host is an expert. Is that different from a product placement and does the payment have to be disclosed?

If the host endorses the product – even if she is just playing the game and saying something like "wow, this is awesome" – it's more than a product placement. If the payment for the endorsement isn't expected by the audience and it would affect the weight the audience gives the endorsement, it should be disclosed. It doesn't matter that the host isn't an expert or the segment is humorous as long as the endorsement has credibility that would be affected by knowing about the payment. However, if what the host says is obviously an advertisement – think of an old-time television show where the host goes to a different set, holds up a cup of coffee, says "Wake up with ABC Coffee. It's how I start my day!" and takes a sip – a disclosure probably isn't necessary.

Endorsements by Individuals on Social Networking Sites:

Many social networking sites allow you to share your interests with friends and followers by clicking a button or sharing a link to show that you're a fan of a particular business, product, website or service. Is that an "endorsement" that needs a disclosure?

Many people enjoy sharing their fondness for a particular product or service with their social networks.

If you write about how much you like something you bought on your own and you're not being rewarded, you don't have to worry. However, if you're doing it as part of a sponsored campaign or you're being compensated – for example, getting a discount on a future purchase or being entered into a sweepstakes for a significant prize – then a disclosure is appropriate.

I am an avid social media user who often gets rewards for participating in online campaigns on behalf of brands. Is it OK for me to click a "like" button, pin a picture, or share a link to show that I'm a fan of a particular business, product, website or service as part of a paid campaign?

Using these features to endorse a company's products or services as part of a sponsored brand campaign probably requires a disclosure.

We realize that some platforms – like Facebook's "like" buttons – don't allow you to make a disclosure. Advertisers shouldn't encourage endorsements using features that don't allow for clear and conspicuous disclosures. Whether the Commission may take action would depend on the overall impression, including whether consumers take "likes" to be material in their decision to patronize a business or buy a product.

However, an advertiser buying fake "likes" is very different from an advertiser offering incentives for "likes" from actual consumers. If "likes" are from non-existent people or people

who have no experience using the product or service, they are clearly deceptive, and both the purchaser and the seller of the fake "likes" could face enforcement action.

I posted a review of a service on a website. Now the marketer has taken my review and changed it in a way that I think is misleading. Am I liable for that? What can I do?

No, you aren't liable for the changes the marketer made to your review. You could, and probably should, complain to the marketer and ask them to stop using your altered review. You also could file complaints with the FTC, your local consumer protection organization, and the Better Business Bureau.

How Should I Disclose That I Was Given Something for My Endorsement?

Is there special wording I have to use to make the disclosure?

No. The point is to give readers the essential information. A simple disclosure like "Company X gave me this product to try" will usually be effective.

Do I have to hire a lawyer to help me write a disclosure?

No. What matters is effective communication. A disclosure like "Company X gave me [name of product], and I think it's great" gives your readers the information they need. Or, at the start of a short video, you might say, "The products I'm going to use in this video were given to me by their manufacturers." That gives the necessary heads-up to your viewers.

Do I need to list the details of everything I get from a company for reviewing a product?

No. What matters is whether the information would have an effect on the weight readers would give your review. So whether you got \$100 or \$1,000 you could simply say you were "paid." (That wouldn't be good enough, however, if you're an employee or co-owner.) And if it is something so small that it would not affect the weight readers would give your review, you may not need to disclose anything.

When should I say more than that I got a product for free?

It depends on whether you got something else from the company. Saying that you got a product for free suggests that you didn't get anything else.

For example, if an app developer gave you their 99-cent app for free for you to review it, that information might not have much effect on the weight that readers give to your review. But if the app developer also gave you \$100, knowledge of that payment would have a much greater effect on the credibility of your review. So a disclosure that simply said you got the app for free wouldn't be good enough, but as discussed above, you don't have to disclose exactly how much you were paid.

Similarly, if a company gave you a \$50 gift card to give away to one of your readers and a second \$50 gift card to keep for yourself, it wouldn't be good enough only to say that the company gave you a gift card to give away.

I'm doing a review of a videogame that hasn't been released yet. The manufacturer is paying me to try the game and review it. I was planning on disclosing that the manufacturer gave me a "sneak peek" of the game. Isn't that enough to put people on notice of my relationship to the manufacturer?

No, it's not. Getting early access doesn't mean that you got paid. Getting a "sneak peek" of the game doesn't even mean that you get to keep the game. If you get early access, you can say that, but if you get to keep the game or are paid, you should say so.

Would a single disclosure on my home page that "many of the products I discuss on this site are provided to me free by their manufacturers" be enough?

A single disclosure on your home page doesn't really do it because people visiting your site might read individual reviews or watch individual videos without seeing the disclosure on your home page.

If I upload a video to YouTube and that video requires a disclosure, can I just put the disclosure in the description that I upload together with the video?

No, because consumers can easily miss disclosures in the video description. Many people might watch the video without even seeing the description page, and those who do might not read the disclosure. The disclosure has the most chance of being clear and prominent if it's included in the video itself. That's not to say that you couldn't have disclosures in both the video and the description.

What about a disclosure in the description of an Instagram post?

When people view Instagram streams, longer descriptions are truncated, with only the first two or three lines displayed. To see the rest, you have to click "more." If an Instagram post makes an endorsement through the picture or the beginning lines of the description, any required disclosure should be presented without having to click "more."

Would a button that says DISCLOSURE, LEGAL, or something like that which links to a full disclosure be sufficient?

No. A hyperlink like that isn't likely to be sufficient. It does not convey the importance, nature, and relevance of the information to which it leads and it is likely that many consumers will not click on it and therefore will miss necessary disclosures. The disclosures we are talking about are brief and there is no space-related reason to use a hyperlink to provide access to them.

The social media platform I use has a built-in feature that allows me to disclose paid endorsements. Is it sufficient for me to rely on that tool?

Not necessarily. Just because a platform offers a feature like that is no guarantee it's an effective way for influencers to disclose their material connection to a brand. It still depends on an evaluation of whether the tool clearly and conspicuously discloses the relevant connection. One factor the FTC will look to is placement. The disclosure should catch users' attention and be placed where they aren't likely to miss it. A key consideration is how users view the screen when using a particular platform. For example, on a photo platform, users paging through their streams will likely look at the eye-catching images. Therefore, a disclosure placed above a photo may not attract their attention. Similarly, a disclosure in the lower corner of a video could be too easy for users to overlook. Second, the disclosure should use a simple-to-read font with a contrasting background that makes it stand out. Third, the disclosure should be a worded in a way that's understandable to the ordinary reader. Ambiguous phrases are likely to be confusing. For example, simply flagging that a post contains paid content might not be sufficient if the post mentions multiple brands and not all of the mentions were paid. The big-picture point is that the

ultimate responsibility for clearly disclosing a material connection rests with the influencer and the brand – not the platform.

How can I make a disclosure on Snapchat or in Instagram Stories?

You can superimpose a disclosure on Snapchat or Instagram Stories just as you can superimpose any other words over the images on those platforms. The disclosure should be easy to notice and read in the time that your followers have to look at the image. In determining whether your disclosure passes muster, factors you should consider include how much time you give your followers to look at the image, how much competing text there is to read, how large the disclosure is, and how well it contrasts against the image. (You might want to have a solid background behind the disclosure.) Keep in mind that if your post includes video and you include an audio disclosure, many users of those platforms watch videos without sound. So they won't hear an audio-only disclosure. Obviously, other general disclosure guidance would also apply.

What about a platform like Twitter? How can I make a disclosure when my message is limited to 280 characters?

The FTC isn't mandating the specific wording of disclosures. However, the same general principle – that people get the information they need to evaluate sponsored statements – applies across the board, regardless of the advertising medium. The words "Sponsored" and "Promotion" use only 9 characters. "Paid ad" only uses 7 characters. Starting a tweet with "Ad:" or "#ad" – which takes only 3 characters – would likely be effective.

You just talked about putting "#ad" at the beginning of a social media post. What about "#ad" at or near the end of a post?

We're not necessarily saying that "#ad" has to be at the beginning of a post. The FTC does not dictate where you have to place the "#ad." What the FTC will look at is whether it is easily noticed and understood. So, although we aren't saying it has to be at the beginning, it's less likely to be effective in the middle or at the end. Indeed, if #ad is mixed in with links or other hashtags at the end, some readers may just skip over all of that stuff.

What if we combine our company name, "Cool Stylle" with "ad" as in "#coolstyllead"?

There is a good chance that consumers won't notice and understand the significance of the word "ad" at the end of a hashtag, especially one made up of several words combined like "#coolstyllead." Disclosures need to be easily noticed and understood.

Is it good enough if an endorser says "thank you" to the sponsoring company?

No. A "thank you" to a company or a brand doesn't necessarily communicate that the endorser got something for free or that they were given something in exchange for an endorsement. The person posting in social media could just be thanking a company or brand for providing a great product or service. But "Thanks XYZ for the free product" or "Thanks XYZ for the gift of ABC product" would be good enough – if that's all you got from XYZ. If that's too long, there's "Sponsored" or "Ad."

What about saying, "XYZ Company asked me to try their product"?

Depending on the context of the endorsement, it might be clear that the endorser got the product for free and kept it after trying it. If that isn't clear, then that disclosure wouldn't be good enough. Also, that disclosure might not be sufficient if, in addition to receiving a free product, the endorser was paid.

I provide marketing consulting and advice to my clients. I'm also a blogger and I sometimes promote my client's products. Are "#client" "#advisor" and "#consultant" all acceptable disclosures?

Probably not. Such one-word hashtags are ambiguous and likely confusing. In blogs, there isn't an issue with a limited number of characters available. So it would be much clearer if you say something like, "I'm a paid consultant to the marketers of XYZ" or "I work with XYZ brand" (where XYZ is a brand name).

Of course, it's possible that that some shorter message might be effective. For example, something like "XYZ_Consultant" or "XYZ_Advisor" might work. But even if a disclosure like that is clearer, no disclosure is effective if consumers don't see it and read it.

Would "#ambassador" or "#[BRAND]_Ambassador" work in a tweet?

The use of "#ambassador" is ambiguous and confusing. Many consumers are unlikely to know what it means. By contrast, "#XYZ_Ambassador" will likely be more understandable (where XYZ is a brand name). However, even if the language is understandable, a disclosure also must be prominent so it will be noticed and read.

I'm a blogger, and XYZ Resort Company is flying me to one of its destinations and putting me up for a few nights. If I write an article sharing my thoughts about the resort destination, how should I disclose the free travel?

Your disclosure could be just, "XYZ Resort paid for my trip" or "Thanks to XYZ Resort for the free trip." It would also be accurate to describe your blog as "sponsored by XYZ Resort."

The Guides say that disclosures have to be clear and conspicuous. What does that mean?

To make a disclosure "clear and conspicuous," advertisers should use plain and unambiguous language and make the disclosure stand out. Consumers should be able to notice the disclosure easily. They should not have to look for it. In general, disclosures should be:

- close to the claims to which they relate;
- in a font that is easy to read;
- in a shade that stands out against the background;
- for video ads, on the screen long enough to be noticed, read, and understood;
- for audio disclosures, read at a cadence that is easy for consumers to follow and in words consumers will understand.

A disclosure that is made in both audio and video is more likely to be noticed by consumers. Disclosures should <u>not</u> be hidden or buried in footnotes, in blocks of text people are not likely to read, or in hyperlinks. If disclosures are hard to find, tough to understand, fleeting, or buried in unrelated details, or if other elements in the ad or message obscure or distract from the disclosures, they don't meet the "clear and conspicuous" standard. With respect to online disclosures, FTC staff has issued a guidance document, "Disclosures: How to Make Effective Disclosures in Digital Advertising," which is available on ftc.gov.

Where in my blog should I disclose that my review is sponsored by a marketer? I've seen some say it at the top and others at the bottom. Does it matter?

Yes, it matters. A disclosure should be placed where it easily catches consumers' attention and is difficult to miss. Consumers may miss a disclosure at the bottom of a blog or the bottom of a page. A disclosure at the very top of the page, outside of the blog, might also be overlooked by consumers. A disclosure is more likely to be seen if it's very close to, or part of, the endorsement to which it relates.

I've been paid to endorse a product in social media. My posts, videos, and tweets will be in Spanish. In what language should I disclose that I've been paid for the promotion?

The connection between an endorser and a marketer should be disclosed in whatever language or languages the endorsement is made, so your disclosures should be in Spanish.

I guess I need to make a disclosure that I've gotten paid for a video review that I'm uploading to YouTube. When in the review should I make the disclosure? Is it ok if it's at the end?

It's more likely that a disclosure at the end of the video will be missed, especially if someone doesn't watch the whole thing. Having it at the beginning of the review would be better. Having multiple disclosures during the video would be even better. Of course, no one should promote a link to your review that bypasses the beginning of the video and skips over the disclosure. If YouTube has been enabled to run ads during your video, a disclosure that is obscured by ads is not clear and conspicuous.

I'm getting paid to do a videogame playthrough and give commentary while I'm playing. The playthrough – which will last several hours – will be live streamed. Would a disclosure at the beginning of the stream be ok?

Since viewers can tune in any time, they could easily miss a disclosure at the beginning of the stream or at any other single point in the stream. If there are multiple, periodic disclosures throughout the stream people are likely to see them no matter when they tune in. To be cautious, you could have a continuous, clear and conspicuous disclosure throughout the entire stream.

Other Things for Endorsers to Know

Besides disclosing my relationship with the company whose product I'm endorsing, what are the essential things I need to know about endorsements?

The most important principle is that an endorsement has to represent the accurate experience and opinion of the endorser:

- You can't talk about your experience with a product if you haven't tried it.
- If you were paid to try a product and you thought it was terrible, you can't say it's terrific.

You can't make claims about a product that would require proof the advertiser doesn't have. The Guides give the example of a blogger commissioned by an advertiser to review a new body lotion. Although the advertiser does not make any claims about the lotion's ability to cure skin conditions and the blogger does not ask the advertiser whether there is substantiation for the claim, she writes that the lotion cures eczema. The blogger is subject to liability for making claims without having a reasonable basis for those claims.

Social Media Contests

My company runs contests and sweepstakes in social media. To enter, participants have to send a Tweet or make a pin with the hashtag, #XYZ_Rocks. ("XYZ" is the name of my product.) Isn't that enough to notify readers that the posts were incentivized?

No, it is likely that many readers would not understand such a hashtag to mean that those posts were made as part of a contest or that the people doing the posting had received something of value (in this case, a chance to win the contest prize). Making the word "contest" or "sweepstakes" part of the hashtag should be enough. However, the word "sweeps" probably isn't, because it is likely that many people would not understand what that means.

Online Review Programs

My company runs a retail website that includes customer reviews of the products we sell. We believe honest reviews help our customers and we give out free products to a select group of our customers for them to review. We tell them to be honest, whether it's positive or negative. What we care about is how helpful the reviews are. Do we still need to disclose which reviews were of free products?

Yes. Knowing that reviewers got the product they reviewed for free would probably affect the weight your customers give to the reviews, even if you didn't intend for that to happen. And even assuming the reviewers in your program are unbiased, your customers have the right to know which reviewers were given products for free. It's also possible that the reviewers may wonder whether your company would stop sending them products if they wrote several negative reviews – despite your assurances that you only want their honest opinions – and that could affect their reviews. Also, reviewers given free products might give the products higher ratings on a scale like the number of stars than reviewers who bought the products. If that's the case, consumers may be misled if they just look at inflated average ratings rather than reading individual reviews with disclosures. Therefore, if you give free products to reviewers you should disclose next to any average or other summary rating that it includes reviewers who were given free products.

My company, XYZ, operates one of the most popular multi-channel networks on YouTube. We just entered into a contract with a videogame marketer to pay some of our network members to produce and upload video reviews of the marketer's games. We're going to have these reviewers announce at the beginning of each video (before the action starts) that it's "sponsored by XYZ" and also have a prominent simultaneous disclosure on the screen saying the same thing. Is that good enough?

Many consumers could think that XYZ is a neutral third party and won't realize from your disclosures that the review was really sponsored (and paid for) by the videogame marketer, which has a strong interest in positive reviews. If the disclosure said, "Sponsored by [name of the game company]," that would be good enough.

Soliciting Endorsements

My company wants to contact customers and interview them about their experiences with our service. If we like what they say about our service, can we ask them to allow us to quote them in our ads? Can we pay them for letting us use their endorsements?

Yes, you can ask your customers about their experiences with your product and feature their comments in your ads. If they have no reason to expect compensation or any other benefit before they give their comments, there's no need to disclose your payments to them. However, if you've given these customers a reason to expect a benefit from providing their thoughts about your product, you should disclose that fact in your ads. For example, if customers are told in advance that their comments might be used in advertising, they might expect to receive a payment for a positive review, and that could influence what they say, even if you tell them that you want their honest opinion. In fact, even if you tell your customers that you aren't going to pay them but that they might be featured in your advertising, that opportunity might be seen as having a value, so the fact that they knew this when they gave the review should be disclosed (e.g., "Customers were told in advance they might be featured in an ad.").

I'm starting a new Internet business. I don't have any money for advertising, so I need publicity. Can I tell people that if they say good things about my business on Yelp or Etsy, I'll give them a discount on items they buy through my website?

It's not a good idea. Endorsements must reflect the honest opinions or experiences of the endorser, and your plan could cause people to make up positive reviews even if they've never done business with you. However, it's okay to invite people to post reviews of your business after they've actually used your products or services. If you're offering them something of value in return for these reviews, tell them in advance that they should disclose what they received from you. You should also inform potential reviewers that the discount will be conditioned upon their making the disclosure. That way, other consumers can decide how much stock to put in those reviews.

A company is giving me a free product to review on one particular website or social media platform. They say that if I voluntarily review it on another site or on a different social media platform, I don't need to make any disclosures. Is that true?

No. If you received a free or discounted product to provide a review somewhere, your connection to the company should be disclosed everywhere you endorse the product.

Does it matter how I got the free product to review?

No, it doesn't. Whether they give you a code, ship it directly to you, or give you money to buy it yourself, it's all the same for the purpose of having to disclose that you got the product for free. The key question is always the same: If consumers knew the company gave it to you for free (or at a substantial discount), might that information affect how much weight they give your review?

My company wants to get positive reviews. We are thinking about distributing product discounts through various services that encourage reviews. Some services require individuals who want discount codes to provide information allowing sellers to read their other reviews before deciding which reviewers to provide with discount codes. Other services send out offers of a limited number of discount codes and then follow up by email to see whether the recipients have reviewed their products. Still others send offers of discount codes to those who previously posted reviews in exchange for discounted products. All of these services say that reviews are not required. Does it matter which service I choose? I would prefer that recipients of my discount codes not have to disclose that they received discounts. Whichever service you choose, the recipients of your discount codes need to disclose that they received a discount from you to encourage their reviews. Even though the services might say that a review is not "required," it's at least implied that a review is expected.

What Are an Advertiser's Responsibilities for What Others Say in Social Media?

Our company uses a network of bloggers and other social media influencers to promote our products. We understand we're responsible for monitoring our network. What kind of monitoring program do we need? Will we be liable if someone in our network says something false about our product or fails to make a disclosure?

Advertisers need to have reasonable programs in place to train and monitor members of their network. The scope of the program depends on the risk that deceptive practices by network participants could cause consumer harm – either physical injury or financial loss. For example, a network devoted to the sale of health products may require more supervision than a network promoting, say, a new fashion line. Here are some elements every program should include:

- 1. Given an advertiser's responsibility for substantiating objective product claims, explain to members of your network what they can (and can't) say about the products for example, a list of the health claims they can make for your products, along with instructions not to go beyond those claims;
- 2. Instruct members of the network on their responsibilities for disclosing their connections to you;
- 3. Periodically search for what your people are saying; and
- 4. Follow up if you find questionable practices.

It's unrealistic to expect you to be aware of every single statement made by a member of your network. But it's up to you to make a reasonable effort to know what participants in your network are saying. That said, it's unlikely that the activity of a rogue blogger would be the basis of a law enforcement action if your company has a reasonable training, monitoring, and compliance program in place.

Our company's social media program is run by our public relations firm. We tell them to make sure that what they and anyone they pay on our behalf do complies with the FTC's Guides. Is that good enough?

Your company is ultimately responsible for what others do on your behalf. You should make sure your public relations firm has an appropriate program in place to train and monitor members of its social media network. Ask for regular reports confirming that the program is operating properly and monitor the network periodically. Delegating part of your promotional program to an outside entity doesn't relieve you of responsibility under the FTC Act.

What About Intermediaries?

I have a small network marketing business. Advertisers pay me to distribute their products to members of my network who then try the product for free. How do the principles in the Guides affect me?

You should tell the participants in your network that if they endorse products they have received through your program, they should make it clear they got them for free. Advise your clients – the advertisers – that if they provide free samples directly to your members, they should remind

them of the importance of disclosing the relationship when they talk about those products. Put a program in place to check periodically whether your members are making those disclosures, and to deal with anyone who isn't complying.

My company recruits "influencers" for marketers who want them to endorse their products. *We* pay and direct the influencers. What are our responsibilities?

Like an advertiser, your company needs to have reasonable programs in place to train and monitor the influencers you pay and direct.

What About Affiliate or Network Marketing?

I'm an affiliate marketer with links to an online retailer on my website. When people read what I've written about a particular product and then click on those links and buy something from the retailer, I earn a commission from the retailer. What do I have to disclose? Where should the disclosure be?

If you disclose your relationship to the retailer clearly and conspicuously on your site, readers can decide how much weight to give your endorsement.

In some instances – like when the affiliate link is embedded in your product review – a single disclosure may be adequate. When the review has a clear and conspicuous disclosure of your relationship and the reader can see both the review containing that disclosure and the link at the same time, readers have the information they need. You could say something like, "I get commissions for purchases made through links in this post." But if the product review containing the disclosure and the link are separated, readers may not make the connection.

As for where to place a disclosure, the guiding principle is that it has to be clear and conspicuous. The closer it is to your recommendation, the better. Putting disclosures in obscure places – for example, buried on an ABOUT US or GENERAL INFO page, behind a poorly labeled hyperlink or in a "terms of service" agreement – isn't good enough. Neither is placing it below your review or below the link to the online retailer so readers would have to keep scrolling after they finish reading. Consumers should be able to notice the disclosure easily. They shouldn't have to hunt for it.

Is "affiliate link" by itself an adequate disclosure? What about a "buy now" button?

Consumers might not understand that "affiliate link" means that the person placing the link is getting paid for purchases through the link. Similarly, a "buy now" button would not be adequate.

What if I'm including links to product marketers or to retailers as a convenience to my readers, but I'm not getting paid for them?

Then there isn't anything to disclose.

Does this guidance about affiliate links apply to links in my product reviews on someone else's website, to my user comments, and to my tweets?

Yes, the same guidance applies anytime you endorse a product and get paid through affiliate links.

It's clear that what's on my website is a paid advertisement, not my own endorsement or review of the product. Do I still have to disclose that I get a commission if people click through my website to buy the product?

If it's clear that what's on your site is a paid advertisement, you don't have to make additional disclosures. Just remember that what's clear to you may not be clear to everyone visiting your site, and the FTC evaluates ads from the perspective of reasonable consumers.

Expert Endorsers Making Claims Outside of Traditional Advertisements

One of our company's paid spokespersons is an expert who appears on news and talk shows promoting our product, sometimes along with other products she recommends based on her expertise. Your Guides give an example of a celebrity spokesperson appearing on a talk show and recommend that the celebrity disclose her connection to the company she is promoting. Does that principle also apply to expert endorsers?

Yes, it does. Your spokesperson should disclose her connection when promoting your products outside of traditional advertising media (in other words, on programming that consumers won't recognize as paid advertising). The same guidance also would apply to comments by the expert in her blog or on her website.

Employee Endorsements

I work for a terrific company. Can I mention our products to people in my social networks? How about on a review site? My friends won't be misled since it's clear in my online profiles where I work.

If your company allows employees to use social media to talk about its products, you should make sure that your relationship is disclosed to people who read your online postings about your company or its products. Put yourself in the reader's shoes. Isn't the employment relationship something you would want to know before relying on someone else's endorsement? Listing your employer on your profile page isn't enough. After all, people who just read what you post on a review site won't get that information.

People reading your posting on a review site probably won't know who you are. You definitely should disclose your employment relationship when making an endorsement.

On her own initiative and without us asking, one of our employees used her personal social network simply to "like" or "share" one of our company's posts. Does she need to disclose that she works for our company?

Whether there should be any disclosure depends upon whether the "like" or "share" could be viewed as an advertisement for your company. If the post is an ad, then employees endorsing the post should disclose their relationship to the company. With a share, that's fairly easy to do, "Check out my company's great new product …." Regarding "likes," see what we said above about "likes."

Our company's policy says that employees shouldn't post positive reviews online about our products without clearly disclosing their relationship to the company. All of our employees agree to abide by this policy when they are hired. But we have several thousand people working here and we can't monitor what they all do on their own computers and other devices

when they aren't at work. Are we liable if an employee posts a review of one of our products, either on our company website or on a social media site and doesn't disclose that relationship? It wouldn't be reasonable to expect you to monitor every social media posting by all of your employees. However, you should establish a formal program to remind employees periodically of your policy, especially if the company encourages employees to share their opinions about your products. Also, if you learn that an employee has posted a review on the company's website or a social media site without adequately disclosing his or her relationship to the company, you should remind them of your company policy and ask them to remove that review or adequately disclose that they're an employee.

What about employees of an ad agency or public relations firm? Can my agency ask our employees to spread the buzz about our clients' products?

First, an ad agency (or any company for that matter) shouldn't ask employees to say anything that isn't true. No one should endorse a product they haven't used or say things they don't believe about a product, and an employer certainly shouldn't encourage employees to engage in such conduct.

Moreover, employees of an ad agency or public relations firm have a connection to the advertiser, which should be disclosed in all social media posts. Agencies asking their employees to spread the word must instruct those employees about their responsibilities to disclose their relationship to the product they are endorsing, e.g., "My employer is paid to promote [name of product]," or simply "Advertisement," or when space is an issue, "Ad" or "#ad."

My company XYX wants to tell our employees what to disclose in social media. Is "#employee" good enough?

Consumers may be confused by "#employee." Consumers would be more likely to understand "#XYZ_Employee." Then again, if consumers don't associate your company's name with the product or brand being endorsed, that disclosure might not work. It would be much clearer to use the words "my company" or "employer's" in the body of the message. It's a lot easier to understand and harder to miss.

Using Testimonials That Don't Reflect the Typical Consumer Experience

We want to run ads featuring endorsements from consumers who achieved the best results with our company's product. Can we do that?

Testimonials claiming specific results usually will be interpreted to mean that the endorser's experience reflects what others can also expect. Statements like "Results not typical" or "Individual results may vary" won't change that interpretation. That leaves advertisers with two choices:

1. Have adequate proof to back up the claim that the results shown in the ad are typical, or

2. Clearly and conspicuously disclose the generally expected performance in the circumstances shown in the ad.

How would this principle about testimonialists who achieved exceptional results apply in a real ad?

The Guides include several examples with practical advice on this topic. One example is about an ad in which a woman says, "I lost 50 pounds in 6 months with WeightAway." If consumers can't generally expect to get those results, the ad should say how much weight consumers can expect to lose in similar circumstances – for example, "Most women who use WeightAway for six months lose at least 15 pounds."

Our company website includes testimonials from some of our more successful customers who used our product during the past few years and mentions the results they got. We can't figure out now what the "generally expected results" were back then. What should we do? Do we have to remove those testimonials?

There are two issues here. First, according to the Guides, if your website says or implies that the endorser currently uses the product in question, you can use that endorsement only as long as you have good reason to believe the endorser does still use the product. If you're using endorsements that are a few years old, it's your obligation to make sure the claims still are accurate. If your product has changed, it's best to get new endorsements.

Second, if your product is the same as it was when the endorsements were given and the claims are still accurate, you probably can use the old endorsements if the disclosures are consistent with what the generally expected results are now.

Where can I find out more?

The Guides offer more than 35 examples involving various endorsement scenarios. Questions? Send them to endorsements@ftc.gov. We may address them in future FAQs.

The FTC works to prevent fraudulent, deceptive and unfair business practices in the marketplace and to provide information to help consumers spot, stop and avoid them. To file a complaint or get free information on consumer issues, visit ftc.gov or call toll-free, 1-877-FTC-HELP (1-877-382-4357); TTY: 1-866-653-4261. Watch a video, "How to File a Complaint," at consumer.ftc.gov/media to learn more. The FTC enters consumer complaints into the Consumer Sentinel Network, a secure online database and investigative tool used by hundreds of civil and criminal law enforcement agencies in the U.S. and abroad.

In a Pickle?: Vetting and Litigating Docudramas

By Jean-Paul Jassy

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Docudramas are not new. And neither is the cluster of legal claims that often mushroom from a good story that blends fact and fiction. The docudrama is a tricky mix of legal and practical conundrums setting traps for even the most well-vetted works, but, thankfully, protection exists for even the most thinly stretched portrayals. Ultimately, it is clear that docudramas rightfully deserve and get robust protection under the First Amendment.

We all generally recognize that a docudrama is a production, usually a movie or television program, that is based on or borrows from real life but takes liberties to fill in—or invent—dialogue, characters, scenes, and story transitions. A film meant to present a historical record is better labeled a documentary, hopefully interesting or moving, but usually a little dry. A good docudrama, on the other hand, breathes with life, context, and dynamism. And that dynamism, that element of fictionalization, frequently has led, does lead, and will lead to all manner of lawsuits.

The question is how to apply well-hewn defamation, privacy, publicity, and copyright jurisprudence to a genre that simultaneously combines concededly false elements with very real facts about very real—and sometimes very pissed-off—people.

Identifying the Docudrama

Docudramas have been around for centuries, although we didn't always call them that. Shakespeare's histories are basically all docudramas. There is no real evidence that Caesar said "Et tu, Brute?" after he was betrayed by Brutus, but the line certainly adds to the story.¹ We understand that the play *Julius Caesar* has kernels of accepted fact—Caesar really was assassinated by a group of senators, including Brutus—surrounded by brilliant fable and dialogue.

Twenty-eight years ago, the Ninth Circuit Court of Appeals, in *Partington v. Bugliosi*, expressed confidence that viewers are readily familiar with docudramas, which "often rely heavily upon dramatic interpretations of events . . . in order to capture and maintain the interest of their audience," and audiences understand that "such programs are more fiction than fact."² More recently, California's intermediate appellate court held that "[v]iewers are generally familiar with dramatized, fact-based movies and miniseries in which scenes, conversations, and even characters are fictionalized and imagined."³

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The Problems with Docudramas

Shakespeare was one of the first to use the expression "in a pickle."⁴ Without the benefit of the First Amendment, that's exactly what a docudrama would be: a legal pickle. The

California Court of Appeal described the docudramatist's dilemma in *DeHavilland v. FX Networks, LLC*: "if they portray a real person in an expressive work, accurately and realistically without paying that person, they face a right of publicity lawsuit. If they portray a real person in an expressive work in a fanciful, imaginative—even fictitious and therefore 'false' way—they face a false light lawsuit if the person portrayed does not like the portrayal."⁵

This is where the dilemma begins for producers of docudramas, clearance lawyers vetting docudramas, and litigators defending docudramas. Where a work is admittedly fictional, at least in part, what do we do about the falsity element of defamation and false light claims? If it is fictional, isn't it admittedly false? Should we have to break the docudrama into component parts—accurate and dramatized? If so, how do we communicate to the viewer what is true and what is false without a complete breakdown in the narrative flow of the work? And what about actual malice, especially because most docudramas are about public figures and public officials? How do you get around "knowledge of falsity" when you *know* that part of your work is invented? And if the work is not meant to be purely factual or newsworthy, should a subject of a docudrama have a right of publicity claim?

There is a lot to consider.

It may come as a surprise, but the best rule of thumb is to approach a docudrama the same way as any other publication. That means evaluating the key elements of potential defamation, false light, right of publicity/misappropriation of likeness, and copyright claims. But some special considerations may arise for docudramas.

Defamation, False Light, and the Docudrama

Is the Docudrama "Of and Concerning" the Plaintiff?

The first stop is the "of and concerning" element—i.e., is a person who may claim harm identified or identifiable in the docudrama? Oftentimes, this is an easy call—a character in the docudrama is expressly based on a real person. If that is the case, the "of and concerning" element is likely not in play.

The more complicated scenarios come in other contexts. For example, docudramas sometimes use composite characters—a blend of real people into one character to carry the narrative forward. Sometimes one of the real persons associated with the composite character will sue, but that is a difficult road for a plaintiff. For example, in *Greene v. Paramount Pictures Corp.*, the Second Circuit Court of Appeals held that "no reasonable viewer" of the docudrama film *The Wolf of Wall Street* would understand a character who was meant to be a composite of three people with a fictitious name and a different job than the plaintiff could be understood to be

about the plaintiff.⁶ Other times, a docudrama will make efforts—albeit occasionally insufficient efforts—to mask a character's association with a real person.

If there is some question whether the plaintiff is identifiable, the test is generally the same in the docudrama context as it would be in a purely nonfiction context. Courts will look to a variety of identifiable traits, most commonly a character's name, physical appearance, ethnicity, geographic location, occupation, etc., and the overall context of the program or film to determine whether a reasonable person would match the character to the plaintiff.

For example, in *Polydoros v. Twentieth Century Fox Film Corp.*, the 40-year-old plaintiff claimed that a bespectacled 10-year-old character portrayed him in the coming-of-age film *The Sandlot.*⁷ The film did not purport to be factual, but the plaintiff's name was similar to the character's name, both lived in a similar area, and the plaintiff had been childhood schoolmates with the screenwriter/director.⁸ Nevertheless, the court held that "no sensible person" would see the film as a true depiction of the plaintiff: "No person seeing this film could confuse the two. . . . [T]he rudimentary similarities in locale and boyhood activities do not make 'The Sandlot' a film about appellant's life. This is a universal theme and a concededly fictional film."⁹ Perforce the court concluded that *The Sandlot* is not really a docudrama at all because it was not meant to be a blend of fact and fiction.

In another case, *Tamkin v. CBS Broadcasting, Inc.*, the plaintiffs had identical names to characters in casting synopses but different last names in the ultimate broadcast of an episode of the fictional television show *CSI: Crime Scene Investigation.*¹⁰ The plaintiffs also had the same profession as the characters (real estate agents) but in different locations (Los Angeles versus Las Vegas). Again, the court concluded that "no reasonable person" would make the connection, even as to the casting synopses.¹¹

Some jurisdictions, such as New York, have used an even higher standard. In *Carter-Clark v. Random House, Inc.*, the court held that the character in a book had to be "so closely akin" to a real person that a reader "would have no difficulty linking the two."¹² In *Carter-Clark*, the court held that the account in a fictional book (loosely based on the rise of Bill Clinton) about a librarian who had an affair with a presidential candidate was not close enough to a real librarian who had met with Clinton. Thus, "[a]lthough the book was inspired by real-life personalities and events," the court held, "it was still fiction, and must be analyzed as such in this libel suit."¹³

And in *Springer v. Viking Press*, New York's intermediate appellate court used the "so closely akin" test to reject a libel-in-fiction claim, holding that similarities in name, physical height, weight, build, incidental grooming habits, and recreational activities were insufficient to establish the "of and concerning" element in light of the "profound" dissimilarities "both in manner of living and in outlook."¹⁴

In *Batra v. Wolf*, however, a television network faced a suit in New York for a *Law & Order* "ripped from the headlines" episode about judicial corruption involving a character with the same name, ethnicity, and physical appearance as the plaintiff. The court noted that the

similarity between the plaintiff and the character was "complete . . . in significant ways" and ruled that the case could proceed.¹⁵

In short, it is not easy for a plaintiff to establish the "of and concerning" element as to a work that is at least partially fiction. Something at least above passing similarities is required, and the "so closely akin" test from New York provides even more fulsome protection under the First Amendment.

Does the Docudrama Convey a False Statement of Fact About the Plaintiff?

Even if there is a sufficient connection between the plaintiff and the docudrama's character, the plaintiff still must establish the existence of a false statement of fact. This constitutionally based rule applies in the context of defamation and false light claims.¹⁶ Indeed, the Supreme Court explained that "an acknowledgment that [a] work is so-called docudrama or historical fiction . . . might indicate that . . . quotations should not be interpreted as the actual statements of the speaker to whom they are attributed."¹⁷

Consequently, docudramas get a large umbrella of protection. "Docudramas," the *Partington* court held, are entitled to "substantial latitude" under the First Amendment.¹⁸ In *Partington*, the Ninth Circuit held that viewers "would be sufficiently familiar with this [docudrama] genre to avoid assuming that all statements within them represent assertions of verifiable facts. To the contrary, most of them are aware by now that parts of such programs are more fiction than fact."¹⁹ The court explained that "the general tenor of the docudrama also tends to negate the impression that the statements involved represented a false assertion of objective fact," as docudramas "often rely heavily upon dramatic interpretations of events and dialogue filled with rhetorical flourishes."²⁰

And the District of Columbia Circuit Court of Appeals recently held in *Khodorkovskaya v. Gay* that a fictional play, *Kleptocracy*, although inspired by historical events, employed various fantastical dramatic devices (such as Vladimir Putin talking to a stuffed tiger), underscoring its fictional nature.²¹ In that context, the court rejected a false light claim, holding that no reasonable audience member would understand the play to communicate that the plaintiff was a prostitute or murderer even though that is how her character was portrayed in the play.²²

It is tempting to believe that courts will treat all docudramas—which, by definition, are not meant to be strictly factual renditions—as not capable of conveying statements of fact. And perhaps they should. Recent decisions caution, however, that a defendant may not always reliably point to the general tenor of the docudrama as fictional in order to avoid liability.

The case of *Gaprindashvili v. Netflix, Inc.* involved the television series *The Queen's Gambit* about the life of a fictional female chess player.²³ The series was not based on real people or real events, but it briefly referenced a real female chess champion, Nona Gaprindashvili, and suggested that she, unlike the program's protagonist, had not faced (and therefore had not defeated) men in her career.²⁴ But Gaprindashvili had faced and defeated many men in her chess-playing career, so she sued alleging that the series misrepresented her achievements.

The defendant argued that the series was entirely fictional, which any reasonable viewer would understand.²⁵ But the federal district court in Los Angeles ruled that it could not ignore that the program referenced a real person by name, referenced her real career, and incidentally showed an actor who supposedly resembled the plaintiff. The court stated that it was "not aware of any cases precluding defamation claims for the portrayal of real persons in otherwise fictional works." "On the contrary," the court held, "the fact that the Series was a fictional work does not insulate [defendant] from liability for defamation if all the elements are otherwise present."²⁶

Another case, *Fairstein v. Netflix, Inc.*, involved a docudrama series, *When They See Us*, concerning the "Central Park Five" sexual assault case.²⁷ The federal district court in New York held that, because the series had famous actors playing real people, popular music, and stylized visual sequences, the average viewer would not take it to be a strictly factual recitation, "and would instead understand it as a dramatization drawn from historical events."²⁸ The court held that the series' commentary on the merits of the prosecution's case were a matter of opinion, but that statements regarding whether the plaintiff (as a prosecutor) concealed DNA evidence from the defense was "actionable mixed opinion" with a "precise meaning" "capable of being proved or disproved," and, even in the context of an otherwise dramatic work, the average viewer could reasonably believe that the depictions on that particular subject were based on undisclosed facts.²⁹

Two circuit cases, *Partington* and *Khodorkovskaya*, offer robust protection for dramatized works. But a cautionary lesson from *Gaprindashvili* and *Fairstein* is that a trial court may conclude that what it views as genuine assertions of fact, even in an otherwise fictionalized or highly dramatized work, may give rise to a defamation claim if the other elements are met.

The "statement of fact" element also cannot be satisfied by a plaintiff in the context of parodies and satires, whether "dramatic" or not. For example, in the seminal case of *Hustler Mag., Inc. v. Falwell*, the Supreme Court protected an advertisement parody (and it was specifically labeled an "ad parody") suggesting that the Rev. Jerry Falwell's first sexual experience was in an outhouse with his own mother.³⁰ The court explained that the First Amendment barred liability for the ad parody that "could not reasonably have been interpreted as stating actual facts" about Falwell.³¹

In *Pring v. Penthouse Intern., Ltd.*, an adult magazine ran a fanciful article describing Miss Wyoming as being able to perform oral sex such that she could make a man levitate, which she did at a Miss America beauty pageant.³² The jury decided that the article was definitely about ("of and concerning") the plaintiff.³³ And the trial court "decided that the story generally was not fiction," but the Tenth Circuit Court of Appeals protected the magazine, holding that the challenged portion of the article as humor or fiction did nothing to diminish its constitutional protection: "The story is a gross, unpleasant, crude, distorted attempt to ridicule the Miss America contest and contestants. It has no redeeming features whatever. There is no accounting for the vast divergence in views and ideas. However, the First Amendment was intended to cover them all."³⁴

What Do We Do with Actual Malice in Docudramas?

In some cases, the producer of a docudrama may be genuinely ignorant that a portion of the film's or program's story is false, in which case the actual malice rule should operate the same as it would for any other type of publication. Indeed, the public figure or public official plaintiff must show, with clear and convincing evidence, that the defendant acted with knowledge of falsity or reckless disregard for the truth, and where the plaintiff fails to make the requisite showing, then the defamation claim must fail.³⁵

For example, in *Lovingood v. Discovery Communications Inc.*, the Eleventh Circuit Court of Appeals held that the plaintiff had not demonstrated actual malice based on supposedly altered quotations in a docudrama about the space shuttle *Challenger* disaster because there was insufficient evidence of knowledge of falsity, reckless disregard for the truth, or willful blindness.³⁶ And, in an older case, *Davis v. Costa-Gavras*, a federal district court explained that "[s]elf-evidently a docudrama partakes of author's license—it is a creative interpretation of reality—and if alterations of fact in scenes portrayed are not made with serious doubts of truth of the essence of the telescoped composite, such scenes do not ground a charge of actual malice."³⁷ And, in one of the first "docudrama" cases, the Sixth Circuit Court of Appeals held that a defendant could reasonably rely on a court record to show that it did not have actual malice that the portrayal of plaintiff in a film was knowingly or recklessly false.³⁸

But it gets trickier when, as often happens, the defendant *knows* that some portions of the docudrama are false or fictionalized. Of course, the previously discussed arguments may apply—e.g., the docudrama is not really about the plaintiff or it is not stating verifiably false facts about the plaintiff. But, if those arguments do not hold, the producer may still rely on the benefits of the constitutionally based actual malice rule to avoid liability.

The way to resolve the tension between actual malice's knowledge of falsity (or reckless disregard for the truth) and the fictionalization inherent in docudramas is to require clear and convincing evidence that the defendant *intended* to create a false impression when presenting the false or fictionalized information. This parallels the court's approach in *Hoffman v. Capital Cities/ABC, Inc.*, where the Ninth Circuit held, in applying the actual malice standard, that the plaintiff had to prove that the defendant intended to create a false impression when superimposing plaintiff actor Dustin Hoffman's face on someone else's body in a photo.³⁹

Similarly, in *DeHavilland*, the court noted that, of course, "fiction is by definition untrue," therefore the plaintiff must show that the defendant *intended* its portrayal of plaintiff in a docudrama to be taken as a false assertion of fact, which the plaintiff in that case did not show.⁴⁰

This is all consistent with the Supreme Court's holding in *Time, Inc. v. Hill*, a false light case concerning a magazine article about a novel and Broadway play inspired by a real-life hostage situation, concluding that the actual malice standard required some literary license in describing the underlying hostage event.⁴¹

Although these principles offer significant insulation from liability in litigation, it is perilous to rely solely on a lack of actual malice in the vetting process. Unless a complaining plaintiff fails to adequately plead actual malice, which every federal circuit to address the issue has held to a high pleading standard,⁴² it can be a fairly arduous road through discovery, summary judgment, and possibly trial to argue that a plaintiff has failed to establish actual malice with clear and convincing evidence.⁴³

Misappropriation of Likeness and Right of Publicity

Many states have statutory carve-outs from their right of publicity laws exempting expressive works such as films and television programs.⁴⁴ But regardless of any statutory carve-outs, the First Amendment limits right of publicity and misappropriation of likeness claims.

It is beyond dispute that the First Amendment protects motion pictures and entertainment.⁴⁵ By extension, the First Amendment protects the depiction of real persons in nonfiction accounts (even outside of news accounts).⁴⁶ It also protects the depiction of real persons in fictional stories such as the use of the "name, likeness and personality" of actor Rudolph Valentino "in a fictionalized film which did not accurately portray his life."⁴⁷ And it protects the depiction of real persons in docudramas.⁴⁸ The protection does not turn on the label for the work. The Fifth Circuit Court of Appeals held in *Matthews v. Wozencraft* that it is "immaterial" whether a work is labeled "historical" or "fictional" because it gets protection under the First Amendment either way.⁴⁹

Stepping beyond the content of the docudrama itself, courts consistently hold that advertising and promotional materials attendant to a protected work, such as a docudrama, are also protected speech.⁵⁰

Copyright Issues

Shakespeare's tragedy *Romeo and Juliet* could fairly be called a docudrama. Shakespeare based it on a poem, *The Tragicall History of Romeus and Juliet*, written in 1562 by Arthur Brooke, who, in turn, lifted it from a story by an Italian named Matteo Bandello.⁵¹ Varying accounts suggest that the underlying real basis for the story of the star-crossed lovers comes from Vicenza's Luigi da Porto and his love Lucina, or the story of Siena's Mariotto and Ganozza, which author Masuccio Salernitano insisted was true, or perhaps it stems from Portugal's doomed romantics Pedro and Inês.

In any event, we know that facts cannot be copyrighted.⁵² So, to the extent a docudrama is based on facts, copyright protection would extend only to the expressive portions of an underlying work, including, potentially, their selection and arrangement. In *Miller v. Universal City Studios, Inc.*, the Fifth Circuit Court of Appeals held that a book author's research alone, unearthing underlying facts, would not give rise to a copyright claim against the producers of a docudrama on the same subject.⁵³

The fair use doctrine may also be invoked in the docudrama context. For example, in *Fioranelli v. CBS Broadcasting Inc.*, the court found a transformative fair use in the relatively

short use of a photojournalist's copyrighted footage as part of a docudrama depicting characters' reactions to the true story of two police officers who were trapped in the rubble following the terrorist attacks of September 11, 2001.⁵⁴

Using Disclaimers

Many docudramas alert viewers that the film or program is "based on a true story" or, as the clever disclaimer in Netflix's docuseries *Inventing Anna* announced, "This whole story is completely true. Except for all the parts that are totally made up." Although many courts, such as the Ninth Circuit in *Partington*, have long held that viewers are very familiar with the docudrama genre, these disclaimers can help remind viewers that what they are about to watch (or just watched) has been fictionalized to at least some degree.

In *Porco v. Lifetime Entertainment Services, LLC*, New York's intermediate appellate court found it significant that "the film makes no effort to present itself as unalloyed truth or claim that its depiction of plaintiffs was entirely accurate, instead alerting the viewer at the outset that it is only '[b]ased on a true story' and reiterating at the end that it is 'a dramatization' in which 'some names have been changed, some characters are composites and certain other characters and events have been fictionalized."⁵⁵ Similarly, in *Lovingood*, the docudrama about the space shuttle *Challenger* disaster began with a card reading: "This is a true story.... Some scenes have been created for dramatic purposes."⁵⁶

Other courts, however, have held that a disclaimer is not a silver bullet to avoid liability. For example, in *Gaprindashvili*, the court stated that it would consider the program's disclaimer but that it was not dispositive.⁵⁷ The claim in that case was allowed to proceed even though the program was essentially entirely fictional. And some courts have held that a disclaimer is not helpful if the work otherwise appears to be entirely factual. In the Illinois case of *Bryson v. News America Publications, Inc.*, the plaintiff with the same last name from the same town as a character could maintain a defamation claim even though the work at issue appeared in a magazine's "fiction" section.⁵⁸

In *Sarver v. Chartier*, the court rejected the contention that a fictional character in the Oscar-winning film *The Hurt Locker* was meant to depict the plaintiff in part because the name of the character was different than the plaintiff's name and because the beginning of the film "contains a specific disclaimer that the film is a work of fiction."⁵⁹ In *Greene*, the Second Circuit gave weight to a standard disclaimer that appeared at the *end* of the film.⁶⁰

In another case, however, a district court gave short shrift to a "based on actual events" disclaimer that passed over the screen "very quickly" at the end of the credits of a docudrama, noting also that the DVD cover "describes the film as 'the extraordinary true story of the greatest filly racehorse of all time,' without using qualifying terms such as 'based on' or 'adapted from."⁶¹

Although not necessarily a silver bullet to defeat claims, it is clear that disclaimers can still be useful, particularly if they are presented prominently, preferably at the front of the program or film, and it is clear what the disclaimer is communicating to the viewer. For example,

in *Mosack Fonseca v. Netflix, Inc.*, the court gave significant weight to a disclaimer: "The Court finds no reasonable viewer of the Film would interpret the Film as conveying 'assertions of objective fact,' particularly given the statement at the beginning of the Film 'BASED ON ACTUAL SECRETS' which sets the stage and the disclaimer at the end of the Film that states the Film is fictionalized for dramatization and is not intended to reflect any actual person or history."⁶²

Conclusion

Docudramas are rightfully accorded a significant degree of protection under the First Amendment so that stories—even those that involve, include, or relate to real people and real events—can be told in an engaging, compelling, and thoughtful way. As a legal baseline, docudramas should be approached the same way as any other expressive or nonfiction publication. Think about the elements. Think about the classic defenses, burdens of proof, and burdens of persuasion. Remember that, if anything, docudramas often get *more* protection than other types of works because viewers have understood for centuries—going back to Shakespeare's Globe Theatre and before—that docudramas are not meant to be taken literally in every word and scene. Ultimately, makers and defenders of docudramas have a host of tools and arguments to get out of most any legal pickle.

¹ WILLIAM SHAKESPEARE, JULIUS CAESAR act 3, sc. 1.

² 56 F.3d 1147, 1155 (9th Cir. 1995).

³ De Havilland v. FX Networks, LLC, 21 Cal. App. 5th 845, 866 (2018).

⁴ WILLIAM SHAKESPEARE, THE TEMPEST act 5, sc. 1.

⁵ 21 Cal. App. 5th at 870–71.

⁶ 813 F. App'x 728, 731 (2d Cir. 2020).

⁷ 67 Cal. App. 4th 318 (1997).

⁸ *Id.* at 320–21.

⁹ *Id.* at 323, 326.

¹⁰ 193 Cal. App. 4th 133, 138–40 (2011).

¹¹ *Id.* at 146.

¹² 17 A.D.3d 241 (N.Y. Sup. Ct. App. Div. 2005).

¹³ *Id.* at 241.

¹⁴ 90 A.D.2d 315, 320 (N.Y. Sup. Ct. App. Div. 1982).

¹⁵ No. 116059/04, 2008 N.Y. Misc. LEXIS 1933, at *236 (Sup. Ct. N.Y. Cnty. Mar. 14, 2008).

¹⁶ See Milkovich v. Lorain J. Co., 497 U.S. 1, 19–20 (1990).

¹⁷ Masson v. New Yorker Mag., Inc., 501 U.S. 496, 512–13 (1991).

¹⁸ Partington v. Bugliosi, 56 F.3d 1147, 1154 (9th Cir. 1995).

¹⁹ *Id.* at 1155.

²⁰ *Id.* at 1154–55; *see also* Brodeur v. Atlas Ent., Inc., 248 Cal. App. 4th 665, 681 (2016) (rejecting defamation claim, holding that the "general tenor" of the film, "farcical nature" of a particular scene, and "ditzy nature of the character uttering the allegedly defamatory statement, all indicate that an audience would not expect anything [that character] says to reflect objective fact").

- ²¹ 5 F.4th 80, 83 (D.C. Cir. 2021).
- ²² Id. at 85–88.

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<sup>23</sup> Case No. 2:21-cv-07408-VAP-SKx, 2022 WL 363537 (C.D. Cal. Jan. 27, 2022).
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 24 Id. at *1-*3.

²⁵ *Id.* at *5.

²⁶ *Id.* at *6.

²⁷ 553 F. Supp. 3d 48 (S.D.N.Y. 2021).

²⁸ *Id.* at 59.

- ²⁹ *Id.* at 71–75.
- ³⁰ 485 U.S. 46, 48 (1988).
- ³¹ *Id.* at 50–57.
- ³² 695 F.2d 438, 441 (10th Cir. 1982).
- ³³ *Id.* at 442.
- ³⁴ *Id.* at 442–43.

³⁵ New York Times Co. v. Sullivan, 476 U.S. 254 (1964); Curtis Publ. Co. v. Butts, 388 U.S. 130 (1967).

- ³⁶ 800 F. App'x 840, 848–51 (11th Cir. 2020).
- ³⁷ 654 F. Supp. 653, 658 (S.D.N.Y. 1987).

³⁸ Street v. Nat'l Broad. Co., 645 F.2d 1227, 1236–37 (6th Cir. 1981).

³⁹ 255 F.3d 1180, 1188–89 (9th Cir. 2001).

⁴⁰ DeHavilland v. FX Networks, LLC, 21 Cal. App. 5th 845, 869–70 (2018).

⁴¹ 385 U.S. 374, 389–97 (1967).

⁴² Tah v. Global Witness Publ., Inc., 991 F.3d 231, 243–49 (D.C. Cir. 2021); Nelson Auto Ctr., Inc. v. Multimedia Holdings Corp., 951 F.3d 952, 958 (8th Cir. 2020) ("Every circuit that has considered the matter has applied the *Iqbal/Twombly* standard and held that a defamation suit may be dismissed for failure to state a claim where the plaintiff has not pled facts sufficient to give rise to a reasonable inference of actual malice."); Michel v. NYP Holdings, Inc., 816 F.3d

686, 701–702 (11th Cir. 2016); Biro v. Conde Nast, 807 F.3d 541, 544–45 (2d Cir. 2015); Mayfield v. Nat'l Ass'n for Stock Car Auto Racing, Inc., 674 F.3d 369, 377–78 (4th Cir. 2012); Schatz v. Republican State Leadership Comm., 669 F.3d 50, 58 (1st Cir. 2012).

⁴³ Defendants can, and often do, successfully attack other elements such as falsity and defamatory meaning, but those are not explored in detail here because they are infrequently the subject of differential treatment simply because the underlying work is a docudrama.

⁴⁴ See, e.g., CAL. CIV. CODE § 3344.1(a)(2) (an "audiovisual work, radio or television program shall not be considered a product, article of merchandise, good, or service if it is fictional or nonfictional entertainment, or a dramatic . . . work"); 765 ILL. COMP. STAT. 1075/35(b)(1) (the "Act does not apply to . . . film, radio, television, or other audio, visual or audio-visual work"); IND. CODE § 32-36-1-1(c) (statute "does not apply to . . . film, radio, or television programs"); NEV. REV. STAT. § 597.790(2)(d) (no consent is required under the statute for a "use in an attempt to portray, imitate, simulate or impersonate a person in a . . . film, or a radio, television or other audio or visual program . . ."); OHIO REV. CODE ANN. § 2741.09(A)(1)(a) (statute "does not apply to . . . a dramatic work, fictional work, historical work, audiovisual work . . . regardless of the media in which the work appears . . ."); TEX. PROP. CODE ANN. § 26.012(a) (use of a deceased person's name or likeness in "film, radio program, or television program" is permitted); WASH. REV. CODE § 63.60.070(2) (statute "does not apply to . . . film, radio, online or television program . . .").

⁴⁵ Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 502 (1952).

⁴⁶ See, e.g., Rosemont Enters., Inc. v. Random House, Inc., 294 N.Y.S.2d 122, 129 (Sup. Ct. 1968) (factually based biography of Howard Hughes).

⁴⁷ See, e.g., Guglielmi v. Spelling-Goldberg Prods., 603 P.2d 454, 456–62 (Cal. 1979) (Bird, C.J., concurring); see also Hicks v. Casablanca Records, 464 F. Supp. 426, 430–33 (S.D.N.Y. 1978) (dismissing right of publicity claim stemming from a fictionalized biography—and movie—of deceased author Agatha Christie).

⁴⁸ See, e.g., Seale v. Grammercy Pictures, 949 F. Supp. 331, 334–37 (E.D. Pa. 1996) (rejecting right of publicity claim based on a docudrama about a founder of the Black Panther Party), *aff'd without opinion*, 156 F.3d 1225 (3d Cir. 1998); Ruffin-Steinback v. de Passe, 82 F. Supp. 2d 723, 726, 728–31 (E.D. Mich. 2000), *aff'd*, 267 F.3d 457, 461–62 (6th Cir. 2001) (foreclosing publicity rights liability for television docudrama mixing factual and dramatized elements of a story about The Temptations); Donahue v. Warner Bros. Pictures Distrib. Corp., 272 P.2d 177, 184 (Utah 1954) (dramatized biographical film not subject to publicity rights law).

49 15 F.3d 432, 439–40 (5th Cir. 1994).

⁵⁰ See, e.g., Porco v. Lifetime Ent. Servs., LLC, 150 N.Y.S.3d 380, 387 (Sup. Ct. App. Div. 2021); see also Cher v. Forum Int'l, Ltd., 692 F.2d 634, 639 (9th Cir. 1982).

⁵¹ BILL BRYSON, SHAKESPEARE, at 99 (2009).

⁵² Feist Pubs., Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 348 (1991) ("all facts—scientific, historical, biographical, and news of the day . . . are part of the public domain available to every person").

- ⁵³ 650 F.2d 1365, 1368–72 (5th Cir. 1981).
- ⁵⁴ 551 F. Supp. 3d 199, 240–242 (S.D.N.Y. 2021).

⁵⁵ 150 N.Y.S.3d 380, 386 (Sup.Ct. App. Div. 2021).

⁵⁶ Lovingood v. Discovery Comme'ns Inc., 800 F. App'x 840, 847 (11th Cir. 2020).

⁵⁷ Gaprindashvili v. Netflix, Inc., Case No. 2:21-cv-07408-VAP-SKx, 2022 WL 363537, at *6 (C.D. Cal. Jan. 27, 2022).

⁵⁸ 672 N.E.2d 1207 (Ill. 1996).

⁵⁹ Sarver v. Hurt Locker LLC, No. 2:10-CV-09034-JHN, 2011 WL 11574477, at *8 (C.D. Cal. Oct. 13, 2011), *aff'd sub nom*. Sarver v. Chartier, 813 F.3d 891 (9th Cir. 2016).

⁶⁰ Greene v. Paramount Pictures Corp., 813 F. App'x 728, 732 (2d Cir. 2020).

⁶¹ Thoroughbred Legends, LLC v. The Walt Disney Co., No. 1:07-CV-1275-BBM, 2008 WL 616253, at *13 (N.D. Ga. Feb. 12, 2008).

⁶² Mossack Fonseca & Co., S.A. v. Netflix Inc., No. CV 19-9330-CBM-AS(X), 2020 WL 8510342, at *4 (C.D. Cal. Dec. 23, 2020).

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FRIDAY, JUNE 9, 2023 3:30 - 4:20pm PDT

Whose IP Is It Anyway? Source Material and Underlying Rights in Film and TV

Moderator:

Matt Belloni

Founding Partner, Puck

Panelists:

Michael Grizzi Executive Vice President, Motion Picture Legal, Paramount Pictures

Michael Sherman

Partner, Reed Smith

Michelle Weiner

Co-Head of Books Department, Creative Artists Agency

TABLE OF CONTENTS

WHOSE IP IS IT ANYWAY? SOURCE MATERIAL AND UNDERLYING RIGHTS IN FILM AND TV

- A. Outline of Topics/Issues
- B. "Things to Think About Before...." Michael S. Sherman (May 30, 2023)
- C. "'Friday The 13th' Prequel Series 'Crystal Lake' Ordered at Peacock from Bryan Fuller & A24; Move Follows Interesting Legal Battle" *Deadline* (October 31, 2022)
- D. "Harry Potter and the Desperate Movie Studio" Puck (November 14, 2022)
- E. "Hollywood's Marvel-Disney Horror Story" Puck (April 18, 2022)
- F. "How the Publishing World Is Muscling in on Hollywood Deals: For Authors, "The Future Is Multihyphenate" *The Hollywood Reporter* (May 25, 2022)
- G. "The Best Reese Witherspoon Book Club Recs: From 'Tiny Beautiful Things' to 'The Marriage Portrait'" Variety (April 24, 2023)
- H. "'Top Gun' Copyright Lawsuit Against Paramount Survives Dismissal" The Hollywood Reporter (November 10, 2022)
- I. "Which Video Games Should Streamers Adapt? New Data Proposes 'Fortnite' Series, 'God of War' at Apple Over Amazon and More" Variety (April 11, 2023)
- J. "Why Amazon Spent \$8.5 Billion to Land MGM, and What's Next for the Studio Behind James Bond" Variety (March 17, 2022)
- K. "The Lifecycle of Copyright: 1927 Works In the Public Domain" Library of Congress Blogs (May 31, 2023); link at: <u>https://blogs.loc.gov/copyright/2023/05/1927-works-in-the-public-domain/?locIr=eacop</u>
- L. MCLE

WHOSE IP IS IT ANYWAY? SOURCE MATERIAL AND UNDERLYING RIGHTS IN FILM AND TV

OUTLINE OF TOPICS/ISSUES

So many film and television shows today are based on underlying material. Whether a novel, blog, videogame or foreign television format, literary and underlying rights deals are common in just about every aspect of filmmaking and television production in the current market. This panel will examine the issues that surround making source material agreements from the granting and reserving of various rights, to reversion when things don't go as planned, to copyright termination under the current Copyright Act and finally the management of a deceased author's estate that controls valuable copyright libraries.

THINGS TO THINK ABOUT BEFORE

For clients who own and control copyright protected content there are many issues to consider before it's too late. The content types most relevant in this context are novels and other literary works, photographs, musical compositions, plays and artwork for which there is likely to be a "long tail". Let's assume, as an example, the output of a successful novelist over decades of work.

1. <u>The Assets</u>

a. There should be a complete list of all of her published and unpublished works by title, status (published or unpublished and, if unpublished, complete or incomplete) and copyright registration information (copyright owner, registration date and registration number). If any work was prepared as a "work made for hire" under the U.S. Copyright Act that information should be included. If any work is not registered in the U.S. Copyright Office, it should be registered promptly to establish chain of title and preserve the rights and remedies only available for registered works.

b. There should be a complete list of all of her publishing and other agreements pertaining to her works by title, parties, date, subject matter, material financial, duration, reversion/termination rights and other terms. These would include domestic and international publishing agreements, motion picture/television/other media option/purchase/license agreements, collaboration agreements (assuming that she may have collaborated with another person on any of her works), editor agreements and artwork agreements (e.g. interior drawings, photographs, maps and the like and cover artwork).

c. There should be a complete list of all payors of, and all payees/accounts into which, any advances, royalties, profit shares and other compensation from exploitation of any of the works are payable. The management and disposition of these income streams among beneficiaries and others must be determined and delineated.

d. There should be a complete list of all tangible property in which the works are embodied including paper manuscripts, hard drives, computers (desk and laptop) and other storage media and the contents and locations of each.

2. <u>Disposition</u>

a. Should the works be transferred to a limited liability company, corporation or trust controlled by the author during her lifetime to separate them from her other assets and, if possible, to remove them from her estate (and establish a plan to value her work for estate tax purposes)? Ownership and control of the entity would be subject to her estate plan documents and the governing documents of the entity. b. Should the right to establish an author archive be separately dealt with including the use of tangible personal property (or copies) as part of that archive (manuscripts, annotated proof copies, photo negatives and other storage or reproduction media)? What about public access to or exhibition of such an archive? If an archive is desired, what decisions should be made regarding access and copy controls, disposition of the tangible personal property, limitations on licensing and reproduction?

c. If the works are transferred into an entity the appropriate governing documents or her Will/Trust should designate a successor to the author to manage the entity after her passing with specific instructions about how she wants her work to be exploited or not exploited. For example:

i. Should incomplete works be completed for publication and, if so, by whom, selected by whom and subject to what limitations (e.g. characters to be developed, killed off, franchised, etc.)?

ii. Should complete but unpublished works, or subsequently completed works, be published and, if so, how decisions are made to effect publication? Should there be guidelines about the timing of publication, publishers (domestic and foreign), the use of one or more agents for publishing, film/TV, gaming, merchandise licenses and the like?

iii. Should the right to prepare and publish sequel and other derivative works be permitted or prohibited? If permitted, should parameters be set?

iv. Should the right to license any of her works for film/television/other media be permitted or prohibited? If permitted, should parameters be set (such as the protection of the way in which her characters are depicted and the stories about them told – for example, a character (good or evil) in a work cannot be materially changed or omitted from licensed work or conversely developed along author-suggested story lines)? What about the right to create and exploit derivative works (such as prequels and sequels) written by someone else (along with a list of possible candidates)?

v. Should there be limitations placed on the way in which her name/likeness/biography may be used other than as and in connection with her attribution as the (and possibly an) author of the work in question?

d. Who will be her "literary executor" (the person acting on behalf of the author or the entity to which rights are assigned or licensed to administer and exploit her works)?

i. What qualifications should the person have? Knowledgeable across several areas of on-going and possible future exploitation? Rely on outside advisers (publishing and "book-to-film" agents and managers, legitimate theater agents and rights licensing agents and advisers)?

ii. For how long? Compensated how (commission, fixed fee, hourly or ...)? Reimbursed for (capped) expenses? Replaced upon resignation/disability/death/misfeasance and the mechanism to handle?

iii. What authority (and limitations on that authority) will that person have to act on behalf of the "literary estate" -- make new deals, amend existing ones, collect money, exercise audit rights, hire lawyers, accountants and agents, sue for rights infringement and breach of contract, defend claims, buy errors and omissions and other insurance, etc.?

iv. Will the "literary executor" have the authority to keep, seal or destroy manuscripts of unpublished work, letters, recordings, tapes and other materials and, if so, under what circumstances and with what limitations?

v. What about digital assets such as hard drives, blog posts, social media accounts, domain names and the like? Passwords to access digital assets? The "literary executor" will need express authority to access these digital assets.

e. The "literary rights" to be exploited should include copyright ownership and all rights under or related to copyright, trademark ownership and all rights under or related to trademark, and all rights of publicity (e.g. the use of her name, actual or simulated voice and likeness [implicating "deep fakes"], identification and biography), domestic and international.

f. If the author has a spouse, children, grandchildren or other family members, who should (or should not) be involved in her "literary estate"? Is there any chance that any of her family members would dispute the way in which her "literary estate" is handled? Should possible disputes be anticipated and the disputing party(ies) be penalized in some fashion for interfering with the author's plan?

g. Would the author want to assign ownership of, or revenue to be derived from, certain works to specified family members? To others? To a charity? A private foundation established or to be established by the author and funded with the proceeds of some or all of the exploitation of some or all of the works?

h. If there are contractual reversion rights in any publishing, film or television rights agreements or related or similar documents, they should be identified and calendared so that if any notice of reversion must be given it can be handled by her successors on a timely basis. Similarly, any contractually reserved or retained rights (whether explicit or not) should be identified and the disposition and management of them handled in the "literary estate" plan documents.

i. Note also that under the U.S. Copyright Act authors' statutory heirs have the right to terminate certain transfers of rights under U.S. copyright (not applicable to works made for hire) after the passage of a specified number of years. If the author does not have family that fits into the statutory heir

category, then her executor, administrator, personal representative or trustee will own her entire termination interest. In that case, she may (and should) want to provide instructions as to whether or not she wants the termination right to be exercised and, when exercised, how she wants the terminated rights to be handled. And if there is a termination by family members or other statutory successors¹ who have the right to do so, should they be required to restore the *status quo ante* as a condition to continuing to have other benefits? Needless to say, it is critical to identify and calendar all agreements (and counterparties) that may be subject to termination and the relevant windows and dates during and by which terminations may or must be effected.

3. <u>Third Parties</u>.

a. Counterparties to agreements related to the works must be notified of her passing and to whom correspondence, accountings and payments are to be sent after the author's passing. If she transfers her works to an entity, the manager of that entity will have to have sufficient authority to notify third party payors and other counterparties that such correspondence, etc. is redirected to the manager and payments to one or more designated segregated accounts.

b. If the author has collaborated with others in creating her works, ideally she would have done so with a carefully drafted and negotiated collaboration agreement setting out the ownership, credit, control and financial aspects of the collaborators' business deal. The collaborator (or his or her agents or successors) should be notified when the time comes and informed about who is handling the "literary estate" and who has the right to make decisions on behalf of the author (including heirs who have the ability to make termination of transfer decisions since each author will have their own heirs standing in their shoes).

c. If the author transfers ownership of her works to an entity, to family members or others, a proper transfer document must be recorded in the U.S. Copyright Office for chain of title purposes and to give constructive notice to the rest of the world that the transferee owns and controls the rights in the work involved.

[End]

¹ See the page attached.

Termination Right Ownership

- a. The termination of transfer provisions <u>don't apply</u> to works made for hire. Where that is not the case, the rules below apply.
- b. The surviving author has the right to terminate. If the author does not survive then: (i) if the author is no longer living and signed the agreement certain family members may terminate agreements entered into by the author. The author's surviving spouse owns the entire termination interest if there are no surviving children or grandchildren but, if there are, the surviving spouse owns one- half of the termination interest with the other half owned by the children or, if there is a deceased child, the grandchildren, on a *per stirpes* basis.
- c. An author's surviving children own the entire termination interest equally divided among them if there is no surviving spouse. If there is a surviving spouse, the surviving children have a one-half termination interest divided equally among them.
- d. If one of the author's children is not still living at the time the author dies, any surviving children of that child will have that child's termination interest in equal shares.
- e. The surviving family members who are entitled to terminate an agreement, must exercise the termination right by majority, again on a "per stirpes" basis. However, if there are grandchildren who have a termination right, they must exercise that right by majority or the grandchildren.
 - i. So if our author passes and is survived by her spouse and two children, a majority of the surviving spouse (50%) and one of the surviving children (25%) can terminate.
 - ii. But if there is no surviving spouse, the termination right must be exercised by a majority of the surviving children. If one of the two children has not survived the author and that child has four children, at least three of the grandchildren are required to exercise the termination right.
- f. If there is no surviving spouse and no surviving children or grandchildren, the author's executor, administrator, personal representative or trustee may exercise the termination right.
- g. If the agreement to be terminated was signed by someone other than our author and the agreement was entered into before 1978 and signed by the author's surviving spouse, children, executors or next of kin, the termination right must be exercised by the surviving person or persons who executed it and who survive to the date when the termination right vests (if the surviving spouse and the two surviving children signed the pre-1978 agreement, a majority in interest of all who are still living are required to exercise the termination right).
- h. Carefully examine the following sections of the U.S. Copyright Act for details: Section 203 (grants executed by the author on or after January 1, 1978) and Sections 304(c) and 304(d) (grants executed by the author or the author's heirs, for copyright secured in a work, before January 1, 1978). And see: https://www.copyright.gov/recordation/termination.html.

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'Friday The 13th' Prequel Series 'Crystal Lake' Ordered At Peacock From Bryan Fuller & A24; Move Follows Interesting Legal Battle

Peter White October 31, 2022 12:00PM PDT



<u>Bryan Fuller</u> has scored a straight-to-series order from <u>Peacock</u> for a prequel series set in the <u>*Friday the 13th*</u> universe. It comes from <u>A24</u>.

The move follows a fascinating legal battle between the team behind the original horror film.

<u>*Crystal Lake*</u> comes from *Star Trek: Discovery* co-creator Bryan Fuller, who has been developing a *Friday the 13th* project, originally as a feature film, since 2013. He will serve as writer, showrunner and exec producer.

A24 is the studio, while Victor Miller, who wrote the original screenplay of the 1980 movie, Marc Toberoff, Miller's copyright attorney, and Rob Barsamian, who produced the original movie, will exec produce.

It's worth remembering that Mrs. Vorhees was the original camp killer, a fact that Drew Barrymore's character in the original *Scream* film would have been wise to have known.

The original *Friday the 13th* movie, which starred Betsy Palmer, Adrienne King, Laurie Bartram and Kevin Bacon, follows a group of teenage camp counselors who are murdered at summer camp.

Palmer plays Mrs. Vorhees who initially kills a pair of counselors in 1959 at Camp Crystal Lake after her son, Jason, supposedly drowned, before going on a murder spree in 1979 when a group tries to reopen the camp. Jason turns up at the end to attempt to kill King's Alice after she killed his murderous mother.

It was directed by Sean Cunningham.

The legal case, which was decided by the 2nd U.S. Circuit Court of Appeals and you can read <u>here</u>, saw Miller win the rights to the character that he created after a copyright termination battle. The producers of the original film – Horror Inc., which includes Barsamian, had argued that Miller's involvement was work for hire but a judge ruled that it wasn't.

The case meant that Miller is now able to license a prequel series. The fact that Barsamian is one of the exec producers alongside Miller, means that a deal has been worked out between the groups. This means that there are no longer any question marks over what can and can't appear in the series, as it relates to later films in the franchise. For instance, Jason's famous hockey mask, which didn't show up until *Friday the 13th: Part III*, could potentially be part of the project as a result of the deal between the exec producers.



Friday The 13th / Everett Collection Everett Collection

It's been suggested by sources that this also opens the door for future feature films in the franchise.

Crystal Lake is not the first television series based on the classic horror franchise. *Friday the 13th: The Series* aired for three seasons in syndication between 1987 and 1990 from Frank Mancuso Jr. and Larry B. Williams. The series, which followed a pair of owners of a cursed antiques store, does not feature Jason or any characters from the films.

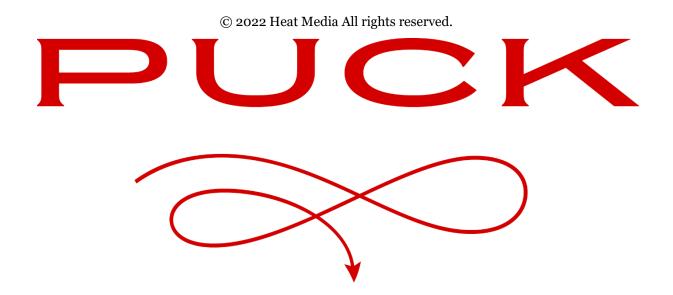
Deadline also <u>revealed</u> in 2014 that Emmett/Furla/Oasis Films and Cunningham's Crystal Lake Entertainment were developing a series with Cunningham exec producing alongside *Power* exec producer Mark Canton with Barsamian also producing, but that project never made it to air.

Full details of the plot of the series are being kept under wraps.

Bryan Fuller said, "I discovered *Friday the 13th* in the pages of Famous Monsters magazine when I was 10 years old and I have been thinking about this story ever since. When it comes to horror, A24 raises the bar and pushes the envelope and I'm thrilled to be exploring the camp grounds of Crystal Lake under their banner. And Susan Rovner is simply the best at what she does. It's a pleasure and an honor to be working with her again."

"Friday the 13th is one of the most iconic horror franchises in movie history and we

were dying to revisit this story with our upcoming drama series Crystal Lake," added Susan Rovner, Chairman, Entertainment Content, NBCUniversal Television and Streaming. "We can't wait to get to work with Bryan Fuller, a gifted, visionary creator who I've had the pleasure of being a longtime friend and collaborator, along with our incredible partners at A24, in this updated version for Peacock that will thrill longstanding fans of the franchise."



Harry Potter and the Desperate Movie Studio

David Zaslav may want more Potter hits, but he has more than a few obstacles—franchise challenges, sequel blues, a complicated and semicancelled talent—in front of him. And Zaz needs Rowling more than she needs him.



Rowling alone created one of the singular pieces of intellectual property of all time, so no matter how much value Warner Bros. brought to the asset she gets to control and leverage the I.P. as she chooses. *Photo: Dave J Hogan/Getty Images*



November 14, 2022

know I wasn't alone in chuckling when the new Warner Bros. Discovery C.E.O. **David Zaslav** announced on an earnings call last week that he'd really like to do "something with J.K. on Harry Potter going forward," noting that his film executives "haven't done a *Harry Potter* movie in 15 years." *You don't say!* one rival exec texted, echoing a few calls I got from others on the Warners lot. People are terrible.

I know, earnings proclamations are general statements for investors, and Zaslav often talks in platitudes that can be easily understood by CNBC. So who cares if the last *Potter* movie was actually 11 years ago, or that Warners has since released three *Fantastic Beasts* movies based on **J.K. Rowling**'s *Wizarding World*, the first two of which she wrote the screenplays for herself? (Similarly, Zaz's peer, Endeavor C.E.O. **Ari Emanuel**, boasted on his earnings call this week about client **Keanu Reeves**' first TV show, Hulu's *Devil in the White City*—a project Reeves fell out of last month.) But more importantly, to some at Warners, it was as if Zaslav's focus on franchises in general, and *Harry Potter* in particular, hadn't been the *singular goal* of just about every top executive at the company since the original *Potter* films ended in 2011. To them, it was déjà vu all over again.

In fact, other than managing DC, the primary job of running Warners ever since the studio and producer **David Heyman** secured the rights when the first *Harry Potter* book was published in 1997, has been about managing **J.K. Rowling** and her universe. Like many artists, she's said to be mercurial and perpetually aggrieved; her

behind-the-scenes battles with **Barry Meyer** and **Alan Horn** over creative and financial issues on the *Potter* movies were legendary; she's renegotiated her deals *many*, *many* times; etc. And rightly so; Rowling alone created one of the singular pieces of intellectual property of all time, so no matter how much value Warner Bros. brought to the asset via films that have grossed more than \$9 billion worldwide, she gets to control and leverage the I.P. as she chooses. Just as Warners does with the DC characters it owns.

It's this kind of control that can make powerful media executives feel small and weak. **Kevin Tsujihara**, who took over Warner Bros. in 2013, made groveling to Rowling at her home in Scotland his priority. Those efforts worked, leading to the *Fantastic Beasts* franchise extension, for which Tsujihara had to make key concessions, renegotiating her deal yet again and letting her write those screenplays—something she'd never done before. Tsujihara then took several victory laps, both internally and externally, until his exit in a 2019 sex scandal.

In that aftermath, **John Stankey**, the AT&T executive, made a point of having at least a basic relationship with Rowling, despite the unwritten rule to not let the ultra-stiff Stankey anywhere near creative people. Warner Media C.E.O. **Jason Kilar** communicated with her. And **Ann Sarnoff**, the Warner Bros. C.E.O. under AT&T's ownership, also traveled for an audience with Rowling; sources say Sarnoff's focus was a potential Potter TV show on HBO Max or another outlet. That wasn't of interest, and HBO executives never went beyond suggesting possible writers. It was kinda pointless without Rowling's endorsement.

This week I learned of another effort: Right before the pandemic in early 2020, **Toby Emmerich**, then running the Warners film studio, made a quiet trip to London to meet

with **Neil Blair**, Rowling's business partner and chief gatekeeper. Emmerich could see where things were going. The *Fantastic Beasts* movies, which were supposed to be the answer for the end of the wildly successful *Potter* adaptations, were... not exactly the answer. The first movie grossed \$814 million worldwide in 2016—big, but down more than \$500 million from *Deathly Hallows: Part 2* in 2011, and neither fans nor critics embraced it. Then *Fantastic Beasts: The Crimes of Grindelwald*, with **Johnny Depp** co-starring, dropped to \$654 million, with even worse reactions. A third film was in the works, but the question was who really wanted it.

So Emmerich brought up an idea that had been pitched before: A potential two-film adaptation of *Harry Potter and the Cursed Child*, the originally five-hour stage play that had become a smash success in London and on Broadway. With a story by Rowling and a hit pedigree, it would be a logical successor to the *Potter* movies in a way that *Fantastic Beasts*, with **Eddie Redmayne** as a new lead, never managed to become. And perhaps most important, *Cursed Child* is set 19 years after the events of the *Potter* books and includes as supporting characters the grown Harry, Hermione, and others, giving it a literal connection to what people loved about Rowling's world. The Potter fan community would go nuts.

Alas, Rowling and Co. weren't interested in *Cursed Child* movies, at least not then, which isn't too surprising. Lead stage producers **Sonia Friedman** and **Colin Callender** knew the life-cycle of a hit Broadway play, which is typically to milk the theater and touring and cruise ship grosses before greenlighting a film, a la *Wicked*. Plus, moving on to *Cursed Child* would have been an admission that *Fantastic Beasts* wasn't working, a tough pill for Rowling to swallow because she was so creatively involved. Then a few months after that meeting, Rowling was quasi-canceled after she doubled-down on anti-transgender comments, the *Potter* leads **Daniel**

Radcliffe and **Emma Watson** began distancing themselves from her, and later in 2020, Emmerich fired Depp from the third *Fantastic Beasts* after a U.K. court ruled that *The Sun*'s description of him as a "wife beater" of **Amber Heard** was substantially true. *Secrets of Dumbledore* came out this April, overshadowed in part by Depp's U.S. defamation battle with Heard. It grossed just \$405 million on a \$200 million production budget, the first of the 11 Rowling films to lose money.

So that's what Zaslav and his new film chiefs **Mike De Luca** and **Pam Abdy** are walking into here. Not great. *Fantastic Beasts*, which Tsujihara said would be a five-film franchise, is almost certainly dead after three. There are zero *Harry Potter* films or TV projects in development, meaning that even if Zaz charmed Rowling and closed a deal tomorrow, nothing would hit until probably 2025 or later. And Rowling herself is semi-radioactive: I don't think the average Potter fan would avoid her work because she's made hurtful comments about trans people and biological sex, but key talent might decline to work with her, and the media mostly treats her as toxic. (In 2020, *New York* magazine's The Cut called her "the most beloved, most reviled children's book author in history.") Even the framing on the trade stories last week around Zaslav's desire to do more with Potter was that he is pushing forward despite her diminished place in the culture.

But at the same time, the Potter property is alive and thriving everywhere *except* on screen. The books are still huge, as are games and consumer products and live experiences, like the wildly popular Leavesden attraction outside London. Warners profits from all that, as well as the Potter areas in the Universal theme parks, though it doesn't collect a piece of the gate at those parks, as some at Warners believe the studio should. And if your neighborhood was anything like mine on Halloween, it was filled with kids dressed as Rowling's characters. The demand for more Potter content is

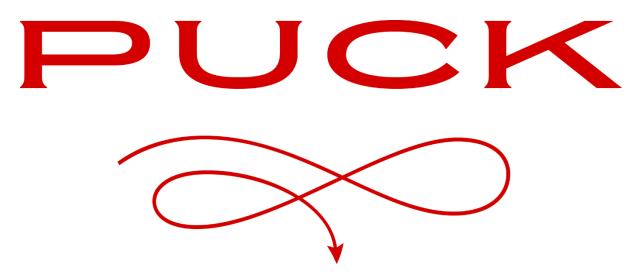
certainly there. Zaz knows that.

So how does he make it happen? According to two sources with knowledge of the deals, Warners has full adaptation rights for the seven *Potter* books, meaning Zaslav could simply order remakes of those movies. Who knows, maybe a new *Sorcerer's Stone* from a revisionist filmmaker would resonate nearly 25 years after the bland **Chris Columbus** original? (Fun fact: It's known that **Steven Spielberg** was interested in directing that first movie, and he developed it for awhile before stepping down; what's *not* known is that Warners eventually saved hundreds of millions of dollars when Spielberg walked, because he would have required the studio share the franchise with him, as Universal does with *Jurassic*.)

But as desperate as Zaz is for more Potter, remakes seem *extra* desperate. And doing so without Rowling's buy-in would nuke that relationship. They need her, and, as rich as she is, she needs them *less*. Never a good dynamic in which to take a risk on a partnership. The reality is that, no matter what Zaz wants or needs for WBD, the future of the franchise is almost entirely up to a creator with a complicated public persona and an iron grip on her property. Complicating matters is **Neil Blair**, Rowling's business partner, who keeps everything super controlled; it's often unclear to Warners people whether Rowling even gets the messages meant for her, or how they are relayed. And it's considered "suicide" to attempt to go around Blair, according to one studio source.

That's why the best move here for Zaz (and De Luca and Abdy) is to go hard after *Cursed Child* again, which I'm told by one source is part of the current plan. It's just sitting there, it's got all the characters and the generational torch-passing, and Rowling, after the failure of *Fantastic Beasts*, is at least incentivized to keep the property going as a film franchise.

Radcliffe, at 33, is still pretty young to play the adult Potter, and he's kinda sworn off revisiting his career-making role, regardless of the politics of Rowling. But maybe he has a price, and getting him on board would grease the wheels and help fans get over any qualms they have with Rowling. Even if they need to recast, it's worth it just to have Harry Potter on the marquee. Kiss Friedman and Callender in as producers if necessary. For Zaslav, and for the future of one of the great franchises, that seems like the best of a bad situation. © 2022 Heat Media All rights reserved.



Hollywood's Marvel-Disney Horror Story

Fifty years ago, Washington created a legal time bomb that allows the creators behind everything from Robocop and Beetlejuice to The Avengers multiverse to terminate their copyright grants and renegotiate. Welcome to the I.P. apocalypse.



Photo by Jeff Gritchen, Orange County Register/SCNG



April 18, 2022

I have a horror story to share. It's about *The Thing*, and the shapeshifting monster that promises to devour much of Hollywood. Studios are now bracing for mass casualties. But there's more to this bloody story.

This tale begins in the 1970s, when federal lawmakers added decades to the lifespan of copyrights. Sounds straightforward, but there was a twist. It was also decided that *authors* of copyrighted works (and their heirs) should enjoy the newly lengthened term rather than publishers and studios. Why? Congress knew that many creatives possess little bargaining power early in their careers and they often assign rights for very little. The idea was to give them a second bite at the apple. These creators would have to wait a while (35 years for works created after 1978; 56 years for older works), but once the ticking clock hits the mark, these individuals can terminate copyright grants and reclaim ownership.

Guess what? That clock is now running out for a plethora of properties, as my colleague **Matt Belloni wrote** this past week. Amazon shouldn't feel too bad about spending \$8.5 billion for a leaky I.P. studio like MGM, which is primed in the next few months to lose both *Robocop* and Hannibal Lecter, and then next year, *One Flew Over the Cuckoo's Nest, Hoosiers*, and *Logan's Run*. Indeed, a trip to the Copyright Office reveals that expiring rights are a growing phenomenon across the industry. According to records, Sony is facing termination on *Bad Boys* while Paramount is facing the situation on *Grease* and Belloni's all-time favorite movie, *Mommie Dearest*. Warner Bros. has received termination notices for *Nightmare on Elm Street*, *Beetlejuice*, and *Ace*

Ventura. Disney has *Mrs*. *Doubtfire*, *Who Framed Roger Rabbit?*, and partial ownership of most of the Marvel superheroes (more on that in a second). And outside the major studios, everything from the musical variety show *Soul Train* to the infamous '70s porn classic *Deep Throat* are in play.

Not all these franchises will end up reclaimed by script authors. What often happens this is especially common in the music industry—is that a termination notice becomes a prelude to a negotiation. The creator might agree to a new grant of rights to the studio (or record label or publisher) in exchange for a fatter royalty check. Or, sometimes, the studio will put up a fight, arguing that a property isn't eligible for termination for this or that reason.

No surprise, then, that this aspect of the entertainment industry invites the involvement of both dealmakers and litigators (not to mention **divorce lawyers** and **probate specialists**). For instance, on Friday, in a lawsuit alleging that Universal Music Group is systematically and improperly rejecting termination notices, recording artists asked a federal judge to certify a class action. **Here's the memorandum they filed**, helpfully forwarded to me by a keen observer. (I had already seen this one, but I nevertheless appreciate comments and tips. Email me at eriq@puck.news.)

All of this brings me to a Malibu lawyer named **Marc Toberoff**, who has made a career off of arguably knowing more about the termination provisions of copyright law than anyone else. Plus, quite importantly, he keeps a good calendar. He recently **scored a massive win**, representing *Friday the 13th* screenwriter **Victor Miller** in a landmark court battle against the horror franchise's producer **Sean Cunningham**. He successfully argued the screenplay was not a work made for hire and thus eligible for termination.

Toberoff is now seeking to achieve something similar for the heirs of some Marvel freelancers from the 1960s who helped create iconic characters such as Iron Man, Spider-Man, Dr. Strange, Ant-Man, Hawkeye, Black Widow, Falcon, Thor and others. Last September, Disney **filed suit in federal court** in an attempt to hold on to full control of Avengers characters, and it's no exaggeration to say that the outcome is worth billions of dollars.

Toberoff is a pretty unusual lawyer. **Just check out his IMDB page**, where he is a credited producer on the remakes of *I Spy*, *Piranha*, *Roots*, and most recently, *Hellraiser*. How did he pull this off? Well, he works on contingency, and that fee can be structured so he shares in his clients' copyright successes, meaning their post-termination licensing endeavors. He's now lawyer slash producer Marc Toberoff, thank you very much.

What will Toberoff's stake be if he beats Disney? I don't know the answer for sure, but I can surmise he'll end up becoming an important and controversial player. That's because I've been paying attention to *The Thing*.

Earlier this century, Toberoff achieved notoriety in a copyright termination fight over Superman. At one point in the long-running court battle, DC Comics filed claims against a company that Toberoff co-founded with Endeavor C.E.O. **Ari Emanuel** for allegedly manipulating the heirs of **Joe Shuster** and **Jerry Siegel**, and interfering with the comic studio's Superman contracts. A judge later ruled this claim had come too late, and Toberoff defended the contingency relationship at the time as "proper."

I mention this because Toberoff quietly filed his own suit last summer where *he* alleges tortious interference. Until 2018, Toberoff was representing the heirs of **John W**.

Campbell, **Jr**., who wrote the novel *Who Goes There?*, which was the basis for Universal's 1982 and 2011 horror films entitled *The Thing*. Toberoff was successful in recapturing the rights, and he took a 50 percent stake in the property thanks to his fee arrangement. Later, he alleges, Blumhouse Productions (the **Jason Blum** company that has overseen such horror hits as *Get Out*, *Paranormal Activity*, and *The Purge*) tendered a "lowball offer" to option those rights. Toberoff countered by requesting a portion of Blumhouse's profit participation from the lucrative deal it has with Universal. No dice.

What happened next, according to Toberoff's suit, is that several individuals got involved—including **Alan Donnes**, a small-time producer who once ran National Lampoon before dying in 2020—and they started making disparaging comments about him to his clients. It was all part of an "illicit scheme," Toberoff alleges, to manipulate his clients to fire him and remake *The Thing* with Blumhouse/Universal for a cheaper price.

Even by Hollywood standards, this is a pretty wild case—and a sign of how valuable even B-level I.P. is these days. In November, a Los Angeles judge rejected part of the suit and left some clues that Toberoff's remaining claims might ultimately not survive the statute of limitations. The dispute is now headed to a California appeals court.

Meanwhile, the Marvel heroes case is heating up. Disney is represented by **Daniel Petrocelli**, the same attorney who once successfully defended DC's continued ability to make Superman movies—and who is **currently representing CNN** against **Chris Cuomo**—and Toberoff has been privately updating Emanuel about it. Endeavor denies that it has a direct stake in the litigation over Iron Man and his buddies, although the company boasted in its first-ever amicus brief at the Supreme Court late last year that it has a "growing practice representing the estates and heirs of creators." (**Read here**.) Speaking up about a copyright termination situation, WME urged the high court to adopt an interpretation of "work for hire" that would benefit creators rather than studios (and would be a disastrous development for Disney and its new C.E.O. **Bob Chapek**). The justices declined to take up the case—probably a disappointment for the survivors of the termination apocalypse.

Disney and Toberoff will now litigate the issue of whether Marvel's freelancers contributed characters as works made for hire. That will entail an investigation into the 1960s-era working conditions for the comic house's authors and illustrators. Even if a district judge rules in Disney's favor that these characters are not eligible for termination, the battle will continue on appeal where Toberoff will insist that lower courts are using the wrong legal standards under old copyright law. How am I sure? That's exactly what happened a decade ago in his case involving comic book legend **Jack Kirby**. In fact, Petrocelli has *already* drawn in his firm's appellate attorneys to the newest case in anticipation of this coming stage of the fight.

Back in 2014, the Kirby termination case got to the Supreme Court's doorstep whereupon Disney settled it for tens of millions of dollars rather than take the small chance the justices would intervene. It's easy to imagine, with so much at stake, that Disney would make a similar offer.

But would Toberoff accept? That amount of money would be hard to turn down, and he certainly would have an obligation to proceed in his clients' best interests. Then again, the incentive of a lawyer working on contingency is a fascinating issue. And being a producer on a Marvel blockbuster has got to be awfully tempting.



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Hollywood

How the Publishing World Is Muscling In on Hollywood Deals: For Authors, "The Future Is Multihyphenate"

Books and magazine articles have long provided the IP Hollywood depends on, but until recently, authors played little role in the process. Now, lit agencies and publishers are changing the rules and shortening the page-to-screen pipeline.

BY SEIJA RANKIN 🕒 MAY 25, 2022 9:15AM



ILLUSTRATION BY NATHAN HACKETT

This June, when the Netflix film Spiderhead hits the streamer, something revolutionary will happen — but blink and you'll miss it. Before the opening scene of the dystopian drama starring Miles Teller, Chris Hemsworth and Jurnee Smollett, the New Yorker logo will appear on the screen. The script is an adaptation of a 2010 George Saunders short story, published in the magazine under the title "Escape From Spiderhead." The film was produced by Condé Nast Entertainment (CNE), one of the first major projects under the group's new president, studio veteran Agnes Chu.

Spiderhead's path to the screen is part of a new push to rethink the traditional page-to-screen pipeline — which insiders on both ends of the dealmaking equation say is meant to bolster the authors behind the IP Hollywood covets.

For decades, book agents would identify the upcoming titles on their publishing slates best fit for film or television, pitch to counterparts at the major Hollywood agencies, and then sit back as producers and film creatives picked the most promising projects and shepherded them the rest of way. "There had to be a better way to get authors a place at the table," says Todd Shuster, co-CEO of Aevitas Creative. The lit agency has developed several pipelines to secure more autonomy for authors and their representation, including a first-look deal with Anonymous Content that allows literary agents to serve as producers. One fruit of this union was the 2020 Netflix movie The Midnight Sky, adapted from the novel Good Morning, Midnight by Aevitas literary agency client Lily Brooks-Dalton. Directed by and starring George Clooney, the film reached Netflix's No. 1 spot in 77 countries, giving Shuster, who has a producer credit, the confidence that the model could work.

With fewer layers between the creators of the written stories in question and those calling the shots on the film or TV version, it's easier to preserve authenticity — something that today's increasingly devout literary fan bases require. And by serving as producers, agents are able to defend the authors' interest. Such deals allow them, for instance, to advocate for the authors themselves to work in a screenwriting capacity, something that's becoming increasingly common: Sally Rooney worked alongside former Succession scribe Alice Birch to create Normal People; Lisa Taddeo is in the writers room for Showtime's adaptation of her blockbuster Three Women; and Brandon Taylor penned the script based on his debut novel, Real Life, to which Kid Cudi is attached to star and produce.

There are strong economic and financial upsides for the publishing world. For agents, the possibility of getting in on screen development deals provides extra incentive to spend months or years revising proposals and manuscripts with their clients to make them ready to pitch to book editors. Authors, for their part, find that decreasing book royalties and often-paltry paychecks have forced them to look beyond <u>books</u> to make a decent living.

"The future is multihyphenate," says Liz Parker, head of Verve Talent Agency's publishing arm, which recently opened a New York office. The department sources books with an eye for adaptation and strives to help authors become full-fledged creators. Among other projects, Verve represents author Akwaeke Emezi for the adaptations of their novels You Made a Fool of Death With Your Beauty — developed by Michael B. Jordan's Outlier Society — and Freshwater, under development at FX. Emezi is an executive producer on the former show and a producer and writer on the latter.

Meanwhile, publishers like Condé Nast and Vox Media, which owns New York magazine (from which articles have been adapted for projects like Netflix's Inventing Anna), are building out inhouse production arms in hopes of bringing revenue into the beleaguered magazine industry,

and maybe even convert viewers into subscribers. CNE was created as part of the pivot-to-video strategy that many traditional magazines hoped would offset lagging newsstand sales and disappearing advertising dollars, and has since expanded into more ambitious Hollywood projects.

Chu, CNE's president, was hired from Disney+ with a mandate to be as proactive as possible with the IP from the magazine group's legacy brands like Vanity Fair, GQ, Vogue and The New Yorker. Her (largely female) team — including Chu's second-in-command, Helen Estabrook, whose producing credits include Damien Chazelle's Whiplash and Jason Reitman's Young Adult — scours lineups for big- and small-screen potential, often bringing stories to the development marketplace before they're published. Upcoming CNE projects include a documentary based on Wired's "A People's History of Black Twitter," by Jason Parham, and an unscripted adaptation of Vanity Fair's investigation into Hillsong pastor Carl Lentz's extramarital affairs, by Alex French and Dan Adler. A more prominent seat at the development table gives CNE more negotiating power to score big wins like the Spiderhead title card, which Chu hopes will strengthen brand identities for the magazines.

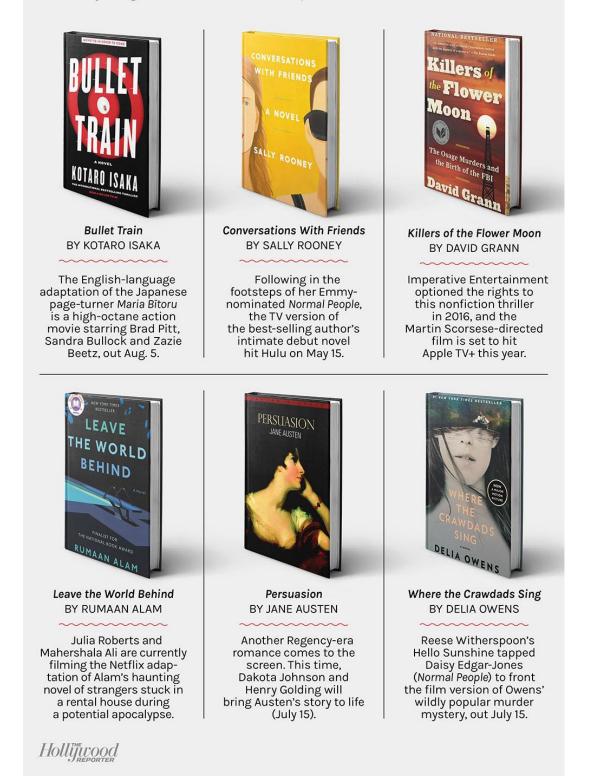
Yet the magazine writer's place in such option deals remains murky, because staff and freelance contracts often give publishers first dibs to option the work in their pages on terms advantageous to the publication. The next step? Getting magazine writers the same kind of autonomy book agents have carved out for novelists and nonfiction authors. CNE has a few yet-to-be-announced films in the works for which they're helping authors get involved in the screenplay. "We're showing writers that we have their backs, and that we're not just brokering the rights," Chu says. "We're actually adding creative value."

Another crucial element of this value-add is the way it can uplift creators of IP who have historically been underpaid or undersupported. Giving writers more creative control and financial rewards over the entire life of a story preserves the integrity of works that are often based on lived experiences. "We're in an age where there's a lot more sensitivity to authorial prerogative," says Aevitas' Shuster.

To be sure, everyone THR spoke with feels confident that the traditional page-to-screen pipeline will remain the norm. But there are now ever more opportunities for scribes to claim a share of Hollywood glamour, and — crucially — to reach a wider audience. "It's an attention economy right now," says Chu. "Everyone is competing for people's time."

The Year in Page-to-Screen Projects

Six standouts among the major books – new works, classic literature and everything in between – set for adaptation in 2022



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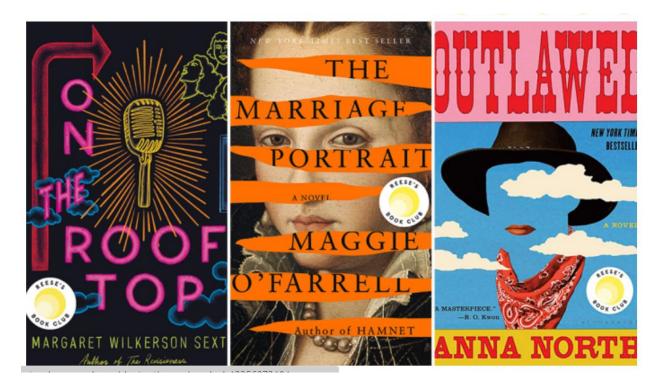


HOME > SHOPPING > NEWS

Apr 24, 2023 1:09pm PT

The Best Reese Witherspoon Book Club Recs: From 'Tiny Beautiful Things' to 'The Marriage Portrait'

By Anna Tingley ∨



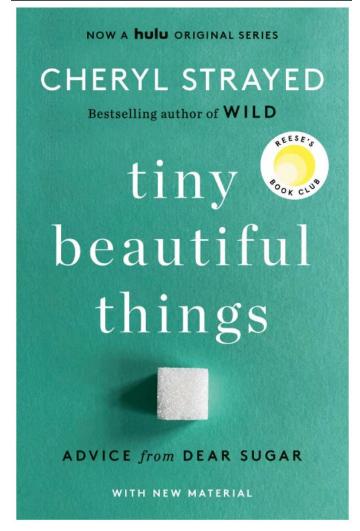
If you purchase an independently reviewed product or service through a link on our website, Variety may receive an affiliate commission.

Since <u>Reese Witherspoon's</u> production company <u>Hello Sunshine</u> got an infusion of capital in 2021, <u>north of \$900 million</u>, the actor-producer-entrepreneur's output has gone into overdrive. Last year alone, she produced suspenseful series "Surface" (<u>Apple TV+</u>), with Gugu Mbatha-Raw, and "Daisy Jones and the Six" (<u>Amazon</u>), starring Riley Keough, as well as features including the adaptation of Delia Owens' novel "Where the Crawdads Sing," the romcoms "Something From Tiffany's" and "Your Place or Mine," in which she stars opposite Ashton Kutcher, and the Netflix drama "From Scratch," starring Zoe Saldaña.

For book lovers, the most satisfying aspect of Witherspoon's projects is that they're all adapted from her favorite books which she adds on a monthly basis to a list called Reese's Book Club Picks. From novels to memoirs to collections of essays, the list runs the gamut in terms of plot and theme — but in every book, a woman is at the center of the story.

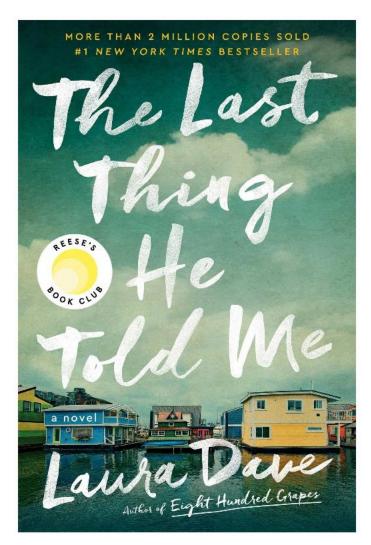
Check out a few of the most popular Reese Witherspoon picks below:

'TINY BEAUTIFUL THINGS' BY CHERYL STRAYED



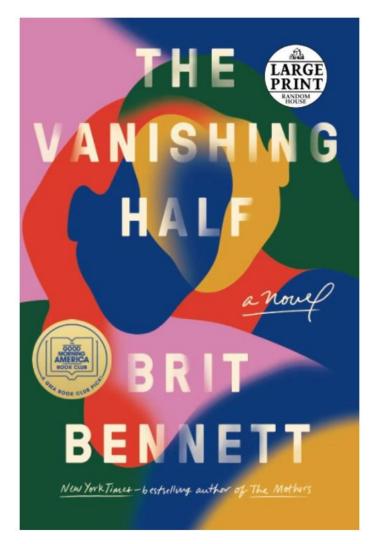
"Tiny Beautiful Things" is a collection of the best essays from Cheryl Strayed's wildly popular advice column "Dear Sugar." Including six new columns and a new preface, the book offers humor, insight, compassion and honesty to help readers navigate life's challenges. Through Witherspoon's production company Hello Sunshine, the bestselling book of essays has been adapted to a new <u>Hulu series</u> starring Katheryn Hahn.

'THE LAST THING HE TOLD ME' BY LAURA DAVE



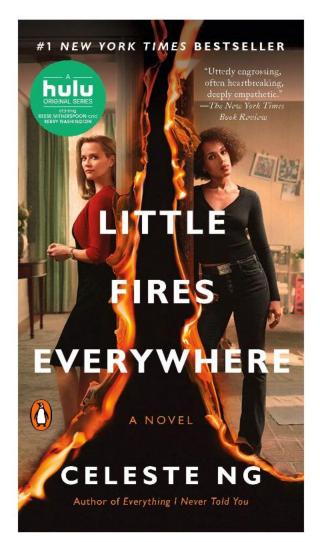
At the onset of this this page-turning thriller from Laura Dave, adapted to a limited series on <u>Apple TV+</u> starring Jennifer Garner, a woman named Hannah Hall receives a note from her husband asking her to take care of his daughter Bailey when he disappears. Despite her confusion and fear, she desperately attempts to contact him before federal agents come to her door and she realizes her husband's identity is not what he claimed. With the help of Bailey, who up until this point resented her stepmother, they investigate Owen's past and build a new future for themselves.

'THE VANISHING HALF' BY BRIT BENNETT



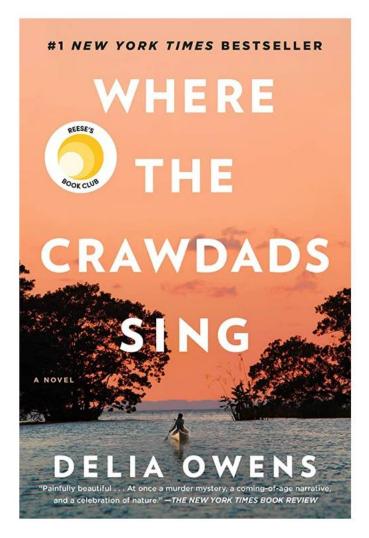
Brit Bennett's "The Vanishing Half" was one of the biggest books of 2020, and is now coming to the screen with Aziza Barnes set to write and produce the HBO adaptation. It tells the story of two identical twin sisters growing up in the Jim Crow South before escaping at 16 and pursuing divergent life paths. There have been no casting announcements for the highly-anticipated series yet.

'LITTLE FIRES EVERYWHERE' BY CELESTE NG



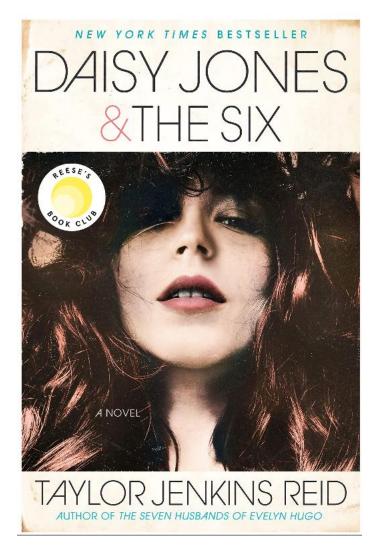
Witherspoon herself starred alongside Kerry Washington in the <u>Hulu adaptation</u> of Celeste Ng's acclaimed novel, which touches on themes of motherhood and the intensity of teenage love. The story follows an enigmatic mother-daughter duo who move into a new town and whose unconventional lifestyle threaten to shake up their community.

'WHERE THE CRAWDADS SING' BY DELIA OWENS



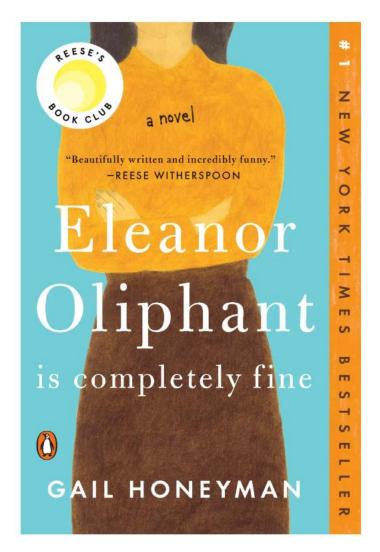
Delia Owens' best-selling novel, whose film adaptation is available to stream on Netflix, follows the wild and unkempt Kye, suspected of a mysterious murder in a quiet fishing village. In the film, Daisy Edgar-Jones stars as Kye, alongside Taylor John Smith and Harris Dickinson.

'DAISY JONES & THE SIX' BY TAYLOR JENKINS REID



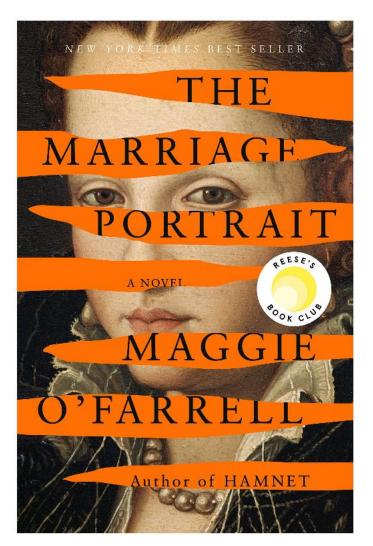
The rollicking drama-filled book by Taylor Jenkins Reid centers on a fictional rock band in the 1970s, loosely based off of Fleetwood Mac, following their rise through the ranks of the LA music scene and beyond, eventually becoming one of the most legendary bands in the world. The TV adaptation, available to stream on <u>Prime Video</u>, was in the works even before the book's 2019 release.

'ELEANOR OLIPHANT IS COMPLETELY FINE' BY GAIL HONEYMAN



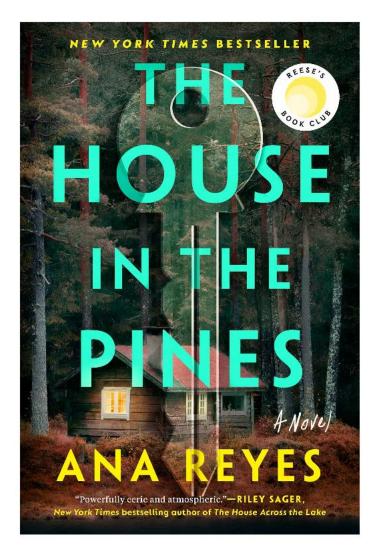
"Fleabag" director Harry Bradbeer will be directing a film adaptation of "Eleanor Oliphant Is Completely Fine," which became a bestseller for years after Witherspoon chose the book as a top pick in 2017. The story follows the socially awkward Eleanor whose life changes when she becomes friends with a deeply unhygienic IT guy that works in her office, rescuing each other from the isolation each of them had been living.

THE MARRIAGE PORTRAIT' BY MAGGIE O'FARRELL



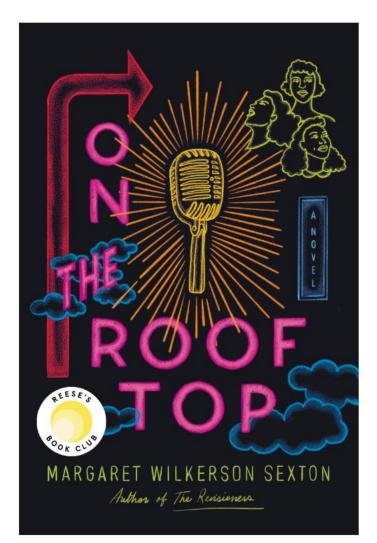
"The Marriage Portrait" tells the somewhat true story of Lucrezia di Cosimo de'Medici, forced at 15 to marry the older Alfonso II d'Este, Duke of Ferrara, in order to unite two powerful families. Alfonso takes her to a remote palace where she is subjected to totalitarian surveillance and control, a chilling saga that portrays a woman trapped in a web of power and deceit.

'THE HOUSE IN THE PINES' BY ANA REYES



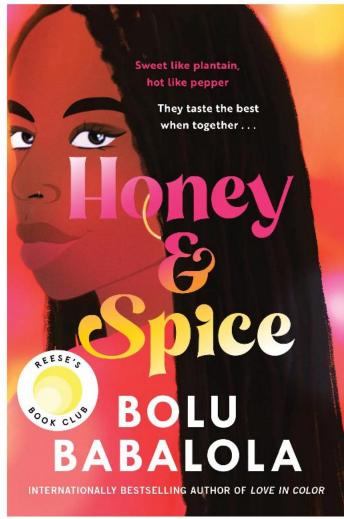
In Ana Reyes's suspense debut, a young woman is still haunted by the death of her childhood best friend. When she discovers a disturbingly similar incident, she must confront her own hazy memories and return to a cabin in the New England woods to unravel the truth that has eluded her for years. Armed with only her wits and determination, she delves deeper into the mystery and uncovers a chilling connection that threatens to shatter her world.

'ON THE ROOFTOP' BY MARGARET WILKERSON SEXTON



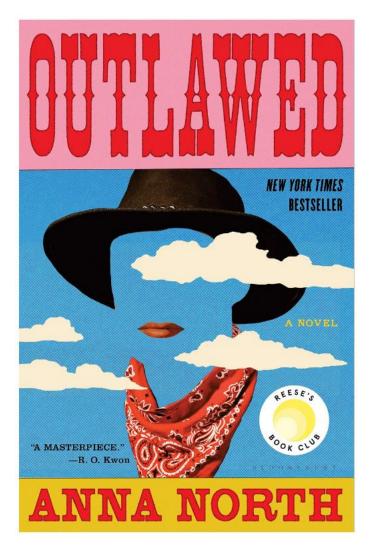
Set against the backdrop of a gentrifying San Francisco in the 1950s, "On the Rooftop" is a wholly original novel about a loving mother whose dreams of musical stardom for her three daughters clashes with their own ambitions.

'HONEY AND SPICE' BY BOLU BABALOLA



From the bestselling author Bolu Babalola, "Honey & Spice" is a dishy romp that offers up a page-turning and steamy romance between a college radio host and the campus playboy.

'OUTLAWED' BY ANNA NORTH



A fugitive 17 year-old girl named Ada thinks she's found her save haven when she finds an atypical gang that's made up of outcast women who have formed their own family outside of ordinary 19th century society. But when they hatch a treacherous, and possibly deadly, plan to solidify their group, she's forced to decide whether she's willing to risk her life for the possibility of a new kind of future for them all.



'Top Gun' Copyright Lawsuit Against Paramount Survives Dismissal

A federal appeals court has recently directed lower courts not to prematurely dismiss copyright suits based on lack of substantial similarity.

BY WINSTON CHO 🕒 NOVEMBER 10, 2022 4:05PM



'Top Gun: Maverick' courtesy of paramount pictures

A judge has refused to dismiss a copyright lawsuit from the heirs to the author of a 1983 magazine story that the original Top Gun was based on that accused Paramount of illegally shutting them out of the sequel.

U.S. District Judge Percy Anderson found on Thursday that the suit pointed to enough similarities between the story and <u>Top Gun: Maverick</u> to survive dismissal. "Defendant's primary argument in its Motion to Dismiss is that Plaintiffs have not sufficiently pled in their [complaint] that the Article and the Sequel are 'substantially similar,'" reads the order. "The Court disagrees."

Paramount acquired the film rights to Ehud Yonay's California Magazine story in 1983 immediately following publication. In June, <u>Paramount was sued</u> by the heirs to Yonay. Shosh and Yuval Yonay argued that they reclaimed their rights to the article under a provision in copyright law that allows authors to terminate licenses after waiting a period of time, typically 35 years. They said that the rights to the story reverted back to them in January 2020 after sending Paramount a notice of termination, but that the studio "deliberately ignored this, thumbing its nose at the statute."

Paramount has maintained that the sequel was "sufficiently completed" prior to the termination date. In a motion to dismiss the lawsuit, it also <u>stressed that the story</u> at issue is a nonfiction piece that shares no similarity with the "narrative action movie about a fictional veteran pilot." The Yonays countered with a list of more than 70 alleged similarities between the article and sequel.

Anderson sided with the Yonays in an order advancing copyright infringement, breach of contract declaratory relief claims. "Here, the Court finds that there are enough alleged similarities between the Article and the Sequel for reasonable minds to differ on the issue of substantial similarity, including the filtering out of unprotected elements," the order reads.

Dismissal in copyright suits typically turns on a comparison of the works' plots, themes, and characters, among various other factors, but the 9th Circuit U.S. Court of Appeals has recently turned to directing lower courts not to prematurely toss cases. In February, the federal appeals court <u>revived a lawsuit</u> against M. Night Shyamalan accusing him of ripping off a 2013 independent movie for his Apple TV+ series Servant. It found that dismissal at such an "early stage of the case was improper" because "reasonable minds could differ" on whether the stories are substantially similar.

"This is a case in which discovery could shed light on [the] issues that actually matter to the outcome," reads the order. "In particular, expert testimony would aid the court in objectively evaluating similarities in cinematic techniques ... determining the extent and qualitative importance of similar elements between the works, and comparing works in the different mediums of film and television."

In allowing the Yonays' lawsuit to proceed, Anderson pointed to the 9th Circuit disfavoring dismissals of lawsuits on the grounds of lack of substantial similarity at early stages of litigation. He concluded that "additional development of the factual record would shed light" on issues relating to whether the works are similar enough to constitute copyright infringement.

The judge also advanced a declaratory relief claim seeking an order that the sequel is a derivative of the article because it "largely rises and falls with Plaintiffs' copyright infringement claim." So does the breach of contract claim, Anderson found.

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Which Video Games Should Streamers Adapt? New Data Proposes Netflix 'Fortnite' Series, 'God of War' at Apple Over Amazon and More (EXCLUSIVE)

By Jennifer Maas ∨



Courtesy Images

Universal's "The Super Mario Bros. Movie," Paramount's "Dungeons & Dragons: Honor Among Thieves," HBO's "The Last of Us" and Netflix's "Arcane" are just the start of a new wave of movies and TV series based on popular video games and table-top gaming IP.

From "God of War" and "Warhammer 40,000" set up at Amazon Prime Video to "Twisted Metal" for Peacock, everyone wants a piece of gaming IP in the battle to gain new subscribers and reduce churn.

But instead of fighting for whatever is popular and hasn't already been adapted, new data provided by fan-community platform and entertainment company Fandom suggests what titles streamers including Netflix, Amazon and HBO Max should be focusing on based on the gaming fanbases of their respective subscribers.

These insights are based on Fandom's first-party platform, cross-visitation data pulled using its proprietary data platform FanDNA, and tracks Fandom's top 10 gaming wikis for fans of each streaming platform.

Per Fandom's findings, which are derived from behavioral data for Fandom's users vs. a study among a sample asking about attitudes and self reported information:

• Apple TV+ viewers WAY over index for God of War. There's a God of War series in the works already – but for Amazon Prime where it doesn't register in the top ten.

• Streamers should consider Starcraft or Half-Life adaptations. These are both decades-old franchises with huge followings, stronger-than-average narratives, and the opportunity for great visual effects.

• Dragon Age and Elder Scrolls could be sleeper hits for a streamer. Similar to The Witcher and Wheel of Time.

• Final Fantasy, Horizon Zero Dawn, Assassin's Creed, Fallout could be "serious" adaptations

• The Rainbow Six video games are based on Tom Clancy novels, which have long been a source for successful film & TV adaptations (Hunt for Red October, Jack Ryan.)

• Freddy Fazbear (from the Five Nights at Freddy's game series) popped up for Hulu — this series is very popular with Gen Z and it's been rumored WarnerMedia is working on a film adaptation already

• Some of these IPs were already films of varying degrees of success: Angry Birds, Doom, Resident Evil, Mortal Kombat

"We started thinking about how, right now, all of these streamers are trying to figure out what they can produce that's going to be unique and differentiated," Fandom CMO Stephanie Fried told Variety. "There's been a real focus on continuing existing franchises because there's this belief that you have a much bigger leg up. 'Super Mario Bros.' just came out and did huge numbers, likely due to the ability to lean on an IP that's been part of people's lives for a very long time.

"For a while, the way that this was happening was through comics, like Marvel and DC, and through books like 'Harry Potter.' And all of a sudden, gaming was the next place. There are so many games, different types of games. And we've seen all of the ones that have actually been developed into franchises on other screens that have been successful. And yet I feel like they've only tapped the surface there because comics and books have always been a little bit more connected, but now gaming, it's going both ways, both developing from a gaming franchise into TV movies and vice versa."

While several of the game titles that show up in these findings have already been adapted for screen — many by different platforms than the ones they align with best in the study — Fandom's data suggests "it's important for studios to consider what's a good content fit for specific platforms/streaming services, whether it's built from scratch, getting the rights to existing content or carving out a space to develop a different part of the franchise."

See below for the Fandom's data broken down by streamer. For example, Fandom found that visitors to the Peacock Wikis "are 37x more likely to engage with Angry Birds than other Fandom users; 29x more likely to engage with Sonic than other users; and so on."

Top Cross-Visitation for Peacock



Photo : Courtesy of Rovio Entertainment

- 1. Angry Birds 37x more likely
- 2. Sonic 29x
- 3. Just Dance 19x
- 4. Mario 14x
- 5. Everquest 12x
- 6. Pokemon 9x
- 7. Fallout 8x
- 8. Dragon Ball 8x
- 9. Minecraft 7x
- 10. Elder Scrolls 6x

Per Fandom: "Though we see things like 'Law and Order' and 'The Voice' get decent amounts of [traction], the top Peacock Wikis are actually animation, driving a lot of young gaming IPs to be the most cross-visited. With some of Peacock's top wikis being in the animated/kid-friendly category, this represents a potential opportunity for the streamer to focus on kid-friendly IPs as upcoming shows."

Top Cross-Visitation for Apple TV+



Photo : Sony / Amazon

- 1. God of War 282x
- 2. Megaman 256x more likely
- 3. Freddy Fazbear's 159x more likely
- 4. Magic the Gathering 72x more likely
- 5. Persona 5 51x more likely

Per Fandom: "Sci-fi and fantasy are among the most represented genres for Apple TV+ including 'For All Mankind,' 'See' and 'Foundation' (and not surprising to see that also represented in cross-visited games). While Apple TV+ had the fewest results of any streaming service, the crossover it did have was huge — representing a really big opportunity for this particular streamer."

Top Cross-Visitation for Paramount+



Photo : Deca Games

- 1. Dragonvale 46x more likely
- 2. The Forest 16x more likely
- 3. Stalker 16x more likely
- 4. Binding of Isaac: Rebirth 16x
- 5. Rainbow Six 12x more likely
- 6. Street Fighter 9x
- 7. Raft 9x
- 8. Dead Cells 8x
- 9. Disco Elysium 7x
- 10. Might and Magic 6x

Per Fandom: "On our site, Paramount trac is driven mostly by Nickelodeon content, which makes a lot of these first person shooter games all the more interesting. It's an opportunity for P+ to look at first-person shooter IPs for potential crossover hits."

Top Cross-Visitation for Amazon Prime Video



Photo : Courtesy of HoYoverse/Ufotable

- 1. Creatures of Sonaria 212x
- 2. Rainbow Six 14x
- 3. Dragon Age 10x
- 4. Doors Game (Roblox) 10x
- 5. Twisted Wonderland 8x
- 6. Call of Duty 6x
- 7. Half Life 3x
- 8. Merge Mansion 3x
- 9. Genshin Impact 1.5x
- 10. Plants Vs. Zombies 1.4x

Per Fandom: "Lots of variety on Amazon — which means they have many different genres of gaming they can lean into and are well positioned to take advantage of gaming IP crossovers. Creatures of Sonaria might come from something like Peanuts, but there are a few first person shooter games represented here, likely driven by more violent programming like 'Jack Ryan,' 'The Boys' and 'Invincible.'"

Top Cross-Visitation for HBO Max



Photo : Sony

- 1. White Wolf (roleplaying game company) 80x
- 2. Castlevania 45x
- 3. Starcraft 21x
- 4. Pillars of Eternity 18x
- 5. Horizon Forbidden West 17x
- 6. Harvest Moon 8x
- 7. The Last of Us which happened! 7x
- 8. Sims 7x
- 9. Cookie Run Kingdom 7x
- 10. Subnautica 6x

Per Fandom: "Not too surprising the channel that has 'Game of Thrones' and 'House of the Dragon' would cross perfectly with a game called White Wolf. Lots of genre/fantasy represented by HBO Max. Narrative-driven games like White Wolf and Horizon are big opportunities for HBO Max to continue to capitalize on the gaming IP crossover."

Top Cross-Visitation for Disney+

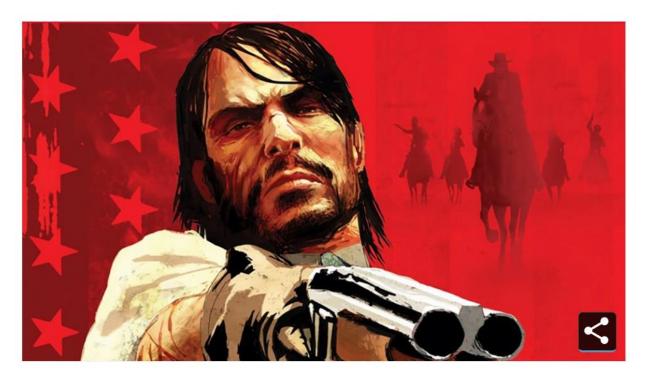


Photo : Courtesy of Rockstar Games

- 1. Megaman 161x
- 2. Sonic 25x
- 3. Poppy Playtime 23x
- 4. Dead Space 14x
- 5. Kirby 7x
- 6. Assassin's Creed 7x
- 7. Brawl Stars 5x
- 8. Undertale 5x
- 9. Grand Theft Auto 5x
- 10. Red Dead Redemption 4x

Per Fandom: "Interestingly, some of the results defy expectations a bit — some horror, some firstperson shooter, some combat. So while you may assume Disney's targets would all be familyfriendly IPs like Sonic, there's actually a lot of adult content here which opens a new door of possibilities for Disney+."

Top Cross-Visitation for Netflix



Photo : Courtesy of Epic Games

- 1. Fortnite 32x
- 2. Starcraft 31x
- 3. Dragonvale 18x
- 4. Mortal Kombat 16x
- 5. God of War 14x
- 6. Atomic Heart 8x
- 7. Stalker 8x
- 8. Phasmophobia 7x
- 9. Diablo 7x
- 10. Overwatch 4x

Per Fandom: "There is a gaming genre variety with Netflix — horror, shooter, action/adventure and battle royale — which opens the door for them to capitalize on some crossover IP hits. Netflix is also the home of 'Vikings,' 'Vikings: Valhalla' and 'Record of Ragnarok' so it's not surprising fans would lean into 'God of War' [and] more Norse content."

Top Cross-Visitation for Hulu



Photo : Square Enix

- 1. Kingdom Hearts 56x
- 2. Doom 13x
- 3. Freddy Fazbear 9x
- 4. Ace Attorney 8x
- 5. Romance Club 8x
- 6. Zelda 7x
- 7. Kirby 7x
- 8. Guilty Gear 6x
- 9. Final Fantasy 6x
- 10. Resident Evil 4x

Per Fandom: "Lots of sitcoms and light-hearted fare are driving Hulu trac on Fandom's site, so it's interesting to find Romance Club and Ace Attorney. 'American Horror Story' might drive horror games like Freddy Fazbear, too. And since 57% of fans say storyline & thematic elements of the game are key factors for them, procedurals like Ace Attorney could be a surprising target for Hulu."

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Why Amazon Spent \$8.5 Billion to Land MGM, and What's Next for the Studio Behind James Bond

By Brent Lang, Brian Steinberg



Courtesy of Nicola Dove/Danjaq/MGM

<u>Amazon</u> bought <u>MGM</u> for its history – but not necessarily its standalone future.

The e-commerce giant surprised Hollywood on Thursday by announcing the completion of its \$8.5 billion acquisition of MGM, an iconic Hollywood brand whose presence in the modern entertainment industry has diminished over time and numerous changes in ownership since the mid-1980s.

The Federal Trade Commission had suggested it might object to Amazon's purchase of MGM, raising the prospect of a long fight. On the heels of Thursday's closing announcement, the FTC still raised the threat of a future challenge to the combination.

Analysts expect the tech company to try and exploit MGM's best-known pieces of intellectual property for future gain - but don't believe the studio has a long path ahead as a separate, influential entity.

"The reason for the acquisition seemed like they were after the big titles, the intellectual property, which of course, first and foremost, meant the <u>James Bond</u> franchise," said Peter Newman, head of Tisch School of the Arts' MBA/MFA program at New York University.

For now, the expectation is that the bulk of MGM's roughly 800 staffers will move to Amazon, where the company will operate, at least initially, as an independent label. That includes the studio's motion picture group chairman Michael De Luca and motion picture group president Pamela Abdy, who have been credited with landing a group of buzzy projects. Amazon has not revealed a reporting structure, but the senior team of MGM will part of the organization that's led by Mike Hopkins, head of Prime Video and Amazon Studios.

If he remains, De Luca has deep relationships across the creative community that could be helpful to Amazon as it looks to bolster its content. At MGM, he landed Paul Thomas Anderson's "Licorice Pizza," Joe Wright's "Cyrano" and Ridley Scott's "House of Gucci," and is producing such upcoming projects as a remake of "Fiddler on the Roof," which will be directed by "Hamilton" wunderkind Thomas Kail, and "Project Hail Mary," an adaptation of "Martian" author Andy Weir's novel of the same name that stars Ryan Gosling. Of the films that have been released, "Licorice Pizza" scored an Oscar nomination for best picture, but lost money, as did "Cyrano" and "House of Gucci." "Dog," a \$15 million drama that was co-directed by and stars Channing Tatum and a film that De Luca greenlit, was a hit, earning \$50 million.

Barbara Broccoli and Michael G. Wilson, the producing team behind the James Bond series, have creative control over the movies and have made it clear that future 007 films will debut in cinemas. Analysts believe that it is Bond that drove Amazon's acquisition. The spy series continues to be popular and there's the potential that it could be built out to include shows and other spinoffs, although those would require the sign-off of Broccoli and Wilson.

"Hollywood is crazy over IP right now and Bond is one of the biggest ones there is," says Jeff Bock, an analyst with Exhibitor Relations. "In order to unlock its true potential though, there need to be TV shows and other ancillary properties. Purists may not like that, but you know what, those purists are on their way out."

Of course, Bond also is in a period of transition. The series wrapped up Daniel Craig's acclaimed run last year with "No Time to Die" and the keepers of 007 must now find a new actor to handle the role and to help continue to find ways to make the womanizing spy relevant in a changed world.

Beyond Bond, there are other ways that Amazon can get its money's worth. Over time, suggested

Newman, the MGM library will be used to drive Amazon's broader relationship with consumers, who already use the company to buy books, music, household goods and more. "While the MGM name is legendary, I don't know what the brand means to people under a certain age," he said.

Amazon is likely not to be as interested in traditional means of distribution that don't lend some boost to its broader commerce business, and is likely to focus heavily on marquee projects that will get consumers to keep a connection to the company through a Prime subscription.

Amazon is betting on MGM to help it move forward in Hollywood's streaming wars, in which victory hinges on attracting new subscribers, then keeping them as big entertainment projects ebb and flow. Wall Street has paid heavy attention to the number of consumers taking out new subscriptions to venues like Disney Plus, Peacock, Netflix and Paramount Plus. But Amazon's fortunes don't rise and fall based on its entertainment business. Amazon and Apple are perhaps the only two streaming combatants who have the luxury of knowing that "the content and entertainment are not the principal sources of revenue — not by a long shot," said Newman.

When Amazon started making its own in-house films, it initially embraced traditional theatrical distribution. But that has changed. Under Jennifer Salke, Amazon has more aggressively emphasized streaming, with films such as "Being the Ricardos" and "Coming 2 America" debuting on Prime. In the case of MGM, many of the movies that are in the works will have some form of exclusive theatrical release because that was part of their contractual agreements. It has yet to be decided, however, how long theaters will have an exclusive window on the MGM movies that have yet to debut and if they will align with the 45 days that most studios have embraced during the pandemic.

The hope is that Amazon can find franchises and pieces of intellectual property in MGM's library of 4,000 films that it can revive as feature films or spinoff shows. MGM controls the rights to the "Rocky," "Legally Blonde," "Stargate," "The Pink Panther" films, among others. Many of these titles have been relatively recently updated — "Rocky" has begat three "Creed" movies since 2015. "The Pink Panther" has been remade with Steve Martin filling in for Peter Sellers as the bumbling Inspector Clouseau.

On the television side, MGM has slowed down in recent years after coming back into the episodic series in a big way with hits like Hulu's "The Handmaid's Tale" and FX's "Fargo" anthology series. MGM also has several long-standing home entertainment distribution deals that must be honored, which could impact when the movies it makes land on Prime. The companies also have yet to decide how to capitalize on Epix, the cable network that MGM owns.

More details will emerge at a virtual town hall that will be held on Friday. But for now, many MGM employees seem relieved that the deal has finally closed even if they still have many questions about what it will mean for their jobs.

"At least now, maybe we'll get some clarity," said one MGM staffer.

Recent Big Media Mergers

Date Finalized	Companies	Value
June 2018	AT&T > Time Warner	\$85B
March 2019	Disney > Fox	\$71B
Q2 2023*	Microsoft > Activision Blizzard	\$69B
Q2 2022*	WarnerMedia > Discovery	\$43B
October 2018	Comcast > Sky	\$39B
Q2 2022*	Take-Two > Zynga	\$13B
December 2019	CBS > Viacom	\$12B
March 2018	Discovery > Scripps Networks	\$12B
August 2019	Sinclair > Fox Sports Networks	\$10B
March 2022	Amazon > MGM	\$8.5B
March 2021	Microsoft > ZeniMax	\$7.5B
Q1 2022*	Univision Holdings > Grupo Televisa	\$4.8B
2022*	Sony > Bungie	\$3.6B

SOURCE: VARIETY INTELLIGENCE PLATFORM ANALYSIS *ESTIMATED DATE OF DEAL FINALIZATION

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