Docudramas: The Legality of Producing Fact-Based Dramas - What Every Producer's Attorney Should Know

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by

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I

Introduction

“Docudrama. n. a fictionalized dramatization for television of an actual event or about a real person or people.”¹

A docudrama, by definition, would seem to be a contradiction. It is a hybrid of both fact and fiction. It is just this characteristic which may give rise to legal liability for those who produce fact-based dramas. This article is intended to set forth the potential liabilities such producers face, to define and discuss briefly the various causes of action available to plaintiffs who sue the media,² and to explore the practical solutions to limiting such liability.

A. Docudrama: A Popular Form of Entertainment

Since its inception, the docudrama has become an increasingly popular and profitable form of television entertainment.³ While the docudrama has had numerous critics since its earliest days,⁴ this has not seemed to hamper the media’s output or the public’s enthusiasm for the form. Docudrama is the presentation of choice whenever there is a sensational murder,⁵ titillating love triangle,⁶ heroic rescue,⁷ personal triumph,⁸ or event of historical importance.⁹ In a recent sweeps period,¹⁰

¹. Webster's New Universal Unabridged Dictionary 540 (2d ed. 1983); contrary to Webster's definition, the term docudrama has also been used to refer to fact-based theatrical features; in this article the term is used to include both, while the focus is on television productions.

². Throughout this article the term “media” will be used broadly to include television, theatrical film, and print publications.


⁵. See, e.g., Fatal Vision (NBC television broadcast, Nov. 18-19, 1984) (former green beret convicted of murdering his pregnant wife and two daughters); The Billionaire Boys Club (NBC television broadcast, Nov. 8-9, 1987) (greedy yuppies murder for money).

⁶. See, e.g., Love, Lies and Murder (NBC television broadcast, Feb. 17-18, 1991) (husband manipulates his daughter and his wife’s sister, who was also his lover, into killing his wife).

⁷. See, e.g., Everybody's Baby: The Rescue of Jessica McClure (ABC television broadcast, May 21, 1989) (heroic rescue of toddler trapped in abandoned well).

⁸. See, e.g., The Ryan White Story (ABC television broadcast, Jan. 16, 1989) (teenager with AIDS fought prejudice, discrimination, and misconceptions about the disease); Victims for Victims: The Theresa Saldana Story (NBC television broadcast, Nov. 12, 1984) (actress’ recovery from near-fatal attack by fan and founding of victims’ support group).

NBC's broadcast of *Love, Lies and Murder* placed second for the week, and ABC's first installment of the mini-series *And The Sea Will Tell*, a fact-based story of murder on the high seas, placed third for the week. Docudramas provide the public with a voyeuristic journey into the lives of celebrities and other people in the news—a catharsis—an opportunity to release pent-up emotions in an entertaining way. Thus, it is easy to see why they are so popular.

The aspects of docudramas which make them subject to liability are the “very characteristics that go to make up the docudrama—invented dialogue, impersonation and concocted scenes.” These characteristics are virtually a necessity unless the docudrama is based solely on trial transcripts. Elizabeth Taylor, who sued ABC to prevent the production of a docudrama based on her life, objected to the use of the form because of its inherent inaccuracies. She aptly stated that any telefilm based on her life would have to be fictionalized “unless there was somebody under the carpet or under the bed during my 50 years.” Because a certain degree of fictionalization is a necessary component of the docudrama, courts have given docudrama producers a great deal of leeway, based primarily on the free speech privilege afforded the media by the First Amendment. Media defendants may also raise defenses grounded in consent, privilege, and disclaimers. Although plaintiffs' prospects for winning lawsuits have been significantly reduced by the courts, plaintiffs continue to sue by alleging they have had their lives disrupted, feelings hurt, privacy invaded, reputations damaged or lost, or have suffered similar harm. Ultimately, the best defense against this type

10. “Sweeps period” is a period in which the network advertising rates are set for the following year based on the number of viewers tuned in during that period. Consequently, networks broadcast their most watched programs during that time.


17. *See, e.g.*, Davis v. Costa-Gavras, 654 F. Supp. 653, 658 (S.D.N.Y. 1987) ("Leeway is properly afforded to an author who thus attempts to recount a true event.").

18. U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .") The United States Supreme Court first acknowledged that motion pictures were entitled to First Amendment protection in *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501-502 (1952) ("The importance of motion pictures as an organ of public opinion is not lessened by the fact that they are designed to entertain as well as to inform. . . . [E]xpression by means of motion pictures is included within the free speech and free press guarantees of the First and Fourteenth Amendments.").
of litigation is diligent legal analysis and informed decisionmaking throughout the various phases of any project’s production.

B. Producing Docudramas

The idea for a docudrama may come from a newspaper article,\textsuperscript{19} magazine story,\textsuperscript{20} television news report,\textsuperscript{21} historical event,\textsuperscript{22} celebrity’s life,\textsuperscript{23} or book.\textsuperscript{24} Once a producer or development executive has expressed an interest in a particular subject, he or she needs to determine how to approach the subject matter of the docudrama. From a practical standpoint, there are two ways to approach producing a fact-based drama: by acquiring rights\textsuperscript{25} or by using public domain sources. Several factors should be considered when making this decision: from whom could the rights be acquired? Is that person likely to consent? Are there alternative sources for the rights? Are there laws which may affect acquisition of the rights? Are the rights still available? How costly will the rights be? Can the project be made without securing the rights? A major factor in this decision is the type of story the producer wishes to dramatize. It is more likely that the rights will be acquired when portraying a heroic or courageous story,\textsuperscript{26} recent news event,\textsuperscript{27} or authorized biography,\textsuperscript{28} than when the topic involves historical events,\textsuperscript{29} unauthorized bi-


\textsuperscript{20} See, e.g., \textit{The Longest Night} (ABC television broadcast, Sept. 12, 1972) (kidnapped heiress buried in underground enclosure).

\textsuperscript{21} See, e.g., \textit{I Know My First Name is Steven} (NBC television broadcast, May 22, 1989) (kidnapped boy raised by child molester); \textit{The Atlanta Child Murders} (CBS television broadcast, Feb. 10 & 12, 1985) (serial murders of children in Atlanta).

\textsuperscript{22} See, e.g., \textit{Washington: Behind Closed Doors} (ABC television broadcast, Sept. 6-11, 1977) (John Ehrlichman’s version of Watergate).


\textsuperscript{24} See, e.g., \textit{Missing} (Universal Pictures 1982) (journalist’s account of the death of an American in Chile during the violent coup); \textit{Murder in Texas} (NBC television broadcast, May 3-4, 1981) (sensational murder trial of prominent plastic surgeon accused of killing first wife; based on book by second wife).

\textsuperscript{25} Rights may be acquired from a number of sources, including the subjects of the drama, journalists, and investigators. This article will focus primarily on acquiring rights from the parties depicted.


\textsuperscript{28} See, e.g., \textit{Mayflower Madam} (CBS television broadcast, Nov. 15, 1987) (upscale prostitution service headed by Mayflower descendant Sydney Biddle Barrows); \textit{Mafia Princess} (NBC television broadcast, Jan. 19, 1986) (Antoinette Giancana’s account of her life as the daughter of a Chicago Mafia boss).
ographies of celebrities, or sensational crimes. Each approach has its advantages and disadvantages. This article will carefully analyze the potential risks of each method and will provide a foundation from which a producer may make informed decisions before entering into the development or production of a docudrama.

II

Potential Liabilities When Rights Are Not Secured

A. Introduction

Many of the lawsuits involving docudramas result from productions in which rights were not secured. The potential areas of liability for media defendants are defamation (libel), invasion of privacy, false light invasion of privacy, intentional infliction of emotional distress, right of publicity, and copyright infringement. The interests protected by these laws are both personality interests (e.g., reputation, privacy, emotional tranquility) and property interests (e.g., right of publicity, copyright). As a practical matter, suits sounding in libel law are substantially limited by virtue of the United States Supreme Court’s decisions in *New York Times Co. v. Sullivan* and its progeny; therefore, the primary risks lie in the privacy area. The celebrity plaintiff may have additional avenues available such as causes of action based on right of publicity and misappropriation. Finally, copyright infringement should not be overlooked; writers must be careful of the way in which source material is used. The following section will explore the evolution of these causes of action, evaluate the current status of the law, and analyze the impact of these rights on the production of docudramas.


32. From a practical standpoint, the distributors (e.g., networks, studios) and insurance companies will often dictate which route the producer must take; however, since both approaches are commonly used, this article will take the position that there is such a choice to be made by the producer.

33. Tort liability is a much more serious risk, as judgments can be very high (punitive damages are available), and foreseeability is not always possible. In contrast, lawsuits based on breach of contract run a lower risk of large judgments, as there are no punitive damages available, and such suits should be more foreseeable and avoidable.

34. 376 U.S. 254 (1964) (public official must prove defendant published with actual malice or reckless disregard of the truth).

35. Hansen, supra note 13, at 14.
B. Defamation Law: Libel

1. History and Development

Defamation law was developed to protect a person’s interest in his or her reputation—the way in which an individual is perceived by others. Under the common law, a plaintiff could win a libel suit by showing that a false and defamatory statement had been made and that he or she had suffered harm as a result. There was no requirement for culpability on the part of a defendant, and innocent violators were punished; it was a strict liability offense. In 1964, the United States Supreme Court constitutionalized libel law when it handed down its controversial decision in New York Times Co. v. Sullivan. The case involved an advertisement placed in the New York Times, which was a solicitation for money to support civil rights activities such as student protests, the struggle for voting rights, and the legal defense of Dr. Martin Luther King, Jr. The text of the advertisement criticized the Montgomery, Alabama Police Department. Although he was not specifically named in the ad, Montgomery’s Commissioner of Public Affairs subsequently sued for defamation. The Alabama Supreme Court upheld a verdict for the plaintiff. The United States Supreme Court reversed, holding that while the ad contained some inaccurate descriptions of events, it was a permissible publication. The Court reasoned that criticism of public officials and comment upon public issues is protected by the First Amendment, and a rule curtailing this freedom would have a “chilling effect” on the media:

A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions—and to do so on pain of libel judgments virtually unlimited in amount—leads to a comparable “self-censorship.” . . . Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so. . . . The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering

36. Defamatory statements by media defendants have been considered libel, rather than slander, even when orally uttered. Libel is the “publication” of a false statement. Exhibition of a film is considered to be a publication.
38. Id.
40. Id. at 256.
41. Id.
42. Id. at 264.
43. “The category of public officials includes not only those who are commonly classified as public officers but also public employees who exercise any substantial governmental power.” W.P. KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 113, at 806 (5th ed. 1984).
damages for a defamatory falsehood relating to his official conduct un-
less he proves that the statement was made with "actual malice"—that
is, with knowledge that it was false or with reckless disregard of
whether it was false or not.44

Media defendants were granted even greater protection by the Court
when it extended the "actual malice" standard created in New York
Times to include public figures.45 The standard of culpability applicable
for private figures was set forth in Gertz v. Robert Welch, Inc.46 in which
the Court held that a private figure could recover for defamation upon a
showing of mere negligence. The rationale for this lower standard was
that the plaintiffs had not "voluntarily exposed themselves to increased
risk of injury from defamatory falsehood,"47 and did not have access to
the media for rebuttal, and were therefore more vulnerable to injury and
more deserving of recovery. The Court's ruling allowed the states to set
any standard of fault with regard to private figures except strict liability
and maintained the "actual malice" standard for awarding punitive dam-
ages. In its most recent landmark case in this area, Philadelphia Newspa-
pers, Inc. v. Hepps,48 the Supreme Court held that when a defamatory
statement regarding a matter of public concern is published about a pri-
vate figure, the plaintiff has the burden of proving the falsity of the state-
ment in order to recover. By placing the burden on the plaintiff to prove
falsity, rather than on the defendant to prove truth, the Court further
expanded protection for media defendants in the area of defamation.

2. Current Standards for Liability

Libel is a false and unprivileged publication by writing, printing, pic-
ture, effigy, or other fixed representation to the eye, which exposes any
person to hatred, contempt, ridicule, or obloquy, or which causes him
to be shunned or avoided, or which has a tendency to injure him in his
occupation.49

This California libel statute is a representative model. While each
state has its own statute for defamation, the elements which are neces-
sary to prove defamation are basically the same. The fundamental re-
quirements are the following: (1) The statement must be a false

44. 376 U.S. at 279-80. In March, the Court affirmed its broad definition of "public offi-
cial" when it declined to reinstate a defamation action brought by a social worker whose life
had been destroyed by a "substantially false" news article. THE HOLLYWOOD REPORTER, Mar.
45. Curtis Publishing Co. v. Butts, 380 U.S. 130 (1967) (university coach held to be a
public figure; in a consolidated case, Associated Press v. Walker, a retired army general was
held to be a public figure).
47. Id. at 345.
statement of fact which may injure reputation, (2) the statement must be “of and concerning” the plaintiff, and (3) the requisite standard of culpability must be met (i.e., negligence in publishing the statement if the plaintiff is a private figure or actual malice or reckless disregard if the plaintiff is a public figure or public official). Each of these three elements must be proven in order for a plaintiff to recover.

The first element has two components: the statement of fact must be false and it must be defamatory. Dean Prosser defined a statement as defamatory if it “tends . . . to diminish the esteem, respect, goodwill or confidence in which the plaintiff is held, or if it tends to excite adverse, derogatory, or unpleasant feelings or opinions”50 about the plaintiff. What is or is not defamatory may vary among the jurisdictions; values and mores differ51 and, therefore, infallible predictions on this issue cannot be made. In some cases, however, the defendant will be able to argue that the plaintiff is “libel-proof” and therefore could not be defamed. This is particularly true when the plaintiff is a criminal.52

With regard to falsity, the vast majority of docudramas present a unique problem: scenes will be created and the dialogue, for the most part, will be invented. Therefore, statements uttered by the characters and imagined scenes are technically false. Most courts, however, hold that such “author’s license” is a necessary and appropriate use, and not actionable if the scenes contain the “essence of truth.”53 Another aspect of the tort is that the false statement be one of fact. In Gertz v. Robert Welch, Inc., the Supreme Court stated, “[T]here is no such thing as a false idea.”54 In other words, if the statement is an opinion, it is not actionable as a false statement of fact. Distinguishing between opinion and fact has often been difficult for courts; the standard applied is “whether the ordinary reader would perceive the statement as fact or opinion.”55 Courts interpreted Gertz as giving complete constitutional protection to opinions, making them not actionable. In June 1990, however, the Supreme Court withdrew this unlimited right and held that the

50. PROSSER, supra note 37, at 739.
51. Many media defendants can be sued anywhere, as the requirements for personal jurisdiction can easily be met (i.e., mass media has “minimum contacts” with all jurisdictions). Therefore, the success or failure of a defamation suit may depend on where it is brought.
52. See, e.g., Cardillo v. Doubleday & Co., 518 F.2d 638 (2d Cir. 1975) (book linking plaintiff to Mafia activities not actionable as plaintiff was in the federal penitentiary on numerous felony convictions).
55. Gerdes, supra note 14, at 37.
First Amendment does not require a special opinion privilege.\textsuperscript{56} Declaring that the passage from Gertz had been misinterpreted, the Court stated that it had not "intended to create a wholesale defamation exception for anything that might be labelled 'opinion.'"\textsuperscript{57} Instead, the Court explained, the culpability requirements and constitutional protections afforded media defendants via its previous decisions in \textit{New York Times}, \textit{Curtis Publishing Co.}, Gertz, and \textit{Philadelphia Newspapers} were sufficient to "ensure that debate on public issues remains 'uninhibited, robust, and wide-open.'"\textsuperscript{58}

As a result, the standards applicable to defamation claims based on factual statements are equally applicable to claims based on opinion statements. While the burden of proving falsity is on the plaintiff, and truth is an absolute defense to a claim of defamation, lengthy litigation could prove costly; hence, relying exclusively on this defense may be unwise.

The next element in a defamation action is that the false and defamatory statement must be "of and concerning" the plaintiff. This element is particularly relevant in the context of docudrama. Identification of the plaintiff as the character portrayed may be difficult. Docudramas often contain characters which are hybrids of actual people, known as composite characters, and the names of those characters may have been changed. Using composite characters can be particularly appropriate when the individual depicted is portrayed in a possibly defamatory manner. The object is to combine more than one person into one character and to blend their characteristics so much that "no one person can claim to be the one portrayed."\textsuperscript{59} Changing a character's name also may be useful to dispute this element, but it should not provide the producer with a false sense of security. In a controversial case regarding the "of and concerning" element, \textit{Bindrim v. Mitchell},\textsuperscript{60} a California court held that even a fictional character in a novel could be a defamatory portrayal if "a reasonable person, reading the book, would understand that the fictional character therein pictured was, in actual fact, the plaintiff acting as described."\textsuperscript{61} By allowing a plaintiff to prevail against an author of a fictional work, the court eliminated the need to prove fault—the pub-

\textsuperscript{57} Id.
\textsuperscript{58} Id.
\textsuperscript{59} Interview with Patricia Clifford, Executive Vice-President of Television, Interscope Communications, in Westwood, Cal. (Mar. 28, 1991).
\textsuperscript{60} 155 Cal. Rptr. 29 (Ct. App.), cert. denied, 444 U.S. 984 (1979) (writer attended a nude encounter therapy session led by plaintiff, then wrote a novel in which the nude therapist was portrayed as using vulgar language and making advances at patients).
\textsuperscript{61} Id. at 78.
lisher of a "novel" intentionally publishes something false. This application is a distortion of the *New York Times* standard, and the Supreme Court has yet to rule on the issue and clarify an appropriate standard for fictional works.

Another component of this analysis is that the portrayal must be believable in order to be actionable. This was the crucial distinction made in *Pring v. Penthouse International Ltd.*, in which the court held that although the plaintiff could be identified as the Miss Wyoming described in the Penthouse article, the article clearly depicted events which "could not reasonably be understood as a statement of fact." The case was dismissed on appeal for failure to show a false statement of fact. Hence, a motion for summary judgment is often successful at this stage of the proceedings if the defendant can show it is not reasonable to conclude that the plaintiff is the character portrayed or if the portrayal is not believable.

The final element to be proven is the requisite level of culpability on the part of the defendant—actual malice if the plaintiff is a public figure or official and negligence if the plaintiff is a private figure. The determination of the court of whether the complaining party is a public or private figure is crucial because a public figure or official has little chance of recovery. Obvious public figures include "prominent personalities, either in their sphere of employment or in their activities conducted in view of the general population." The more difficult category to classify are those people who have not voluntarily exposed themselves to the public eye but have become newsworthy because of a particular event. The Supreme Court has separated these two groups of people into general public figures and limited public figures. A general public figure is described as "an individual [who] may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts," whereas a limited public figure is "an individual [who] vol-

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62. 695 F.2d 438 (10th Cir. 1982) (Miss Wyoming's talent in the Miss America pageant was described as a performance of complex sexual acts while levitating her boyfriend and coach).
63. *Id.* at 441.
64. This classification is determined as a matter of law, and therefore the decision is made by the judge.
69. *Id.* at 351.
The limited public figure distinction has benefitted media defendants when historical events are dramatized years after their occurrence. A frequently cited example is *Street v. National Broadcasting Co.*, where one of the prosecuting witnesses in the famous Scottsboro Boys rape trial sued NBC over her portrayal in the network's docudrama. Although the telefilm was produced forty years after the events depicted, the Sixth Circuit held that "once a person becomes a public figure in connection with a particular controversy, that person remains a public figure thereafter for purposes of later commentary or treatment of that controversy." The court found no evidence of actual malice because the docudrama had been carefully researched and documented; thus, the ruling in favor of the defendants was affirmed. The public figure/private figure dichotomy was also applied to the docudrama context in *Davis v. Costa-Gavras*, in which the State Department and military personnel sued for defamation, alleging that in the film *Missing* they were portrayed as acquiescing in the murder of a United States citizen in Chile. The plaintiffs were deemed to be public figures, and therefore the “actual malice” standard of *New York Times* was required. The case was subsequently dismissed on a motion for summary judgment because the district court concluded that the plaintiffs did not have clear and convincing affirmative evidence of actual malice.

One final consideration in assessing potential liability is whether the person depicted is living or dead. There is no cause of action in defamation for a deceased person. Consequently, docudramas depicting the lives of deceased celebrities are only at risk from the secondary living characters portrayed. This may account for the abundance of biographical docudramas produced shortly after a celebrity's death.

As a practical matter, most docudrama portrayals of major characters fall within the public official or public figure categories. After all, if the individual was not at least a limited public figure, why would the network produce the telefilm? Therefore, for a plaintiff to succeed, he or

70. *Id.* This distinction is also relevant in the area of invasion of privacy, discussed *infra*, notes 79-126 and accompanying text.
71. 645 F.2d 1227 (6th Cir. 1981).
72. *Id.* at 1235.
73. *Id.* at 1235.
75. *Id.* at 1386.
she would have to prove actual malice or reckless disregard of the truth. This is virtually unprovable in the television docudrama context. The networks' clearance processes are thorough and provide ample evidence to rebut a claim of recklessness. Consequently, due to the difficult obstacles for plaintiffs in defamation actions, there has been a rise in litigation in other areas of tort law such as invasion of privacy, false light invasion of privacy, right of publicity, and misappropriation.

C. Invasion of Privacy

1. History and Development

In the late nineteenth century, two legal scholars wrote what is considered to be “one of the most famous and influential law review articles ever published. . . . [I]t single-handedly started a new field of law in the United States.” The scholars were Louis Brandeis and Samuel Warren, and the new field of law was privacy. Warren and Brandeis were concerned about the increase in “yellow journalism” and the new technologies which made it easier to invade “the sacred precincts of private and domestic life . . . .” The press had free reign to publish private, embarrassing information about people, and there was no legal remedy available. Brandeis and Warren asserted that people had “the right to enjoy life—the right to be let alone,” and therefore there must be a remedy because the “press is overstepping in every direction the obvious bounds of propriety and of decency.” The interest sought to be protected was “the right to be let alone,” an interest distinctly different from the interest in one's reputation protected by defamation law.

The impact of the Brandeis and Warren article was not immediately apparent. However, two cases decided in the early twentieth century led to the legal recognition of this concept of privacy. In 1902, Abigail Robinson sued Rochester Folding Box Company for using her photograph in

77. Sobel, supra note 4, at 6. See discussion on Script Clearance infra notes 351-63 and accompanying text.
78. Hansen, supra note 13, at 14.
82. Warren & Brandeis, supra note 80, at 195.
83. In the event that the information published was true, defamation was not an available cause of action.
84. Warren & Brandeis, supra note 80, at 193.
85. Id. at 196.
advertisements for their flour. Roberson claimed that the ad had humiliated her and resulted in physical illness which had left her confined to bed. In a 4-3 decision, the New York Court of Appeals denied her relief, holding that there was no law under which relief could be granted. The decision led to a "storm of public disapproval" which resulted in the New York Legislature's enactment of the nation's first right of privacy statute:

A person, firm or corporation that 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 person... is guilty of a misdemeanor.

Although this statute only covered advertising uses, it was the first step toward the codification of the right of privacy.

Three years later, the Georgia Supreme Court became the first court to acknowledge the law of privacy. In Pavesich v. New England Life Insurance Co., the plaintiff's photograph had been used in the defendant's advertisement for life insurance. The ad was a "before and after" look at two men: plaintiff was featured as the "before" client above the caption: "In my healthy and productive period of life I bought insurance... and to-day my family is protected..." The plaintiff never had a policy with the company, and he complained of ridicule, invasion of privacy and libel. The Georgia Court recognized a common law right to privacy, which has "its foundation in the instincts of nature...[and] is therefore derived from natural law."

Thereafter, the right of privacy evolved in many directions throughout the United States and more narrow subparts under the general category of invasion of privacy were created. In 1960, the body of case law and statutory law which had developed was organized by Dean Prosser in his influential law review article Privacy. Prosser proposed a four-part scheme, which was later adopted by the Restatement of Torts and most courts. The four separate privacy categories Prosser outlined are the following:

87. Id. at 878.
90. 50 S.E. 68 (Ga. 1905).
91. Id. at 69.
92. Id. at 69-70.
93. Privacy, supra note 88.
94. McCarthy, supra note 79, § 1-2.
95. Prosser, supra note 37, at 804-14.
1. Intrusion upon the plaintiff’s seclusion or solitude, or into his private affairs.96
2. Public disclosure of embarrassing private facts about the plaintiff.
3. Publicity which places the plaintiff in a false light in the public eye.
4. Appropriation, for the defendant’s advantage, of the plaintiff’s name or likeness.

These torts offer protection previously unavailable to the plaintiff who is suing the media and must be carefully considered by producers depicting living real people.97

2. Public Disclosure of Private Facts

The tort that Brandeis and Warren were concerned about is embodied in Prosser’s second type of privacy, that which involves public disclosure of embarrassing facts. Prosser provides a three-part test for this tort:

1. There must be a public disclosure of private facts;
2. The facts disclosed must be private facts; and
3. The matter made public must be one which would be offensive and objectionable to a reasonable man of ordinary sensibilities.98

As applied to the docudrama context, the first prong of the test would not be at issue. A television broadcast is indisputably public. With regard to the second prong, Prosser indicated that “anything visible in a public place” had been held to be public,99 as well as matters of public record.100 The questionable cases typically arise when undesirable facts, long forgotten, are brought back to the public’s attention. The leading case on this issue is Melvin v. Reid101 (a.k.a. The Red Kimono case), in which the plaintiff, who was once a prostitute and a defendant in a notorious murder trial, had been rehabilitated and led an exemplary life after her acquittal. Seven years after the trial, the defendant produced a film, The Red Kimono, based upon the actual events—in essence a docudrama—using the plaintiff’s real name. The release of the film ru-

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96. The first type of tort deals primarily with physical intrusions, such as police searches, and therefore further discussion is beyond the scope of this article.
97. As with defamation, invasion of privacy does not survive the death of an individual. Lugosi v. Universal Pictures, 603 P.2d 425 (Cal. 1979). California law grants the deceased personality’s assignee or statutory successor the exclusive right of publicity in the deceased celebrity’s name, voice, photo, likeness, etc., for advertising and selling uses. CAL. CIV. CODE § 990 (West 1992). However, literary and dramatic uses are specifically exempt, thereby making this statutory right inapplicable to the docudrama.
98. PROSSER, supra note 37, at 809-12.
ined her life by revealing her past to the world and her friends.\textsuperscript{102} The court found this to be an actionable claim for invasion of privacy because it was an unnecessary intrusion.\textsuperscript{103}

The types of revelations which violate the third prong are measured by an objective "reasonable person" standard. In order to be actionable, the facts revealed must be more than merely trivial, and the publication must be highly objectionable or offensive and "unrelated to any legitimate public interest."\textsuperscript{104} Therefore, the plaintiff, a former child prodigy who later led a secluded life, was not able to recover, even though an article revealing his present life was emotionally devastating to him.\textsuperscript{105}

While the court felt that \textit{New Yorker Magazine}'s article about the plaintiff was a merciless exposure with little apparent object but that of pandering to the curiosity of the public, it acknowledged that the mores of the community are such that "the misfortunes of and frailties of neighbors and 'public figures' are of considerable interest . . . to the rest of the population."\textsuperscript{106} Although the court ruled in favor of the defendant, it articulated a standard beyond which the media may not proceed: a publication would not be protected if it made "revelations . . . so intimate . . . and unwarranted . . . as to outrage the community's notions of decency."\textsuperscript{107} This standard has been widely recognized by the courts and often cited.\textsuperscript{108}

Once evidence supporting the three factors has been established, the court is faced with balancing the conflict between the interests of the media to publish newsworthy information, as protected by the First Amendment, and the rights of individuals to keep their private facts from public view.

Nondefamatory portrayals are protected from liability if they are deemed newsworthy or in the public interest, if they are partially informative, or if they possess artistic merit . . . . As a result, the First Amendment is the predominant factor in determining the scope of an individual's right to sue the media for portrayals that impinge upon his privacy.\textsuperscript{109}

\begin{itemize}
\item \textsuperscript{102} \textit{Prosser, supra} note 37, at 809.
\item \textsuperscript{103} \textit{Melvin,} 297 P. at 91.
\item \textsuperscript{104} \textit{Mayer, supra} note 66, at 160.
\item \textsuperscript{105} Sidis v. F-R Publishing Corp., 113 F.2d 806 (2d Cir. 1940), aff'd 34 F. Supp. 19 (S.D.N.Y. 1938) (Sidis graduated from Harvard at 16, and as an adult lived a menial life).
\item \textsuperscript{106} \textit{Id.} at 809.
\item \textsuperscript{107} \textit{Id.}
\item \textsuperscript{108} \textit{See, e.g., Leopold v. Levin,} 259 N.E.2d 250, 256 (Ill. 1970) (plaintiff pleaded guilty to the kidnapping and murder of a 14-year old boy; the crime attracted international attention).
\item \textsuperscript{109} Peter L. Felcher \& Edward L. Rubin, \textit{Privacy, Publicity and the Portrayal of Real People by the Media,} 88 \textit{Yale L.J.} 1577, 1585 (1979).
\end{itemize}
The issue then becomes clearer: under what circumstances does the balance tip in favor of the First Amendment, and therefore the media, and when are the rights of the individual greater?

When balancing that equation, the courts consider whether the plaintiff is a public or private figure and the length of time which has elapsed since the public event occurred. These two concepts are interrelated. An individual may be a public figure at the time of a newsworthy event but may regain private figure status by being out of the public eye for a certain period of time.110 While the courts have substantially limited a public figure's right of privacy, reasoning that "they have sought publicity and consented to it; . . . their personalities and their affairs already have become public . . . [and] the press has a privilege, guaranteed by the Constitution, to inform the public about those who have become legitimate matters of public interest,"111 persons who have regained their status as private figures do have legal recourse. This is particularly relevant when disclosure of an individual's previous criminal history is made. There is a strong public policy to rehabilitate people, allowing them to lead respectable lives without the fear of having their past mistakes splashed across the headlines. The Red Kimono case is often cited for this proposition,112 as is Briscoe v. Reader's Digest,113 in which Reader's Digest published an article about the theft and highjacking of trucks on America's highways. The article mentioned a truck highjacking and subsequent police battle with the thief, Marvin Briscoe, but failed to disclose that the event had occurred eleven years earlier. In fact, Briscoe had been rehabilitated and was living an exemplary life when the article revealed his previous crime to his family and friends and subjected him to scorn and abandonment. The court allowed recovery, stating that Briscoe "has assumed a position in 'respectable' society. . . . The rights guaranteed by the First Amendment do not require total abrogation of the right to privacy,"114 and it was unnecessary for the article to mention Briscoe's name and reveal his identity.

In contrast, courts have held that some former criminals achieved such notoriety that they will never be able to regain private figure status with regard to those events. For example, NBC broadcast a dramatization of the events surrounding the highly publicized pardon of convicted

111. Privacy, supra note 88, at 826.
112. Melvin, 297 P. at 97 ("Where a person who has by his own efforts rehabilitated himself, we, as right-thinking members of society, should permit him to continue in the path of rectitude rather than throw him back into a life of shame or crime.").
113. Briscoe, 483 P.2d at 36.
114. Id. at 41-42.
murderer Charles Bernstein and the journalist who helped win his freedom.\textsuperscript{115} As in the cases of \textit{Melvin} and \textit{Briscoe}, Bernstein had “lived an exemplary, virtuous, honorable . . . and private life . . . and made many friends who were not aware of the incidents of his earlier life.”\textsuperscript{116} However, in holding in favor of the defendant, the court was able to distinguish this case from those with contrary holdings. In both \textit{Melvin} and \textit{Briscoe} the publication used the real name of the plaintiff, whereas NBC had used a fictitious name and the facts were “sufficiently changed” to conceal the plaintiff’s identity.\textsuperscript{117} In dealing with the issue of newsworthiness, the court held:

\[\text{[A]s a matter of law . . . a criminal proceeding widely publicized for a period of at least eight years and containing elements of decided popular appeal does not lose its general public interest in a period of four years or even twelve years; hence, republication in a reasonable manner was privileged.}\textsuperscript{118}

The court compared the facts of this case to \textit{Sidis v. F-R Publishing Corp.}, stating that there was a legitimate public interest in information which “might be of current public value in pointing out to parents the unhappy results of forcing a child prodigy into public notoriety.”\textsuperscript{119}

Another example where recovery was denied was in \textit{Leopold v. Levin},\textsuperscript{120} where the Illinois Supreme Court held that a novel and subsequent film “suggested” by the crime of the plaintiff did not violate his right of privacy with regard to “matters associated with his participation in that completely publicized crime.”\textsuperscript{121} Although the plaintiff’s name was not used in the novel, the defendants could not succeed in claiming the plaintiff was not the character depicted; the hardcover jacket sleeve read, “This book is a novel suggested by what is possibly the most famous and certainly one of the most shocking crimes ever committed in America—the Leopold-Loeb murder case.”\textsuperscript{122} Instead the defendant won on the newsworthiness argument. The court stated that

\textsuperscript{115} \textit{The Big Story}, telecast Jan. 18, 1952, reenacted Charles Bernstein’s story, which was highly publicized from his conviction in 1933 until his release in 1940. Although his real name was not used, the name of the reporter who helped him, Martha Strayer, was used. NBC promoted the program as “from the front pages of the Washington Daily News comes the Big Story of reporter Martha Strayer, as she wrote it, as she lived it. A story of an innocent man in death row marking days off a calendar—and a reporter’s fight to save his life.” Bernstein v. National Broadcasting Co., 129 F. Supp. 817, 819 n.6 (D.D.C. 1955).

\textsuperscript{116} Id.

\textsuperscript{117} Id. at 836.

\textsuperscript{118} Id. at 835.

\textsuperscript{119} Id.

\textsuperscript{120} 259 N.E.2d 250 (Ill. 1970); \textit{See also} Street v. National Broadcasting Co., 645 F.2d 1227 (6th Cir. 1981) (portrayal of key witness in Scottsboro Boys trial 40 years after the event not invasion of privacy as event still newsworthy).

\textsuperscript{121} \textit{Leopold}, 259 N.E.2d at 255.

\textsuperscript{122} Id. at 252.
"[a] strong curiosity and social and news interest in the crime, the prosecution, and Leopold remained. It is of some relevance, too, in this consideration, that the plaintiff himself certainly did not appear to seek retirement from public attention. The publication of the autobiographical story and other writings and his providing interviews unquestionably contributed to the continuing public interest in him and the crime."123

Even in a more sympathetic scenario, where victims of a notorious crime sought recovery for invasion of privacy, such relief was denied because they were deemed still to be newsworthy.124 The case involved a review of a Broadway play "inspired" by the Hill family's ordeal as hostages in their home at the hands of three escaped convicts.125 The Supreme Court held that, although the family members had not voluntarily injected themselves into the public eye they had become public figures and therefore had a diminished amount of privacy. Although the case did not turn on the issue of public versus private figures, it is an important case because it was the first time the Court applied the dual standard analysis to the tort of invasion of privacy.126

When evaluating the possible liability for invasion of privacy claims arising from public disclosures in the docudrama context, producers must consider whether the disclosed facts are private (or previously disclosed to the public or a matter of public record), whether the facts would be highly offensive to the average person, whether the event depicted is newsworthy (taking into account the length of time since its occurrence and the nature of the event), and whether the person depicted is a public or private figure.

D. False Light

Dean Prosser labelled the third type of privacy tort as false light invasion of privacy. Prosser described this offense as "publicity that places the plaintiff in a false light in the public eye."127 For example, a false statement attributed to the plaintiff in a news article,128 a tabloid

123. Id. at 255.
125. The play, loosely based on the Hills' ordeal, was performed three years after the event. Life Magazine's review of the play mentioned their names, although they had not consented to the play nor been interviewed. The fictionalized version depicted the family as being subjected to violence and abuse by their captors, when in fact the Hills were treated very well.
126. The decision was grounded primarily in a claim for false light invasion of privacy, which is discussed infra.
127. Privacy, supra note 88, at 813.
128. Cantrell v. Forest City Publishing Co., 419 U.S. 245 (1974) (news article described plaintiff's demeanor and attributed thoughts to her when in fact the interviewer never met her).
asserting a relationship between a producer and an actress, and a completely fictionalized biography all were held to constitute this tort. Courts have had difficulty defining this tort because there is some dispute about its underlying purpose. Legal scholars disagree whether this tort is related to defamation or invasion of privacy. The view adopted by a court is critical to the legal analysis which follows it. Therefore, the competing philosophies will be explored.

Dean Prosser viewed false light as akin to defamation, stating that "[t]he interest protected is clearly that of reputation, with the same overtones of mental distress as in defamation." Prosser saw this tort as providing a needed remedy which could be expanded "beyond the narrow limits of defamation." The primary distinction between defamation and false light is that in a claim for false light the plaintiff does not have to prove that the statement was defamatory. Instead, the plaintiff need only show that he or she was placed in a false light before the public and "(a) the false light in which the [plaintiff] was placed would be highly offensive to a reasonable person, and (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the [plaintiff] would be placed."

The United States Supreme Court decided its first false light claim in *Time, Inc. v. Hill*. This case involved a family who had been held hostage in their home by three escaped convicts. *Life Magazine* published a review of a Broadway play "inspired" by their story. The article inaccurately stated that the family had been subjected to violence and abuse at the hands of the convicts. The Court held that false statements about matters of public interest are inevitable and, unless published with "knowledge of its falsity or in reckless disregard of the truth," they are not actionable. The Court's rationale follows:

We run a grave risk of serious impairment of the indispensable service of a free press in a free society if we saddle the press with the impossible burden of verifying to a certainty the facts associated in news articles with a person's name, picture or portrait, particularly as related to nondefamatory matter.

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129. Fellows v. National Enquirer, Inc., 721 P.2d 97 (Cal. 1985) (tabloid labelled happily married producer as "new man in [Angie's] life" when he was photographed next to Angie Dickinson at a restaurant; in fact, he had never met her).


132. *Id.* at 815-16.


134. 385 U.S. 374 (1967).

135. *Id.* at 388.

136. *Id.* at 389-90.
Therefore, if the subject of the publication was a matter of public interest, the Court mandated the application of the *New York Times* actual malice standard to false light claims. Hence, the issue in docudramas is whether the use of invented dialogue and created scenes is knowing falsity or reckless disregard of the truth. "A limited degree of inaccuracy, falsity, fictionalization, or dramatization is usually permissible without giving rise to a false light privacy action."\(^{137}\) For example, Rasputin's murderer sued CBS when it broadcast a play reenacting the events surrounding the Russian monk's assassination.\(^{138}\) The plaintiff's complaint alleged falsity through manufactured dialogue and fictionalized events. The court, however, granted summary judgment for the defendant, finding no violation of the plaintiff's reputation or personality interests.\(^{139}\)

For some legal scholars, however, classifying false light claims as the equivalent of defamation is incorrect because it is not the truth or falsity of the statement which is the issue. Instead, it is argued, it is the publication of the statement itself which is actionable because the resulting harm is due to the "mental stress from having been exposed to public view."\(^{140}\) Professor Nimmer, for example, viewed false light as derivative of the true facts disclosure tort. He wrote:

> Once the false light cases are understood as a logical, even a necessary, extension of the private facts cases, the fallacy of equating the false light cases to defamation actions becomes apparent. The injury to the plaintiff's peace of mind which results from the public disclosure of private facts may be just as real where that which is disclosed is not true. It would be absurd to hold that the publication of an intimate fact creates liability, but that the defendant is immunized from liability (though the injury to plaintiff's peace of mind is no less) if the intimate "fact" publicly disclosed turns out not to be true, thus putting a premium on falsehood.\(^{141}\)

Furthermore, Nimmer asserted that if the statements presented, if true, would not invade the plaintiff's privacy, then no cause of action for false light should arise. Some courts agree with this approach. For example, the Kentucky Court of Appeals noted:

> In this overall first amendment controversy, what previously could not be achieved through the tort law of libel and slander because of the requirement of proving malice is now being "backdoored" through the

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139. *Id.*
tort of [false light] invasion of privacy. The resulting effect is a form of prior restraint upon the press.\footnote{142} Similarly, the North Carolina Supreme Court has refused to recognize this tort, holding that any recovery for false light would be a duplication of the protections afforded by libel and slander, and would “add to the tension already existing between the first amendment and the law of torts in cases of this nature.”\footnote{143} Even in New York, where Warren Spahn had prevailed over the publisher of his fictionalized biography, a recent Court of Appeals decision considered “[t]he scope of this tort [to be] sufficiently vague and its impact upon free expression sufficiently ominous that [the court] has questioned whether the tort is cognizable in New York.”\footnote{144}

The divergence in current case law is caused by the uncertainty about whether the “matter of public interest” standard set forth in \textit{Time, Inc. v. Hill}\footnote{145} was overruled when the Supreme Court rejected that standard in \textit{Gertz v. Robert Welch, Inc.}\footnote{146} The Supreme Court’s failure to clarify the issue in \textit{Cantrell v. Forest City Publishing Co.}\footnote{147} has led to “disorder and confusion in the law.”\footnote{148} If false light is recognized as an extension of privacy law, then media plaintiffs will only be able to recover if the stringent matter-of-public-interest standard articulated in \textit{Time, Inc. v. Hill} is not met. This is obviously the preferable approach for media defendants because it will provide virtual immunity on matters of public concern. Because this issue remains unresolved, producers must be wary of false light claims and review nondefamatory material with the same diligence as material which is more obviously actionable.

\section*{E. Intentional Infliction of Emotional Distress}

The tort of intentional infliction of emotional distress protects still another personality interest—“peace of mind.”\footnote{149} The courts have found this to be a particularly troublesome tort because damages as a result of mental suffering are difficult to measure, and the injuries may be falsified.\footnote{150} Early judicial decisions refused to recognize this tort unless there was an additional tort claim. Over time, however, the tort has slowly

\footnote{143. Id. at 381 (citing Renwick v. News & Observer, 312 S.E.2d 405, 413 (N.C. 1984)).}
\footnote{144. Kovner, \textit{The Great Docudrama Controversy—Elizabeth Taylor and ABC}, 1 Comm. Law. 1, 8 (Spring 1983).}
\footnote{145. 385 U.S. 374 (1967).}
\footnote{146. 418 U.S. 323 (1974).}
\footnote{147. 419 U.S. 245 (1974).}
\footnote{148. Walden & Netzhammer, supra note 140, at 381.}
\footnote{149. PROSSER, supra note 37, at 57.}
\footnote{150. Id.}
evolved and become an independent cause of action.\textsuperscript{151} Even so, some states still tie an intentional infliction of emotional distress claim to other torts: "New York recognizes an action for intentional infliction of emotional distress, but does not allow recovery for publication of 'embarrassing facts' without a prerequisite showing that there was also actual damage to reputation."\textsuperscript{152} Likewise, the California Supreme Court has held that a plaintiff has no cause of action for intentional infliction of emotional distress against a publisher and author if "the very same acts . . . were insufficient to support a cause of action for defamation."\textsuperscript{153} The Illinois Supreme Court cautioned against wide recovery under this tort, holding that "the law should aim to toughen the psyche of the citizen rather than pamper it."\textsuperscript{154} Therefore, such claims will rarely be successful.

In order to succeed on a claim, the plaintiff will have to show that the defendant's action (1) was extreme and outrageous conduct beyond all possible bounds of decency; (2) was intended to inflict emotional distress; (3) resulted in serious emotional distress; and (4) caused injury that must be equivalent to that which a reasonable person would have suffered.\textsuperscript{155} This is an extremely difficult test to meet, particularly with regard to media defendants because of the additional burden of the First Amendment privilege.\textsuperscript{156} The Reverend Jerry Falwell attempted to extend this tort to offensive publications about public figures in \textit{Falwell v. Flynt}.\textsuperscript{157} This case presents a provocative look at intentional infliction of emotional distress and its possible impact on the production of docudramas.

The November 1983 issue of \textit{Hustler Magazine} featured a parody of a Campari advertising campaign which interviewed celebrities about their "first time"—the first time they drank Campari, that is. The \textit{Hustler} parody featured televangelist Jerry Falwell talking about his "first time" as that term is more commonly understood—stating that his first time was an "incestuous rendezvous with his mother in an outhouse."\textsuperscript{158}

\textsuperscript{151} Id.
\textsuperscript{153} Flynn v. Higham, 197 Cal. Rptr. 145, 147 (Ct. App. 1983).
\textsuperscript{154} Knierim v. Izzo, 174 N.E.2d 157, 164 (Ill. 1961).
\textsuperscript{155} \textsc{Prosser, supra} note 37, at 56.
\textsuperscript{158} \textit{Hustler}, 485 U.S. at 48.
Falwell was not amused and sued for libel, invasion of privacy, and intentional infliction of emotional distress. The jury found in favor of the defendant on the libel claim, finding that the parody “could not reasonably be understood as describing actual facts,” but ruled in Falwell’s favor on the intentional infliction of emotional distress cause of action. This ruling was upheld by the Court of Appeals, which rejected defendant’s argument that the New York Times actual malice standard should apply. Instead, the court reasoned that “the issue is whether [the advertisement’s] publication was sufficiently outrageous to constitute intentional infliction of emotional distress.” This decision was extremely distressing from the media’s perspective because of its underlying principle that “even if the story was not libelous (because nobody took it seriously as purported ‘truth’), it could still be the subject of a suit for damages, purely because it made Falwell feel bad.” In essence, this judgment allowed public figures to silence speech which they felt was offensive or hurt their feelings.

Fortunately for the media, the United States Supreme Court reversed this ruling in a unanimous decision holding that the First Amendment precluded public figures from recovering for intentional infliction of emotional distress without a showing of actual malice. The Court reiterated the constitutional standards of recovery for libel and defamation (i.e., actual malice) and emphasized the “fundamental importance of the free flow of ideas and opinions on matters of public interest and concern.” In addition, the Court expressed concern over the “chilling effect” the lower court’s ruling would have on political cartoonists and satirists. The Court concluded that public figures and public officials may not recover for the tort of intentional infliction of emotional distress by reason of publications such as the one here at issue without showing in addition that the publication contains a false statement of fact which was made with ‘actual malice,’ i.e., with knowledge that the statement was false or with reckless disregard as to whether or not it was true.

What is disturbing about the opinion is its emphasis on the conclusion that the advertisement could not “reasonably be understood as describing actual facts” and therefore could not meet the requirement of a false statement of fact (i.e., it was an opinion). The question remains,

159. Id. at 49 (citation omitted).
160. Falwell, 797 F.2d at 1270.
161. Id. at 1276.
164. Id. at 50.
165. Id. at 52.
166. Id. at 56.
however, as to what impact the Court’s recent ruling in Milkovich v. Lorain Journal Co. will have. If opinions are no longer afforded immunity from liability, and parodies such as this one are obviously published with knowledge of falsity, can one successfully argue that the publication of an offensive, outrageous parody such as this is subject to liability? It seems unlikely given the strong public interest in free speech, but the potential litigation may in and of itself have a chilling effect on expression.

F. Right of Publicity

Elizabeth Taylor once said, “I am my own commodity. I am my own industry. The way I look, the way I sound, that is my industry and if somebody else portrays me and fictionalizes my life, it is taking away from me.” Is she correct in claiming that she exclusively owns the right to exploit her image? In a truly commercial sense, she is. The right of publicity affords an individual the right to control the use of his or her “name, voice, signature, photograph, or likeness . . . for purposes of advertising or selling, or soliciting purchases of, products . . . without the person’s prior consent . . .”. The issue which arises is whether a docudrama falls within the statutory definition of a commercial use or whether it is a protected form of expression under the First Amendment.

1. History and Development

To evaluate the status of the right of publicity and the direction in which it is moving, it is important to briefly examine its development. The right of publicity grew out of the right of privacy to protect an individual’s proprietary interest in his or her name or likeness. Because public figures could not seek protection for commercial uses of their personalities under a theory of invasion of privacy, they argued for protection under a common law right of publicity. One writer credits two events with laying the foundation for widespread recognition of this tort: the 1953 decision in Haelan Laboratories v. Topps Chewing

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169. CAL. CIV. CODE § 3344(a) (West 1991); see also N.Y. CIV. RIGHTS LAW §§ 50-51 (McKinney 1991) (prohibits the use of the name, portrait or picture of any living person for advertising or trade purposes without consent).
171. McCARTHY, supra note 79, § 1-5.
172. Id. § 1-2.
and Professor Nimmer's 1954 law review article, *The Right of Publicity.* In *Haelan Laboratories*, Judge Jerome Frank was the first jurist to recognize expressly the right of publicity. The case involved the use of a baseball player's photograph on a baseball card enclosed with chewing gum. The player had granted Haelan Laboratories an exclusive right to use his photograph, and subsequently Haelan's competitor, Topps Chewing Gum, also used the ballplayer's image. Judge Frank, in reversing the lower court, created the "right of publicity," which acknowledged the commercial value of a person's identity.

A year later, Professor Nimmer wrote an influential article analyzing the "inadequacy of traditional legal theories in protecting publicity values" of celebrities' personae, and encouraging acceptance of the right of publicity as a necessary protection. On the one hand, the meaning of commercial exploitation has been easy for the courts to discern when the product or service was clearly commercial. In addition, when the defendant's news broadcast appropriated the plaintiff's entire act, and the result was the decimation of his commercial livelihood, recovery was allowed. On the other hand, First Amendment considerations are still balanced against the plaintiff's economic interests. Therefore, when the content of the commercial use is also newsworthy, the balance may tip in favor of the defendant.

For example, a New York court held that a poster with a photograph of the television comedian Pat Paulsen accompanied by the slogan "For President" was constitutionally protected expression because it dealt with a matter of public interest. While the public interest is weighty, there are limitations. The actual malice standard of *New York Times* has been applied to cases where violation of the right of publicity is claimed regarding a false publication. In applying the right of publicity, some commentators have suggested dividing the category of "celebrities" into political or historical figures and those outside the political

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173. 202 F.2d 866 (2d Cir. 1953).
175. *Id.* at 204 (citation omitted). Invasion of privacy was not a suitable cause of action for a public figure because he was deemed to have waived this right.
176. *Id.*
180. *See Eastwood v. Superior Court*, 198 Cal. Rptr. 342 ( Ct. App. 1983) (National Enquirer's use of Clint Eastwood's name and photograph was a commercial exploitation not entitled to First Amendment protection as the accompanying story was published with knowing or reckless disregard for the truth).
arena. Under this theory, the former category would be granted greater constitutional protection because “[p]ortrayals that are primarily informative are often designated news. . . . Because these portrayals are viewed as essential to the public debate, they are afforded the fullest First Amendment protection.” It is clear that the right of publicity evolved to protect a celebrity’s property interest from commercial exploitation without consent and compensation. Therefore, the initial inquiry of whether a docudrama is a commercial exploitation needs to be addressed.

2. Misapplying the Right of Publicity to Docudramas

In a strict sense, the broadcasting of a docudrama is not a commercial use of a celebrity’s name, likeness or voice, and such a use will not severely impact on the commercial livelihood of the celebrity. It may be argued, however, that the celebrity’s name is being used to sell the product (i.e., the biographical docudrama), and the program may lack newsworthiness. A troublesome case in this area is *Taylor v. American Broadcasting Co.* Briefly, ABC was developing a docudrama based on Taylor’s life to be entitled *The Elizabeth Taylor Story*. Taylor promptly filed suit seeking injunctive relief, claiming misappropriation and violation of her common law right of publicity. While the law is far from clear on the issue of a celebrity’s right of publicity in the docudrama context, the suit itself was enough to terminate the project.

In related cases in which the highest courts of California and New York have ruled, the reasoning and analysis applied would lead to seemingly conflicting results in the *Taylor* case. In the New York case, the court found that since the biography used “imaginary incidents, manufactured dialogue, and attributed thoughts and feelings,” and the de-
fendants knew of the fictionalization, the publication violated the New York statute. In contrast, the California Supreme Court, with Chief Justice Bird writing for herself and three other justices, took a much broader view of the scope of the First Amendment and the California Constitution's guarantee of free speech. Chief Justice Bird wrote:

The right of publicity derived from public prominence does not confer a shield . . . . Surely, the range of free expression would be meaningfully reduced if prominent persons in the present and recent past were forbidden topics for the imaginations of authors of fiction. . . . Valentino was a Hollywood star. His life and career are part of the cultural history of an era. . . . Whether the publication involved was factual and biographical or fictional, the right of publicity has not been held to outweigh the value of free expression.

The Taylor case, which would have provided a perfect opportunity to test these opposing views, did not live up to its promise because ABC settled the case. Suits (or threatened suits) of this sort can severely impact the production of docudramas about living celebrities, both from a monetary and creative standpoint. Docudrama producer Roger Gimbel commented on the creative implications of the Taylor suit: "Such legal threats can be a severe dramatic drawback, since they make it nearly impossible to produce anything but a flattering puff piece on a living subject who has not consented to be portrayed." In addition, First Amendment attorneys express concern over the chilling effect the financial impact of such suits will have:

Prior restraint is a very heavy burden on freedom of expression. Broadcasters have to build in the cost of litigation, so as celebrities become more litigious, and file more suits to try to prevent dramas or movies about them from being made, fewer people worth writing about will be written about, and the public will lose a significant means of being informed.

Aside from the serious implications of prior restraint, Taylor's complaint has another major flaw. Taylor has argued that the value of her life story would decrease if other versions were produced. However, this is an

192. Guglielmi v. Spelling-Goldberg Prods., 603 P.2d 454 (Cal. 1979) (affirmed dismissal of right of publicity claim of Valentino's nephew, as right of publicity is not descendible). It should be noted that this case was decided before the enactment of California Civil Code section 990.
193. Id. at 460-63.
194. Because the case was filed in New York, perhaps it was the fear of an adverse judgment that persuaded ABC to settle.
195. Credits include My Own Story, a 1981 docudrama about the life of Sophia Loren, which the actress authorized and starred in (as herself and her mother).
197. Id. at 19.
unlikely consequence because television frequently broadcasts more than
one version of the same events, and it is hard to imagine a network
turning down the "authorized" version of Elizabeth Taylor's life.

Logic then seems to lead to the conclusion that docudramas should
not be subject to right of publicity claims. When individuals choose to
make a profession out of being in the public eye, they lose a certain
amount of privacy and their personal lives become a matter of "public
interest." Whether it is an article in People Magazine or the National
Enquirer, or a television docudrama, celebrities should not be able to use
injunctive relief as a prior restraint to such publications. This would take
the law down a slippery slope which would severely impact First Amend-
ment rights and deprive the public of access to matters in which it is
interested. In addition, if the docudrama, once presented, is defamatory
or actionable for other reasons, then celebrities are able to seek redress in
the courts. Allowing it before the fact would be a grave mistake.

G. Copyright Infringement

Copyright infringement should not be overlooked when producing a
docudrama. Source material used by a writer will most likely be pro-
tected by copyright, since articles and books are original works fixed in a
tangible medium of expression. The Copyright Act grants the
owner of the copyright an exclusive right to reproduce and prepare deriv-
ative works based upon the copyrighted work. An infringement of
these rights is actionable under the Act. With regard to a nonfiction
work, while the work itself is protected, the facts embodied in it are
not. The rationale is that the Act requires originality for copyright
protection, and facts are not considered to be original. Therefore,

199. See, e.g., The Royal Romance of Charles and Diana (CBS television broadcast, Sept.
20, 1982), and Charles and Diana: A Royal Love Story, supra note 29; Liberace, supra note 76,
and Liberace: Behind the Music, supra note 76; Nutcracker: Money, Madness and Murder,
supra note 31, and At Mother's Request (CBS television broadcast, Jan. 4 & 6, 1987).
200. See, e.g., Elvis & Me (ABC television broadcast, Feb. 7-8, 1988) (Priscilla Presley's
story of her life with Elvis) which was not preempted by prior Elvis telefilms Elvis, supra note
30, and Elvis & the Beauty Queen (NBC television broadcast, Mar. 1, 1981).
201. The United States Copyright Act of 1976, 17 U.S.C. § 102(a) (1991) [hereinafter the
Act]: "Copyright protection subsists, in accordance with this title, in original works of author-
ship fixed in any tangible medium of expression, now known or later developed, from which
they can be perceived, reproduced, or otherwise communicated, either directly or with the aid
of a machine or device" (emphasis added).
202. Id. §§ 101-810.
203. Id. § 106. A docudrama is considered a derivative work.
204. Id. § 501(a).
206. Id. The opposite result would allow the first person who wrote about an event (present
or historical) to have a monopoly on its telling.
"courts have denied copyright protection not only to historical facts, but also to facts as set forth in biographical works, in news stories, and in other forms of expression."207 The potential liability for the docudrama producer lies in the manner in which the writer copies from the source material. Protection is afforded to the author's expression of the facts, which includes the arrangement, selection, and patterning of the facts. Therefore, if the author of the source material has a unique angle on the story or an unusual style, the material may not be freely copied. In such an instance, the producer may wish to purchase the rights to the work.208 Copyright infringement actions against docudrama producers are most likely to arise based on three theories of recovery: the author claims infringement of his or her research; the author claims the docudrama is substantially similar to his or her work; or the author claims the writer appropriated too much of his or her work. Although to some extent the claims overlap, they will be discussed separately below.

1. Facts and Research Are Not Protected

Writers have argued that their labor and efforts in researching a subject should be entitled to copyright protection. This argument was rejected by the Second Circuit in *Rosemont Enterprises v. Random House, Inc.* 209 and by the Fifth Circuit in *Miller v. Universal City Studios, Inc.* 210 In *Rosemont*, the plaintiff alleged that defendant's biography of Howard Hughes utilized a great deal of the research presented in his articles on Hughes published in *Look Magazine*. The court held this to be a legitimate use, stating: "We... cannot subscribe to the view that an author is absolutely precluded from saving time and effort by referring to and relying upon prior published material."211 One of the underlying purposes of copyright law is to grant authors exclusive rights as motivation for the creation and dissemination of information to the public. Therefore, if one author builds upon another's work, it is seen as furthering this underlying public interest.212 Relying in part on the *Rosemont* decision, the Fifth Circuit in *Miller* also rejected the author's contention that his research efforts should be protected by copyright. The author of *83 Hours Till Dawn* had spent an estimated 2500 hours researching his book based on the sensational kidnapping of a Florida college student (the victim served as a co-author) and claimed that the Universal Studios made-for-

207. Id.
208. Gerdes, supra note 14, at 56.
210. 650 F.2d 1365 (5th Cir. 1981).
211. *Rosemont*, 366 F.2d at 310 (citations omitted).
television movie, entitled The Longest Night, infringed the copyright to the book. In reversing the trial court, the Court of Appeals reasoned that:

a fact does not originate with the author of a book describing the fact . . . . The line drawn between uncopyrightable facts and copyrightable expression of facts serves an important purpose in copyright law. It provides a means of balancing the public’s interest in stimulating creative activity, as embodied in the Copyright Clause, against the public’s need for unrestrained access to information. 213

2. Scenes-a-Faire and Substantial Similarity

A more traditional copyright infringement claim may arise when the plaintiff-author claims that the docudrama was based on his or her book. In order to succeed on such a copyright infringement claim, the plaintiff will have to prove that: (1) The defendant had access to the copyrighted work, and (2) the defendant’s work is substantially similar to plaintiff’s. 214 Access may be proven based on circumstantial evidence of a “reasonable opportunity to view.” 215 If the source material is “a famous, widely-disseminated work,” access may be presumed. 216 Therefore, access is not a major issue if the source material is a book or widely distributed periodical. The second issue, substantial similarity, is more likely to be the triable element. More specifically, in a suit involving a nonfiction work, the plaintiff would have to prove substantial similarity in the copyrightable elements of his or her work.

For example, Thomas Walker, a former New York City police officer, wrote a book entitled Fort Apache, based on his experiences in the South Bronx’s Forty-first Precinct. 217 Five years later, the defendant’s film, Fort Apache: The Bronx, which depicted the “same milieu” as the plaintiff’s book, was released. 218 The plaintiff sued, alleging his book was copied. Both stories revolved around the “violence and urban decay of the Forty-first Precinct,” and depicted prostitution, drug abuse, thefts, murders, suicides, and other crimes. 219 The court held that these elements “would appear in any realistic work about the work of policemen in the South Bronx. These similarities, therefore are unprotectible as

213. Miller, 650 F.2d at 1368-71. Ultimately, Miller’s book was also used as the basis for a docudrama, when the victim’s story was retold in 83 Hours ’Til Dawn (CBS television broadcast, Nov. 11, 1990). Once more, this shows that although a particular story has been told on television, it does not preempt future projects.


217. The precinct had been nicknamed “Fort Apache” by police officers.

218. Walker, 784 F.2d at 46.

219. Id.
scenes-a-faire, that is, scenes that necessarily result from the choice of setting or situation.""220 Scen-
es-a-faire is a valuable defense in the docudrama context when productions are “inspired by” real events, rather than being “based upon” one specific event.

3. **Fair Use**

The Copyright Act limits authors' exclusive rights for “fair uses” of the copyrighted work.221 This exception entitles others to use the copyrighted work “for purposes such as criticism, comment, news reporting . . . or research.”222 Once the plaintiff has proven copyright infringement, the defendant may raise fair use as a defense. The Act sets forth four considerations when evaluating whether or not the defendant's use is a fair use:

1. the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
2. the nature of the copyrighted work;
3. the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
4. the effect of the use upon the potential market for or value of the copyrighted work.223

The third and fourth factors will be the most critical in a docudrama case. For example, in *Harper & Row, Publishers v. Nation Enterprises*,224 *The Nation* magazine was held to have infringed the copyright to Gerald Ford's memoirs by publishing, verbatim, the most important 300 words in his book.225 The Supreme Court agreed with the district court, which found that this publication “took essentially the heart of the book,” which exceeded a fair use.

In a recent Ninth Circuit decision, the court identified the “last factor [as] undoubtedly the single most important element of fair use.”226 The court affirmed summary judgment for the defendant, holding that although the novelist copied from the plaintiff's historical work, the material copied was primarily unprotectible research, and the financial impact of the use, if any, was likely to be minuscule. Further, the court stated that “[i]f an author of a novel used [plaintiff’s] work and was hon-

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220. *Id.* at 50.
222. *Id*.
223. *Id*.
225. *Id.* at 566. In addition, because *The Nation* was distributed before the book, the defendant violated Ford's right of first publication.
226. Narell v. Freeman, 872 F.2d 907, 914 (9th Cir. 1989). See also NIMMER, supra note 205, § 13.05[A] (§ 107(4) is the most important consideration so as not to frustrate the constitutional policy of encouraging creative effort through economic incentive).
orable enough to acknowledge sources, such a use might enhance sales of [the plaintiff's book]." 227

While it is unlikely that a docudrama would credit a source not purchased, the same theory could be argued; that is, an increase in attention to the subject matter may lead to increased book sales and therefore have a positive financial impact. Copyright infringement is perhaps one of the easiest potential liabilities to prevent. The Act and case law comprehensively set forth the elements for infringement, and careful use of source material can avoid all claims.

III

Potential Liabilities When Rights Are Secured

A. Introduction

To avoid many, if not all, of the liabilities discussed thus far, a producer may wish to acquire rights228 in the story to be dramatized. Although obtaining "releases229 [is] one of the safest ways to prevent litigation,"230 the legal inquiry does not end here. A new set of legal issues arises which includes deciding from whom to acquire the rights and how to structure the acquisition agreement for the rights. In some instances, the nature of the story will dictate pursuit of the rights. For example, a producer may benefit immeasurably from securing the subject's rights to a story of personal triumph231 or a heroic rescue.232 If the docudrama features a sensational crime233 or historical event,234 however, it may prove more worthwhile to acquire rights of a journalist or criminal investigator. Once the producer has chosen which rights to pursue, legal and financial considerations need to be addressed. This section of the article

227. Id.
228. The term "rights" is used in this section to mean life story rights (when contracting with the parties portrayed) and literary rights (if a book, magazine story, or manuscript is acquired).
229. In this context the release would relinquish the tort remedies detailed above (defamation, invasion of privacy, right of publicity, etc.).
231. See, e.g., The Ted Kennedy, Jr. Story, supra note 26; The Ryan White Story, supra note 8.
233. See, e.g., Missing, supra note 24 (rights to the book The Execution of Charles Hormon: An American Sacrifice were acquired); Murder Ordained (CBS television broadcast, May 3 & 5, 1987) (story of minister who conspired with lover to murder their spouses; rights acquired from two journalists and the police investigator); Nutcracker: Money, Madness and Murder, supra note 31 (based on Shana Alexander's nonfiction account of how a New York socialite manipulated her son into killing her rich but frugal father).
234. See, e.g., Kent State, supra note 9 (three books credited as underlying rights); All The President's Men (Warner Brothers 1976) (Woodward & Bernstein's account of the Watergate scandal).
will discuss the creative, legal, and financial limitations present when obtaining rights and detail measures which should be taken to minimize the risk of litigation.

B. Sources of the Rights

The primary sources of rights are the subject to be portrayed, journalists who have been involved in researching and reporting a particular story or case, or police investigators. When dealing with a story which focuses on an individual or family who is to be portrayed in a positive light, the most logical choice is to go directly to the family. However, in many instances a newsworthy event triggers a "feeding frenzy for rights" whereby the subject is deluged with offers from agents, studios, or producers. As a result, several problems may emerge: subjects may be reluctant to consent or demand inordinate sums of money, or only partial rights may be available (additional rights may have been acquired by another producer). While lack of exclusivity will not preclude a network sale, acquiring all the rights is certainly an asset. If significant rights are acquired by two parties, a co-production may be a beneficial solution; the two companies pool their resources and have one stronger package to sell to the networks (or other third party licensee).

Purchasing the rights to a journalist's research and personal observations is frequently selected when the docudrama is based on a crime or where the subjects depicted would be unwilling to consent. Although a story may be told from public domain sources, these rights provide the producer with a "selling tool . . . your angle into the story . . . the person who has given you insight." An ideal illustration is All The President's Men. The story of the Watergate scandal could have been

235. Clifford, supra note 59.
236. Eg., after Reverend Bird and his mistress were arrested for the murders of their spouses, 36 producers originally scrambled for the rights and all three networks began developing the project.
237. See, e.g., At Mother's Request, supra note 199 and Nutcracker: Money, Madness and Murder, supra note 31 (Frances Schreuder murder case; both versions based on journalist's books); Washington: Behind Closed Doors, supra note 22, Blind Ambition (CBS television broadcast, May 20-23, 1979), and All The President's Men, supra note 234 (three perspectives on Watergate and the Nixon White House; all based on books); The Longest Night, supra note 20, and 83 Hours 'Til Down, supra note 213 (kidnapped heiress buried underground; versions told 18 years apart; one version based on a book, the other public domain).
238. Eg., producer Zev Braun had obtained the rights of the police investigator in the Reverend Bird case, and Interscope Communications secured the rights of two journalists. The two entities then joined forces to sell the project to CBS, which aired it as Murder Ordained. Clifford, supra note 59.
239. Id. This applies equally to rights obtained from a police investigator, district attorney, etc.
240. All the President's Men, supra note 234.
told without Woodward and Bernstein, but their story of perseverance and investigative expertise was an integral part of the scandal and subsequent film and made that version of Watergate the most valuable one at the time.\textsuperscript{241} In most cases, however, the journalist would not be an integral part of the story, but a neutral observer who has researched and compiled the events.\textsuperscript{242} As a practical matter, producers should be aware that many experienced journalists will attempt to “attach” themselves to the story. In order to obtain the subject’s rights, the producer must involve the journalist in the project as either a consultant or a writer. If a producer can avoid the pitfall of having to hire the journalist as a writer on the telefilm,\textsuperscript{243} employing him or her as a consultant can be advantageous.

Two other limitations on securing rights warrant discussion. The first is that the person sought to be portrayed may refuse to consent (reasons may include that the portrayal will be negative, a monetary agreement could not be reached or other contractual demands could not be met). In such an instance, the project will not be abandoned, but the producer will have to work around the character: “Either eliminate the character altogether or disguise that character. Change their sex, age . . . combine the person with others into one character so that no one person can claim to be the one portrayed.”\textsuperscript{244} This action would provide a defense to a defamation suit because the plaintiff would have difficulty fulfilling the “of and concerning” requirement.\textsuperscript{245} In any event, the insurance companies will influence whether the portrayal of a noncon-

\textsuperscript{241} Of course, at that time none of the players had written memoirs. When these additional versions were available, the unique perspectives provided by Erlichman and Dean were also valuable, and their marketability was not affected by All The President’s Men. Purchasing a book has legal advantages as well: copyright infringement litigation may be avoided since the source material will have been purchased, and the publisher may indemnify the producer or may have already acquired the requisite releases. Generally, a producer feels more legally secure when acquiring a book. “It’s very comforting to the networks if they can buy a major book by a proven author from a reputable book publisher,” observed the agent who sold Joseph’s Wambaugh’s Echoes in the Darkness, based on the headline-making Philadelphia Main Line murder conviction of a high school teacher, to CBS (quoted in Peter H. Brown, Murder Most Glamorized, L.A. TIMES, Apr. 2, 1989, (Calendar), at 19). Courts have also found this to be an important factor when considering whether a media defendant acted with reckless disregard for the truth. See, e.g., Davis v. Costa-Gavras, 654 F. Supp. 653, 656 (S.D.N.Y. 1987), where the court found it reasonable for Universal Studios not to have validated independently the research for the film Missing because the book was nominated for a Pulitzer Prize and published by a major publisher.

\textsuperscript{242} See, e.g., Shana Alexander (Nutcracker: Money, Madness and Murder); Joe McGinnis (Fatal Vision, Blind Faith).

\textsuperscript{243} The disadvantage is that many journalists will not be acceptable writers to the network, and therefore such a commitment can either make a project unsalable, or cost the producer the payment of the writing fee, which will not be reimbursed by the network.

\textsuperscript{244} Clifford, supra note 59.

\textsuperscript{245} See defamation discussion, supra notes 36-78 and accompanying text.
senting party may be used at all.\textsuperscript{246} The second limitation arises when the producer seeks to acquire life story rights directly from a criminal, and a "Son of Sam" statute applies. What follows is a more detailed examination of these statutes.

\textbf{1. Son of Sam Limitations}

Telefilms based on heinous or scandalous crimes have traditionally been successful ventures. Recent telefilms such as \textsl{Love, Lies and Murder}\textsuperscript{247} and \textsl{I Know My First Name is Steven}\textsuperscript{248} have performed extremely well in the ratings.\textsuperscript{249} Nevertheless, acquiring life story rights for this type of docudrama may be difficult because of the so-called "Son of Sam" laws, whereby a criminal is barred from profiting from the sale of his or her story. The original Son of Sam law was enacted after a news story reported that a publisher was negotiating for the life story rights of mass murderer David Berkowitz,\textsuperscript{250} who was nicknamed the Son of Sam.\textsuperscript{251} Outraged by the pending lucrative deal (providing an advance of $250,000),\textsuperscript{252} and "shocked by the large number of thrill seekers and by the media trumpeting forth each little Berkowitz happening," the New York legislature "hastened to debar Berkowitz and others from profiting from their heinous misdeeds."\textsuperscript{253} The result was the nation's first law requiring that a criminal's proceeds from the sale of his or her life story rights be placed in an escrow account for the benefit of the victims of his or her crime.\textsuperscript{254} Since the New York law was enacted in 1982, more than half of the states have adopted similar legislation.\textsuperscript{255} The underlying

\textsuperscript{246} See script clearances discussion, infra notes 351-63 and accompanying text.
\textsuperscript{247} See supra note 6.
\textsuperscript{248} See supra note 21.
\textsuperscript{249} \textsl{Love, Lies and Murder} placed second for the week with a 20.3 rating; \textsl{I Know My First Name is Steven} achieved a 21.6 rating on May 22, 1989. \textsl{The Hollywood Reporter}, February 27, 1991, at 1. See also \textsl{Fatal Vision}, supra note 5 (earned a 44 share); \textsl{Billionaire Boys Club}, supra note 5 (earned a 35 share); \textsl{Murder Ordained}, supra note 233 (earned a 30 share). \textsl{L.A. Times}, Apr. 2, 1989, at C19, C22. A "share" is the percentage of U.S. households tuned into a particular program based on the total number of households viewing television at that time. In contrast, a "rating" is the percentage of U.S. households tuned into a particular program based on the total possible number of households with television, regardless of whether the television was in use at the time of the telecast.
\textsuperscript{250} The contract was actually between the conservator of Berkowitz' estate and the publisher, as he had been declared incompetent.
\textsuperscript{251} New York City was terrorized for more than a year by Berkowitz' random shootings that ultimately left six people dead and seven wounded.
\textsuperscript{252} The proceeds were to go to his defense attorneys.
\textsuperscript{253} Matter of Johnson, 430 N.Y.S.2d 904, 906 (Sup. Ct. 1979).
\textsuperscript{254} N.Y. EXEC. LAW § 632-a (McKinney 1988) (funds were to be distributed to victims who received civil judgments against the criminal).
\textsuperscript{255} It is interesting to note that the catalyst for many of the statutes was a particularly notorious crime within the state. For example, Massachusetts enacted its statute after a former police captain convicted of armed robbery wrote \textsl{The Cops Are Robbers}; Hollywood's
principle of these laws certainly seems justified—criminals should not profit from their crimes, and if possible, victims should be compensated.\textsuperscript{256} Although many publishers and legal commentators criticize the statutes for violating the First Amendment's guarantee of free speech, the Son of Sam laws have withstood a number of constitutional challenges.\textsuperscript{257} However, last December, in a unanimous 8-0 decision, the United States Supreme Court declared New York's Son of Sam law unconstitutional.\textsuperscript{258} The Court focused primarily on two issues: (1) that the statute violated the First Amendment's guarantee of free speech inasmuch as the statute "singled out speech on a particular subject for a financial burden that it places on no other speech and no other income";\textsuperscript{259} and (2) that the statute is overinclusive in that it applies not only to those convicted of crimes, but also to "any person who has voluntarily and intelligently admitted the commission of a crime for which such person is not prosecuted."\textsuperscript{260} The Court determined that such content-based discrimination was inconsistent with the protection of the First Amendment, and, while the state had an interest in compensating victims from the proceeds of the crime, the statute was not "narrowly tailored" enough to overcome the burden placed on First Amendment rights.\textsuperscript{261} As to the impact on the constitutionality of other Son of Sam statutes, the Court declared that it has "no occasion to determine the constitutionality of these other laws" at this time and concluded with a very narrow holding.\textsuperscript{262} Therefore, while the Court clearly has left New

\begin{footnotes}
256. This underlying policy reason allowed Sydney Biddle Barrows to keep the proceeds from her book, \textit{Mayflower Madam: The Secret Life of Sydney Biddle Barrows}, and the subsequent telefilm, \textit{Mayflower Madam}, supra note 28 (descendant of Mayflower pioneers convicted of running an upscale prostitution service). The court held that she committed a "victimless" crime and therefore proceeds could not be attached. \textsc{Ronald L. Goldfarb \& Gail E. Ross}, \textsc{The Writer's Lawyer} 22 (1989).


259. \textit{Id.} at 503.

260. \textit{Id.} at 505 (citing \textsc{N.Y. Exec. Law § 632-1(10)(b)} (McKinney Supp. 1991)).

261. \textit{Id.} at 511-12. The Court cited works such as \textit{The Autobiography of Malcolm X} and Thoreau's \textit{Civil Obedience} as examples of publications from which the authors would not be entitled to profit under New York's statute because of the discussions involving crimes the authors had committed. The Court reasoned that the possibility of erroneous, unbalanced outcomes such as these required that the statute be stricken as overinclusive.

262. \textit{Id.} at 512.
\end{footnotes}
York without its Son of Sam statute, it has cautioned against assuming that other such statutes are also unconstitutional. 263

As a result, before proceeding with the purchase of life story rights from one who may be accused or convicted of a crime (or any other party who may fall within the subject class in the applicable statute), a producer must first determine whether a Son of Sam statute applies. The producer must look to the laws of the state where the crime was committed. The statutes will vary in the types of crimes 264 and parties covered. 265 A potential problem arises if the criminal was on a “crime spree” which proceeded through more than one state, in which case more than one statute may apply. In addition, if the criminal has committed the crime against the United States, Congress has enacted its own version of the Son of Sam law, entitled the Victims Crime Act of 1984. 266 While the state and federal statutes do not prohibit life story acquisition agreements with criminals, the convicted felon may have little motivation to make a deal if he or she cannot reap any of the financial rewards. Some producers have tried to work around these restrictions by obtaining rights from relatives or an intermediary. 267 This is ill-advised as the statute may be broadly constructed, 268 or expansively interpreted by the

263. Even though the United States Supreme Court declared that New York’s Son of Sam statute was unconstitutional, similar statutes in other states would still be valid until the governing state courts declared the statutes unconstitutional or the state legislatures repealed them.

264. Some statutes cover only violent crimes, while others affect all crimes that have victims. The laws have not yet reached proceeds from white collar criminals; however, opponents of these laws express great concern over this possibility. It is argued that if, for example, John Dean (Blind Ambition) and John Ehrlichman (Washington: Behind Closed Doors) were unable to profit from their autobiographies, the public would be deprived of an important part of our nation’s history. It is also argued that “[i]nside information supplied by a criminal not only provides the important elements of a ‘good story’ that the public will enjoy reading [or seeing], but also can reveal insights useful to future law enforcement efforts. Often it is an important tool in fighting crime to fully understand how and why a crime has been committed.” Goldfarb & Ross, supra note 256, at 20.

265. Under the New Jersey statute, N.J. STAT. ANN. §§ 52:4B-27, 52:4B-33 (West 1986), publishers and authors are entitled to their fees and profits, and legal expenses for the criminal may also be paid out of life story rights proceeds.


267. Okuda, supra note 255, at 1373.

268. Skirting the statute is not always feasible. For example, the New Jersey statute explicitly covers every person with whom a producer may try to contract: “[E]very contract with a person convicted or accused of a crime in this State or an agent, beneficiary, conservator, executor, guardian, representative, relative, friend, associate or conspirator of a person convicted or accused of a crime in this State, with respect to the reenactment of the crime . . .” is subject to the law. N.J. STAT. ANN. § 52:4B-26.
courts. For example, Joe McGinnis, the author of *Fatal Vision*, contracted with Dr. Jeffrey MacDonald for his life story rights, and MacDonald was to receive forty percent of the proceeds from any sale of the rights for television or film. Even though the network and production company did not contract directly with MacDonald, these proceeds are considered to be within the scope of the California statute. When the producer does contract with a third party, additional complications may arise if the court later determines that the Crime Victims Board, or similar body, is entitled to the proceeds paid to that party. If the third party no longer has the money received, the producer or network would be responsible for paying to the Crime Victims Board, or similar body, an amount equal to the sum paid to that person (e.g., monies would have to be paid twice). Aside from the practical difficulties in contracting with a convicted felon, there are ethical considerations as well. Patricia Clifford, producer of *Murder Ordained*, aptly stated: "We would never give a convicted felon anything. . . . If they're in jail, they're in jail for a reason. . . . The money is saved, in my opinion, for people who helped the victims."

C. Necessary Provisions in Acquisition Agreements

Once the producer ("Purchaser") has decided from whom to obtain the rights, the most important task lies ahead—drafting an agreement which affords the Purchaser the greatest possible protection but which the rights holder ("Owner") will still sign. Negotiating the terms of a rights acquisition agreement requires a delicate balance between assuring the Owner that he or she has nothing to fear (i.e., that the portrayal will be one which they will approve), protecting the interests of the Purchaser against future litigation, and allowing the Purchaser the creative freedom necessary to produce an exciting, interesting, and suc-

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269. See Matter of Johnson, 904 N.Y.S.2d 904 (Sup. Ct. 1979) ("Any action taken by any person accused or convicted of a crime . . . to defeat the purpose of this section shall be null and void as against public policy."). Another notable example can be found in Jean Harris, convicted murderer of Scarsdale Diet czar Dr. Herman Tarnower, who was ordered to repay money derived from her book even though the funds were given to charity.

270. MacDonald, the former green beret, was convicted of murdering his wife and two daughters. Okuda, supra note 255, at 1374 n.136.

271. Id.

272. Clifford, supra note 59.

273. The following discussion will detail only those provisions specifically relevant to avoiding liability when acquiring life story rights.

274. The term "Purchaser" will be used in this subsection to refer to the person or company who is purchasing the rights.

275. The term "Owner" will be used in this subsection to refer to the person granting the rights, whether the individual is the subject of the life story or a third party (e.g., journalist, police detective, etc.).
cessful docudrama. Standard contract terms in life story acquisition agreements include the following: Exclusivity; Definition of the Property; Rights Granted; Depiction Release and Waiver; Cooperation of the Owner in obtaining documents and releases; Representations and Warranties; and Public Domain Protections. In addition, provisions that are not standard but may be negotiated include the following: Consultant Services; Creative Control; Rights Reserved; and Frozen Rights, Holdback Periods, Right of First Negotiation, and Right of Last Refusal. Each of these provisions will be examined in detail.

1. **Exclusivity**

A rather obvious condition in the agreement is that the rights granted be exclusive. There are two types of exclusivity the Purchaser will seek: the rights granted should include all exploitation rights, and the grant should cover the entire scope of the Owner's life story. With regard to the former, this term is usually expressed in the opening paragraph of a contract in language such as this ("Para. A"):

The following will confirm the terms and conditions of the agreement ("Agreement") between (name of Owner) ("Owner") and (name of Purchaser) ("Purchaser") with respect to Purchaser's exclusive, irrevocable option, and, if exercised by Purchaser, the purchase of all motion picture, television, and allied rights in and to the Property as set forth and defined in paragraph 1. hereinbelow (the "Property").

The latter type of exclusivity is expressed in the definition of property, discussed in detail below.

2. **Property Defined**

The Property may be defined either in one brief sentence in the opening paragraph or in a more detailed paragraph contained in the body of the agreement. The former method would be reflected as follows: "As set forth and defined . . ." in Para. A would be replaced with a brief description of the story purchased. For example, if the docudrama was to depict the Owner's personal triumph over physical disabilities caused by a car accident, the replacement clause may be as follows: "which shall include Owner's life story, specifically including but not limited to the events and incidents surrounding Owner's car accident and subsequent struggle to recover and situations resulting therefrom (the 'Prop-

276. Other standard provisions such as option periods and fees, purchase price, and profit participation will not be discussed herein as they do not particularly differ in this context.

277. Major studio life story acquisition agreement [hereinafter Studio Agreement]. The Studio Agreement is not specifically identified for reasons of confidentiality. The rights granted are specifically delineated in several provisions, infra notes 288-310 and accompanying text.

278. The term "Property" will be used in this subsection to refer to the rights acquired.
erty'). In contrast, the latter approach would include a broader description of the rights granted such as the following:

The term "Property" as used herein, includes, but is not limited to, the unconditional and exclusive right throughout the world to use, simulate and portray Owner's name, likeness, voice, personality and, to the extent that Owner is in a position to grant such exclusive rights, personal experiences, incidents, situations and events which have heretofore occurred (in whole or in part) based upon or taken from Owner's life and activities as (brief description of story).\textsuperscript{279}

Several factors should be considered when choosing which form to use. It is in the Purchaser's best interest to use the broadest possible language and cover the greatest spectrum of the Owner's rights,\textsuperscript{280} whereas the Owner may wish to sell only a certain period of his or her life or only that portion of his or her life relating to a particular event.\textsuperscript{281} Another consideration is the potential marketplace for the Property. If there was only one event of national interest in the Owner's life, it may be unnecessary to acquire broad rights,\textsuperscript{282} but if the Owner has led a varied and fruitful life, or is a celebrity, more expansive rights are desirable, though not always attainable.\textsuperscript{283} If the Purchaser is faced with such a restriction on the rights granted, he or she may wish to insist on a "freeze" of that portion of the Owner's rights not granted and a subsequent "holdback period" with regard to such rights.\textsuperscript{284}

3. Grant of Rights

This provision is perhaps the most important in a life story acquisition agreement. The Grant of Rights must cover all uses of the Property,

\textsuperscript{279} Studio Agreement, \textit{supra} note 277. In the event that Owner has written literary material based on the Property, the following additional language would be added: "and any right, title and interest that Owner may have in that certain (treatment/article/story/book) entitled (title of literary property) written by Owner which is based on the Property."

\textsuperscript{280} For example, rather than a specific description as previously detailed, the following may be used: "with respect to the story of Owner's life, including all events and incidents therein and all literary or other material based thereon."

\textsuperscript{281} D. FARBER, ENTERTAINMENT INDUSTRY CONTRACTS § 63-2 (1990).

\textsuperscript{282} For example, HBO recently acquired the rights to Paul Solomon's life story. Solomon's former lover is accused of killing his wife in what has been dubbed the "Fatal Attraction" murder trial. \textit{L.A. Times}, Mar. 5, 1991, at E1. It is interesting to note that Solomon's deal included an option fee of $15,000, and a purchase price of $150,000, if the film was made. \textit{Newsweek}, Feb. 25, 1991, at 57. These types of deals present an ethical dilemma because it is in Solomon's best interest to get a conviction, and he is a key witness in the trial. On April 27, 1991, a mistrial was declared as the jury was deadlocked 8-4, favoring conviction. \textit{Channel 4 News: Nightside} (KNBC television broadcast, Apr. 27, 1991).

\textsuperscript{283} For example, Interscope just acquired five years of someone's life because the Owner refused to sell more and they felt that the events during that time could warrant a separate telefilm. Clifford, \textit{supra} note 59.

\textsuperscript{284} See discussion on frozen rights, holdback periods, right of first negotiation and right of last refusal, \textit{infra} notes 343-45 and accompanying text. These provisions are also appropriate to cover exploitation rights which are reserved.
as well as providing for expansive rights with regard to the depiction of the Owner.\textsuperscript{285} Donald Farber drafted the following model (italicized words have been added to supplement Farber's model):\textsuperscript{286}

Owner does hereby exclusively sell, grant, convey, transfer, set over and assign to Purchaser, Purchaser's successors, licensees and assigns all rights in and to [Property],\textsuperscript{287} including, but not limited to the following:

(a) Production and Distribution: The sole and exclusive right to make television programs and motion picture versions or adaptations of the [Property] or any part thereof, and to produce one or more motion pictures of any type based upon or adapted in whole or in part from the [Property],\textsuperscript{288} or any part thereof, or any such versions or adaptations (all of such programs, motion pictures, versions or adaptations thereof hereinafter referred to as “motion picture versions”),\textsuperscript{289} and to produce, remake, distribute, exhibit, broadcast, perform, sell, license for exhibition, exploit, dispose of and generally deal in any other manner with one or more motion picture versions, \textit{in perpetuity, in all languages, in any and all media throughout the universe, whether now known or hereafter devised}. Included among such exclusive rights (but not by way of limitation) are remake, sequel, prequel and spin-off rights, all merchandising rights in and to the [Property] (including elements thereof), all rights in and to the title, music, soundtrack album rights and publication rights.\textsuperscript{290}

(b) Adaptation and Fictionalization: The sole and exclusive rights to translate into all languages, and to freely adapt, revise, rearrange, add to and subtract from the [Property], or any part thereof, and the title, theme, plot, sequences, incidents, and characterizations thereof, to make \textit{prequels and sequels} to and new versions or adaptations of the [Property] or any part thereof, to make serials of the [Property] or any part thereof, to use any part or parts of the Property or of the theme thereof or any incidents, characters, character names, scenes and sequences therein contained in conjunction with any other material or materials, and to separately or cumulatively do any or all of the foregoing, to such extent as Purchaser in Purchaser's sole discretion may deem expedient or desirable in the exercise of any of the rights, licenses or privileges herein conveyed.\textsuperscript{291} Purchaser has the right to fictionalize, \textit{dramatize}, simulate, portray and/or impersonate Owner's name,

\begin{itemize}
\item \textsuperscript{285} While the provision does contain some language regarding the depiction of the Owner, obtaining a separate depiction release and waiver is also advised.
\item \textsuperscript{286} \textsc{Farber, supra} note 281, § 63-14 to 63-16.
\item \textsuperscript{287} Farber uses the term “Material” rather than “Property”; however, the term “Property” has been substituted herein for consistency within this article.
\item \textsuperscript{288} The Owner may wish to limit the number of productions, or length (or require additional compensation for each such additional use or longer production), which would be expressed or referred to here.
\item \textsuperscript{289} The term “Projects” may be more suitable than “motion picture version” as it does not create a specific idea in the Owner’s mind (e.g., that a motion picture will be produced).
\item \textsuperscript{290} In many situations an Owner will want to reserve certain rights, such as publication rights. The rights reserved should be referenced here, and another provision should set forth the terms and conditions affecting such reserved rights.
\item \textsuperscript{291} If the agreement contains a Creative Control provision it should be referenced here.
\end{itemize}
likeness, characterization, portrait, picture, voice, recording, and biography in the motion picture versions, and to make use of incidents which have occurred in relation to the Property, factually and/or fictionally, and Purchaser may employ any actor of Purchaser's choosing to portray Owner who may or may not resemble Owner, in Purchaser's (or Purchaser's representative's) sole discretion. 292

In connection with the provisions of this subparagraph (b), Owner agrees to execute Purchaser's standard depiction release, which is attached hereto as Exhibit "A." 293

Notwithstanding anything contained in this Clause 1(b) to the contrary, it is Purchaser's intention to portray Owner's story as factually as possible with the understanding that Purchaser has the right to deviate from the facts in order to enhance the dramatic value of the [Property]. 294

(c) Copyright: The sole and exclusive right to secure copyright registration (or equivalent protection in countries where no copyright law exists) of such motion picture versions, and any other versions or adaptations (including but not limited to videocassettes, videodiscs, and all other modes of exploitation whether now known or hereafter devised) of [Property] herein elsewhere mentioned, and any sound records, soundtracks, or recordings in connection therewith, in all countries of the universe under any now existing or hereafter created laws, regulations or rules, in the name of the Purchaser or any other person, firm or corporation. Purchaser shall be deemed to have acquired and is hereby granted and assigned all rights in the [Property] under any copyright which may have been herein granted, sold, assigned and set over to Purchaser. If requested by Purchaser, Owner agrees to execute, acknowledge and deliver, or cause to be executed, acknowledged and delivered to Purchaser, any instruments that may be required by Purchaser or that may be necessary, proper or expedient in the opinion of Purchaser to establish and vest in Purchaser such rights under such copyright.

(d) Publicity and Advertising: Purchaser shall have the customary right for advertising and publicity purposes to broadcast, prepare, publish and copyright publications in newspapers, magazines and periodical.

292. If applicable to the story acquired, the term "Owner's" in this paragraph should be changed to include "Owner's and Owner's immediate family members." In addition, if the Owner requires that certain incidents or facts about his or her life be excluded, they may be specifically delineated here.

293. Many agreements also contain a separate Depiction Release, which is discussed in detail, infra notes 311-30 and accompanying text.

294. This provision may be reassuring to the Owner and does not limit the Purchaser's rights. It may be an appropriate compromise if the Owner is insisting on some sort of creative control or approval. Another way to appease an Owner's concerns over his or her portrayal is to employ the Owner as a consultant. See discussion infra notes 335-42 and accompanying text.

295. Recent contracts use "universe" to replace "world" as technologies and exploration are rapidly expanding.
cals of all types, of any synopses, excerpts, summaries, and stories (all which shall collectively be referred to as "synopses" herein and may not exceed 2,500 words)\textsuperscript{296} of the [Property] and/or motion picture versions or any part thereof, and the right to use said synopses in posters, lobby displays, pressbooks, trade publications, newspapers, magazines and other periodicals, and all other media of advertising and publicity whatsoever \textit{whether now known or hereafter devised} (and to copyright said synopses in Purchaser's name in all countries and languages of the universe).

The foregoing rights, licenses, privileges and properties shall be enjoyed by Purchaser throughout the universe, and the enumeration thereof shall not be deemed to restrict or limit in any way the generality of the grant made in this clause.

Nothing herein contained shall be interpreted or construed to obligate Purchaser to produce any motion picture version of the [Property], or exercise any of the rights, licenses or privileges herein conveyed.\textsuperscript{297}

Paragraph (a), which sets forth the Production and Distribution rights acquired, should be drafted as broadly as possible. Courts will interpret broad, expansive language as granting all imaginable rights to the Purchaser, except those rights which are specifically reserved by the Owner. For example, in \textit{Platinum Record Co. v. Lucasfilm Ltd.},\textsuperscript{298} the plaintiffs sued to recover damages for the distribution of the film \textit{American Graffiti} on videogcassettes. The plaintiffs argued that when they sold the rights to several songs for the use in the soundtrack for the film, the parties had not contemplated videogcassettes, and therefore the grant did not cover that means of exploitation. In rejecting this theory, the court cited the provision of the contract which granted the right "to exhibit, exploit, market and perform \textit{[American Graffiti]} . . . perpetually throughout the world by any means or methods now or hereafter known."\textsuperscript{299} The court interpreted the broad language to favor the Purchaser, concluding that "if the words are broad enough to cover the new use, it seems fairer that the burden of framing and negotiating an exception should fall on the grantor."\textsuperscript{300}

Similarly, this analysis has been applied to the scope of the Adaptation and Fictionalization rights granted pursuant to paragraph (b) in the model. An illustrative case is \textit{Burnett v. Warner Bros. Pictures},\textsuperscript{301} in

\textsuperscript{296} In his comments, Farber notes that "the number of words permitted to be used in synopses may be as little as 1,000 or as much as 7,500." \textit{Farber, supra} note 281, § 63-16, comment 1(d).

\textsuperscript{297} This last paragraph is often set aside as a separate provision under the heading "No Obligation to Exploit."


\textsuperscript{299} \textit{Id.} at 227 (emphasis added).

\textsuperscript{300} \textit{Id.}

\textsuperscript{301} 493 N.Y.S.2d 326 (Sup. Ct. 1985).
which the playwrights of *Everyone Comes to Rick's*, the underlying work for the film classic *Casablanca*, attempted to limit Warner Brothers' use of their characters in a subsequent television series. The case was dismissed for failure to state a cause of action because the contract contained very broad language granting the Purchaser "all now or hereafter existing rights of every kind . . . [and Owner further grants] the absolute and unqualified right to use said work in whole or in part, in whatever manner said purchaser may desire . . . ." The court held that "it is beyond question that plaintiffs failed to retain any rights . . . The assignment of rights agreement contains no clauses specifically enumerating any rights excluded to Warner Brothers. Rather, it contains only general clauses assigning all imaginable rights to defendant Warner Brothers."

In contrast, if there is a reservation of rights clause which is open to interpretation, the purchaser may be held liable for costly damages for later uses. For example, Peggy Lee was granted summary judgment against the Walt Disney Studios in her suit for a percentage of videocassette sales. Lee alleged that her contract for the animated classic *Lady and the Tramp* granted her the right to receive payments from all "records and transcriptions" containing the soundtrack, and videocassettes fell within the definition of "transcription." In 1952, when the contract was drafted, neither Lee nor Disney had considered videocassette distribution. The court, however, held that the term transcription "implicitly included the sale of videocassettes."

Therefore, the language used to acquire the rights should be as expansive as possible. In the event the Owner does negotiate the right to reserve certain rights in the Property, those rights should be carefully and specifically delineated and defined. In addition, the Purchaser may receive added protection by including a phrase such as "all rights not specifically reserved by the Owner herein shall be deemed granted to the Purchaser."

Farber structured his model life-story acquisition agreement in two parts: an option agreement and the purchase agreement attached to it as Exhibit A; the Rights Granted provisions detailed above were included in his model Purchase Agreement. The following clause, from his model Option Agreement, is also worth reviewing:

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303. Ironically, the series only lasted four weeks, April 10 to May 7, 1983—much shorter than the lawsuit.
304. 493 N.Y.S.2d at 327.
305. Id. at 327-28.
307. Id.
Owner acknowledges that if Purchaser exercises the option, Purchaser shall have the rights, in addition to the other rights granted in the Purchase Agreement, in connection with any such Product to use any information, documents, news reports, clippings, photographs, recordings and other materials dealing with, depicting or concerning Owner and the [Property] whether furnished by Owner, others, or in the public domain. Purchaser shall have the right to include or cause to be included in any such Product such actual or fictional events, scenes, situations, dialogue and other materials as Purchaser may consider desirable or necessary in Purchaser's sole and absolute discretion.

Although the provisions above are complete and exhaustive, a separate Depiction Release may also be desirable. In addition, all living people portrayed in the docudrama should execute such a Depiction Release.

4. Depiction Releases and Waivers

If the producer contracts with the parties being portrayed, a Depiction Release or Waiver may provide complete protection against tort liability. In essence, the Waiver grants the Purchaser immunity against future suits by the Owner for defamation, invasion of privacy, right of publicity, etc., and the Depiction Release grants the Purchaser wide latitude in presenting the Owner and the Owner's story.

The legal protection afforded by a Waiver is complete if it is well drafted and understood by the Owner. In Royer v. Steinberg, the court held that consent to publication of defamatory material is an absolute

308. "Product" is defined as: "Each such means of exploitation based on the Property is hereinafter referred to as a 'Product.'" Farber, supra note 281, § 63-2.

309. In many instances, the Owner will not actually have any rights in the materials described. Therefore, a copyright analysis regarding the use of these materials is still necessary to assure that the teleplay/screenplay writer has not violated any copyrights.

310. Farber, supra note 281, § 63-5 to 63-6.

311. Farber drafted the following provision:

Owner hereby waives and relinquishes any rights or remedies at law, in equity or otherwise, and further releases Purchaser and Purchaser's employees, agents, successors, licensees and assigns from, and covenants not to sue Purchaser, or any of them, with respect to any claim, cause of action, liability or damage of any nature whatsoever arising out of or in connection with the exercise of any of the rights herein granted to Purchaser or granted pursuant to the Purchase Agreement. Such liabilities include without limitation defamation, libel, slander or invasion of any right of privacy or publicity in any jurisdiction. The aforesaid waivers are hereby made by Owner, both on Owner's own behalf and on behalf of Owner's next of kin.

Id. §§ 63-6 to 63-7.

312. In this discussion the terms Waiver and Depiction Release may be used interchangeably as the two provisions are often presented in one contract clause and not distinguished.

The court relied in part on the following section from Restatement (Second) of Torts:

The privilege conferred by the consent of the person about whom the defamatory matter is published is absolute. The protection given by it is complete, and it is not affected by the ill will or personal hostility of the publisher or by any improper purpose for which he may make the publication, unless the consent is to its publication for a particular purpose, in which case the publication for any other purpose is not within the scope of the consent. This rule has also been adopted in several other jurisdictions.

The critical element in this analysis is that the Waiver and/or Depiction Release must be carefully drafted to expressly waive the various torts. A notable case which may be applied to the docudrama context is Kelly v. William Morrow & Co., in which the issue was whether the plaintiff waived the right to sue for defamation by consenting to depiction in a novel. The trial court found, as a matter of law, that the waiver was an absolute defense. The appellate court, however, reversed and remanded on the issue because the language of the actual waiver signed was ambiguous. Therefore, the court could not conclude as a matter of law that the waiver could be considered a "license to defame." Specifically, the plaintiff consented to have Wambaugh portray him in his novel; however, he did not explicitly waive any tort remedies. In the relevant language of the waiver, the plaintiff gave the defendants the rights to "use, simulate and portray my likeness, activities, experiences and career . . . [and] to depict and/or portray me and such other persons to such extent and in such manner, either factually or fictionally . . . ."

The court held that with a contractual waiver such as this, it must be clear that the person agreeing to the portrayal understands the rights which are being waived. The lesson from Kelly is clear. The areas of potential liability must be explicitly waived in order assure the validity of the waiver.

314. In a published letter, Royer, a school superintendent, challenged the school board to substantiate his demotion. The court held that he thereby consented to a published response, even a defamatory one.

315. Restatement (Second) of Torts § 583 cmt. f (1987).


317. 231 Cal. Rptr. 497 ( Ct. App. 1986) (Joseph Wambaugh obtained a release from a border patrol officer to be depicted in his novel Lines and Shadows. Wambaugh used the officer's real name and occupation, but fictionalized much of his characteristics, painting him as "lecherous, heavy drinking, promiscuous, unfaithful and untruthful to his wife, loud, raucous, blasphemous, profane, acting as a pimp for his fellow officers, and vacuous." Id. at 499.).

318. Id. at 502.

319. Id. at 500.

320. The Kelly case was settled before being decided on remand, and therefore the issue of whether ambiguous language will suffice was not ruled upon. However, the line of cases indi-
One requirement for obtaining Errors and Omissions Insurance (a requirement of networks),\textsuperscript{321} is the acquisition of Depiction Releases from all living people recognizably portrayed in the docudrama.\textsuperscript{322} This can become an extremely costly and difficult task. For example, for the docudrama \textit{Kent State} the producer was required to obtain Depiction Releases from eighty-five living people,\textsuperscript{323} and for the telefilm \textit{Everybody's Baby: The Rescue of Jessica McClure}, Interscope Communications acquired twenty-four Depiction Releases.\textsuperscript{324} In recent years, the cost of obtaining releases has escalated dramatically.\textsuperscript{325} As a result, several problems may emerge. In the past, individuals aside from the major characters granted Depiction Releases for a nominal fee, if any, but today people are more aware that their portrayal has value and are more likely to demand large sums of money.\textsuperscript{326} In some instances, the cost of securing the additional releases may affect the creative process by dictating which actual people can be depicted.

A long-form Depiction Release should be obtained from the major characters other than the central characters (e.g., immediate family members).\textsuperscript{327} The example below is used both as an attachment to the acquisition agreement for the Owner and as a separate Depiction Release for other major characters. Although many of the rights provided for in this provision duplicate clauses in the body of the acquisition agreement, this separate release may be of additional value because it summarizes, in one place, all the rights regarding the depiction and provides further cates that a knowing consent is sufficient, and therefore having the potential causes of action specifically delineated should provide complete protection. As stated above, even in the most malicious of cases, the Restatement (Second) of Torts states that the ill will of the publisher is not an issue.

321. See errors and omissions insurance discussion, \textit{infra} at notes 351-63 and accompanying text.

322. Clifford, supra note 59.


324. Clifford, supra note 59.

325. For example, in 1980, NBC obtained all the necessary rights for \textit{Murder in Texas} (violent death of socialite Joan Hill) for $60,000. In 1988, CBS and Zev Braun paid $300,000 for the rights to nine police officers and district attorneys who solved the \textit{Mormon Murders} (Mark Hoffman, who killed to protect his career as a forger of church documents). Joe McGinnis contracted for more than $400,000 for his book \textit{Blind Faith} (insurance executive who murdered his socially prominent wife) and Vincent Bugliosi received a record-breaking $1.1 million for his book \textit{And the Sea Will Tell}, which at the time of the deal had not yet been written. Brown, supra note 241.

326. \textit{Id.} The officers and D.A.s from the Mormon murders case banded together and hired one attorney who presented the rights package as an all or nothing deal.

327. Although the Depiction Releases obtained from minor characters are much shorter, it is still crucial to obtain the rights to depict the individual factually and/or fictionally, to acquire broad distribution rights in the portrayal, and to obtain the waiver of tort remedies.
firmation of the rights granted. The language used for the Depiction Re-
lease for the Owner or additional persons is as follows:

The following will constitute the Agreement ("Depiction Release") be-
tween (name of Purchaser) ("Purchaser") and yourself, (sometimes re-
ferred to herein as "depicted person" or "undersigned"), relating to
your involvement in the project entitled (name of project) (the
"Project").

1. For good and valuable consideration given to the undersigned by
Purchaser pursuant to that certain agreement dated as of (date of
purchase agreement), the adequacy and receipt of which is hereby
acknowledged, the undersigned, (name of depicted person), hereby ex-
pressly agrees and consents to Purchaser exclusively acquiring all mo-
tion picture, television, media and allied rights in and to the
undersigned's name, likeness, voice, personality, biography and the
right to depict and portray the undersigned in connection with any
television or theatrical motion picture based on (Owner's life story
and/or literary material acquired) entitled ("name of underlying liter-
ary property"). Purchaser will also have the right to produce and ex-
hibit remakes, prequels and sequels and to engage in related publicity
and exploitation with respect to all television and theatrical motion
picture uses related to this Project. Purchaser may also make a "be-
hind-the-scenes" documentary-type film or videotape of varying
length, showing how the Project was filmed or produced. Such be-
hind-the-scenes production may be utilized by Purchaser to promote
the Project and may be presented as a separate commercial program
which can be telecast and/or exhibited for publicity and promotion
purposes on television and/or for use for theatrical trailers. Purchaser
shall have the express right to fictionalize the facts relating to the un-
dersigned's involvement in the Project, as well as the undersigned's
other activities connected with the Project. Purchaser will also have
the right to fictionalize the facts relating to various incidents in the
undersigned's life and will have the right to use a fictitious name to
represent the undersigned's life portrayed in any film or television pro-
gram based on the [Property], and/or in connection with any other
exploitation of said life story, including without limitation, publicity.
The undersigned is aware of the need to create the necessary suspense,
excitement and continuity for a commercial motion picture (whether
theatrical or television) and that certain dramatic license may need to
be taken in depicting the undersigned and the incidents from the un-
dersigned's life in such a presentation. Accordingly, the undersigned
consents to Purchaser's discretionary exercise of such "dramatic li-
cense" for the project for television or theatrical motion picture pur-
poses and agrees to bring no claim or action against Purchaser on any
related legal premise (including defamation, invasion of privacy or any
premise of infringement of personal or proprietary rights). The under-
signed also agrees that Purchaser may represent or present the life
story in any order and may elect to omit certain incidents or events
and/or persons in its sole discretion.

328. If this Depiction Release is the only agreement between the parties (i.e., not with the
Owner), the amount paid for the release would be indicated here.
2. Purchaser in its sole discretion may elect not to utilize or depict the undersigned's life or any incidents therein in any manner whatsoever, if Purchaser chooses not to do so.

3. The undersigned agrees that any motion picture or program containing a depiction of the undersigned's life may be produced, distributed, exhibited and publicized throughout the universe, in perpetuity, in all languages, in any and all media now or hereafter known (including without limitation the right to novelize the script of any such motion picture or television program).

4. The undersigned represents and warrants that he/she has the right to enter into this agreement and to grant all rights granted hereunder; that he/she has not previously assigned, licensed or encumbered to, or in favor of, any third party, any of the rights granted to Purchaser under this Agreement, and that he/she shall not endeavor to do so after the execution of this license.

5. The undersigned agrees to indemnify and hold Purchaser, its directors, licensees connected with the project, agents, employees, successors, and assigns, harmless from and against any and all liabilities, claims, damages, losses, penalties, costs and expenses (including reasonable counsel fees) arising out of or relating to any breach or alleged breach of any of the representations, warranties, agreements or obligations made or undertaken by the undersigned hereunder.

6. The undersigned agrees to forever release and absolutely discharge Purchaser, its directors, licensees connected with any project, agents, employees, successors and assigns from any and all claims, demands, causes of action, suits, rights, costs, losses, debts and expenses (including attorneys' fees and costs actually incurred of any nature whatsoever, known or unknown, suspected or unsuspected, which the undersigned ever had, now has, or hereafter may have in any way arising out of or in connection with the project.

7. The undersigned hereby waives, to the fullest extent permitted by law, the provisions and benefits of Section 1542 of the California Civil Code, which statute provides in full:

"A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him, must have materially affected his settlement with the debtor."

The undersigned acknowledges that he/she is aware that he/she may discover facts in addition to or different from those that she now knows or believes to be true, but that it is the undersigned's intent hereby fully, finally, and forever to settle and release all disputes and differences, known or unknown, suspected or unsuspected, which now exist, or heretofore have existed between Purchaser, on the one hand, and the undersigned on the other hand, with respect to the project. In furtherance of such intention, the undersigned acknowledges that the release herein given shall be and remain in effect notwithstanding the discovery or existence of any such additional or different facts.

8. Purchaser is not waiving any right that it would have in the absence of this Agreement as a member of the public with respect to the subject matter of this Agreement.329

329. Studio Agreement, supra note 277.
The Depiction Release should always be notarized to assure that the validity of the signature cannot be disputed. If a minor will be depicted in the docudrama, a parent or guardian will have to execute the release and waiver on the child’s behalf. Contractual consent for minors has been upheld by the courts, as long as the use was not repugnant to public policy.  

5. Cooperation of Owner

A provision providing for the Owner’s cooperation is essential for the development of the project. This provision obligates the Owner to assist in obtaining and providing materials, personal insights, and assistance in obtaining Location and Depiction Releases. Farber’s model is illustrative:

Disclosed and Consultation: Prior to the time that the option is exercised, and thereafter if the Option is exercised, Owner shall, at Purchaser’s request, disclose to Purchaser and Purchaser’s representatives, freely, completely and candidly, all information in Owner’s possession or under Owner’s control including, without limitation, copies of any newspaper or magazine clippings, photographs, transcripts, notes, recordings, or other physical materials relating to Owner’s story and all Owner’s thoughts, observations, recollections, opinions, reactions and experiences surrounding, arising out of, and concerning all those events, circumstances, and activities, relating to Owner’s story.

If Purchaser specifically requires Owner to travel or to incur telephone expenses in connection with such disclosure or consultation, then Purchaser shall reimburse Owner for reasonable out of pocket travel and living expenses for services performed by Owner away from Owner’s home and for long distance telephone calls incurred at Purchaser’s request.

Additional Releases: Owner agrees to use Owner’s best efforts to procure for Purchaser for no additional cost, those depiction releases Purchaser deems necessary from individuals who are a part of Owner’s life story or depicted in any information or materials Owner may supply to Purchaser herein. Owner agrees to use Owner’s best efforts to procure

See, e.g., Shields v. Gross, 448 N.E.2d 108 (N.Y. App. Div. 1983) (Brooke Shields was denied revocation of a release signed by her mother; photographer permitted to sell nude photos of Shields at age ten as long as the uses were not pornographic).

This clause is particularly important during the option period, as it is unlikely that the Owner would be hired as a consultant before a production commitment has been received, or production has actually commenced. See discussion on Consultant Services, infra notes 335-42 and accompanying text.

While some contracts merge cooperation with materials and cooperation with releases into one provision, they are treated as separate provisions herein.

Farber, supra note 281, §§ 63-4, 63-5, and 63-8.
This provision may be used in conjunction with, or instead of, a Consultant Services provision. The primary difference between the Cooperation of Owner and Consultant Services provisions is the matter of monetary compensation; the former requires no additional monies, whereas the latter does.

6. Consultant Services

In many situations it is beneficial to both the Owner and the Purchaser to employ the Owner as a Consultant. This helps allay the fears of the Owner and provides the Purchaser with access to information, materials, and, during the production, attention to accuracy. From a practical standpoint, having the Owner read drafts of the teleplays and consult during production may be problematic. If the Owner disrupts production, it is important to have a pay-or-play provision in the contract which allows the Purchaser to pay-off the Owner for the Consultant Services without being in breach of the agreement. For example, some studios use the following language:

No Obligation to Use: Nothing contained herein shall be construed as requiring Purchaser to utilize any of Owner's services or to produce or broadcast any television program based upon any story, teleplay or other material written or presented by Owner hereunder, or to exercise any option hereunder, or to make any use whatsoever of the results and proceeds of Owner's services. Purchaser shall have fully discharged his obligations hereunder by paying Owner any compensation required under this Agreement.

Pragmatically, the producer will probably get all the background information necessary whether a Cooperation or Consultant provision is negotiated. After all, it is in the Owner's best interests to cooperate as much as possible in order to sell the project (i.e., the purchase price will not be paid before there is a network sale, and usually not before a production commitment) and to achieve an accurate and favorable portrayal. "The owner may use its concern over content to leverage additional compensation for time spent consulting." In such a case, the Purchaser can manipulate the figures to accommodate the additional fee by decreasing the purchase price. This provision may use the same

334. Depending on the nature of the story, the use of certain locations may be necessary or desirable and the Owner is often in a better position to secure such releases as he or she has a relationship with the owner of such locations and is less threatening. In today's climate, however, it is unlikely that a location release could be obtained for "no additional cost."
335. Clifford, supra note 59.
337. Studio Agreement, supra note 277.
338. FARBER, supra note 281, § 63-5, comment 4.
language as the Cooperation clause above or may contain more detailed language such as the following:

Consultant Services: Consultant services shall include, but not be limited to, the following:

a. Owner shall lend Owner's best and most cooperative efforts and knowledge to Purchaser, upon Purchaser's request from time to time, in personal meetings and by correspondence and telephone, to provide Purchaser with facts, data, background, and other material related to the [Property]; and Purchaser may tape record all such discussions and conversations.

b. Owner shall make available to Purchaser all currently extant photographs, documents and correspondence in Owner's possession or control relating to the [Property]; and Purchaser may make copies thereof.

c. Owner shall cooperate with and aid Purchaser, upon Purchaser's request from time to time, in obtaining so-called "right of privacy" releases and location releases from persons and owners of property Purchaser may contemplate depicting in a project based on the [Property].

d. Owner shall cooperate with and aid Purchaser in obtaining access to files and information and permission and authorization to make copies thereof relating to the [Property] and to use, to the fullest extent such rights are available, all or any part thereof in the production, distribution, advertising and exploitation of any project hereunder.

Employing the Owner as a Consultant and providing him or her with drafts of the teleplay may serve to avoid litigation. The Owner's objections are heard early in the production process and adjustments can be made more easily. While a Purchaser would never relinquish creative control to an Owner, this process of review may eliminate future problems before it is too late to make changes.

339. If particular materials or types of materials are critical to developing the Property, the Purchaser may wish to list specifically those materials in this subparagraph.

340. If releases are essential from particular individuals, the Purchaser may wish to add: "Said 'right of privacy' releases shall include, but not be limited to, (name specific people or categories of people) (e.g., members of Owner's immediate family, Owner's former employer, etc.)."

341. Studio Agreement, supra note 277. Additional clauses not detailed above would provide for the fee, payment schedule, duration, and activation of the Consultant Services.

342. If an Owner insists on some degree of creative control, and the Purchaser believes it to be a breaking point in the negotiations for a highly sought after or desirable Property, the Purchaser may include a provision such as the following:

Creative Approval: It is acknowledged and agreed that Creative Approval in connection with the content and direction of the story shall be vested jointly with Owner and (Purchaser's creative executive) on behalf of Purchaser. As between Purchaser and Owner, Owner prevails only as to matters directly relating to the accuracy of events in the Owner's life and of statements by the Owner, and Purchaser's decision shall be final with respect to all other matters. Notwithstanding the foregoing, as customarily required in network development agreements, the approval rights of the network shall be final.

Studio Agreement, supra note 277.
7. Frozen Rights, Holdback Period, Right of First Negotiation, and Right of Last Refusal

In the event the Owner has reserved some rights, these provisions provide the Purchaser with the ability to exploit the Purchaser's rights without having to compete with the exploitation of the same story in another medium. There are four components which may be part of this clause: Frozen Rights, Holdback Period, Right of First Negotiation, and Right of Last Refusal. The Frozen Rights provision obligates the Owner to suspend the exercise of his or her reserved rights during the term of the option period; the Holdback Period applies to the use of the reserved rights in the event the Purchaser exercises the option (the length of the Holdback Period is tied to either the production of a Project based on the Property or the duration of a third-party license agreement); the Right of First Negotiation provides the Purchaser with an exclusive period of time to negotiate for the reserved rights; and the Right of Last Refusal allows the Purchaser to match any offer the Owner receives for the reserved rights. The following provisions are representative of an agreement in which the television rights were acquired by the Purchaser and the theatrical motion picture rights were retained by the Owner:

A. Frozen Rights: During the Option period, the reserved rights in the [Property] shall be “frozen” (i.e., the Owner may not assign, sell, exploit or authorize others to exploit the [Property] or any elements thereof) in any theatrical motion picture project, including but not limited to the rights to produce theatrical motion pictures based on sequels to the [Property] (“Frozen Rights”). In addition, in the event Purchaser exercises the Option herein, such Frozen Rights may not be assigned, sold or otherwise exploited during the applicable “Holdback Period” as defined hereinbelow.

B. Holdback Period: In the event that Purchaser exercises the Option, then the Frozen Rights may not be assigned, sold or otherwise exploited by Owner during the term of the third party licensee agreement for the Project plus one (1) year following the expiration of the term of the third party licensee agreement (“Holdback Period”).\(^{343}\)

C. Right of First Negotiation: In the event the Owner wishes to assign, sell or otherwise exploit the Frozen Rights following the expiration of the Holdback Period, then Purchaser shall have the right of first negotiation in connection with any such assignment, sale or exploitation of the Frozen Rights. Purchaser's right of first negotiation hereunder shall be exercised in accordance with and subject to the following procedures:

(1) If the Owner desires to dispose of the Frozen Rights (whether directly or indirectly) or the Owner desires to negotiate with a third party in connection with such Frozen Rights, then the Owner shall, by written notice, notify Purchaser of such desire and shall grant to Pur-

\(^{343}\) “Network” is often used instead of “third party licensee”; however, it is not recommended as it serves to limit the Purchaser's rights.
chaser the first and exclusive right and option for a period of (number of days)\textsuperscript{344} days following such notice from the Owner to Purchaser to negotiate for the acquisition of such Frozen Rights. If no agreement has been reached between Purchaser and Owner, the Owner shall be free to negotiate elsewhere with respect to such Frozen Rights.

D. Right of Last Refusal: In the event the Owner and Purchaser fail to reach an agreement pursuant to the terms of subparagraph C. hereinabove, and subsequently the Owner receives a bona fide offer from a third party for the Frozen Rights, then Purchaser shall have the Right of Last Refusal with regard to said third party offer. Owner shall, by written notice, notify Purchaser of such offer and shall grant to Purchaser the exclusive right for a period of (number of days) days following such notice from Owner to Purchaser in which Purchaser may match the terms and conditions of said offer. If Purchaser does not match the offer within the period defined herein, then Owner shall be free to accept said third party offer with respect to the Frozen Rights.\textsuperscript{345}

8. Representations and Warranties

The Owner’s Representations and Warranties provision provide further protection against future litigation. In this provision, the Owner makes the following promises:\textsuperscript{346}

(a) Owner represents and warrants that Owner has not heretofore granted, and Owner hereby agrees that hereafter Owner shall not grant, during the Option Term, or thereafter if the Option is exercised, to any party, nor shall Owner exercise or authorize, or permit to be exercised, any right to use or exploit any of the rights granted or to be granted to Purchaser herein or in the Purchase Agreement; and that Owner has not entered into, and shall not enter into during the aforesaid periods, any agreements or activities which will hinder, compete, conflict, or interfere with the exercise of, or diminish, any of the rights granted to Purchaser. Owner has no knowledge of any claim or potential claim by any party which might in any way affect Purchaser’s rights to use and exploit the rights granted or to be granted to Purchaser herein or pursuant to the Purchase Agreement.

(b) Owner represents and warrants that none of the information to be provided by Owner or on Owner’s behalf is, or will be a violation of the rights of any third party, including, without limitation, a defamation, libel, slander or violation of any right of privacy or publicity.

\textsuperscript{344} This period may be as short as fifteen days or as long as ninety days.

\textsuperscript{345} This last provision is of particular importance when the reserved rights include all exploitation rights in subsequent books. The Purchaser would not want to build an audience for certain material and then see a competitor profit from that following. On the one hand, this provision allows the Purchaser to preempt any other agreements by matching the terms of said offers. On the other hand, an Owner who has reserved valuable rights is obviously in a good bargaining position and will not want to grant this right. The Owner’s rationale is two-fold: the Purchaser already had his or her chance to purchase the rights via the Right of First Negotiation, and third parties disfavor these provisions because they may have to expend time and resources to have closed a deal, only to have it preempted by the Purchaser.

\textsuperscript{346} \textit{Farber, supra} note 281, §§ 63-7 to 63-8.
(c) Owner represents and warrants that Owner has the right, authority and legal capacity to grant the rights granted to Purchaser hereunder and in the Purchase Agreement. 347

(d) Owner shall defend, indemnify and hold Purchaser, and Purchaser's employees, agents, successors, licensees and assigns, harmless from and against any and all claims, damages, liabilities, losses or expenses (including reasonable attorneys' fees and costs) which Purchaser or any such party may suffer or incur arising out of or in connection with the breach by Owner of any of the representations and warranties set forth herein or in the Purchase Agreement.

(e) Purchaser shall defend, indemnify and hold Owner harmless from and against any and all claims, damages, liabilities, losses or expenses (including reasonable attorneys' fees and costs) which Owner may suffer as a result of any fictional material added to the [Property] by Purchaser. 348

9. Public Domain Protections

Finally, a Public Information or Public Domain provision should be included in the agreement. There are two parts to this clause. The first is applicable if the Purchaser decides not to exercise the option but to produce a docudrama based on the Owner's story from public domain sources. 349 The following is representative: "Under no circumstances shall Purchaser, or Purchaser's successors, licensees or assigns, be in a less favorable situation than Purchaser would have been had Purchaser not secured from Owner the rights described herein or in the Purchase Agreement." 350 In addition, this clause may help to protect the Purchaser against future litigation from the Owner if the Purchaser subsequently decides to produce a similar story. For example, Purchaser acquires Owner's life story, a triumph-over-personal-tragedy story dealing with Owner's miraculous recovery after he was paralyzed in a car accident. Subsequently, Purchaser produces a triumph-over-personal-tragedy story involving an individual who miraculously recovered from a near fatal plane crash. Owner then claims that it is his story, except that the facts were doctored slightly to disguise it and thus avoid paying the purchase price. This provision serves to protect against the preemption of an entire arena—in this scenario, physical triumph over tragedy.

347. If there is only one agreement, rather than separate option and purchase agreements, the sentence would end after “hereunder.”

348. This clause solely benefits the Owner and therefore need not be included unless specifically requested.

349. This situation may arise in a variety of ways. For example, the parties may have negotiated an exorbitant purchase price, but the option subsequently lapsed, making the rights unavailable. In another instance, further research may disclose that purchasing the rights is unnecessary.

350. Farber, supra note 281, § 63-10.
IV
Protective Measures and Defenses

A. Introduction

Having examined all the areas of potential liability and how they arise, the most important question remains: What preventive measures can a producer's attorney take to minimize the risk of liability? The preventative process is called "clearance." Every docudrama script must be cleared before airing. In addition, the network will require the producer to obtain errors and omissions insurance, which also requires an extensive clearance procedure. Finally, should a suit be filed, the media defendant should consider the available defenses: privilege, consent, and disclaimers.

B. Script Clearance

In order to obtain errors and omissions insurance, a network requirement, the producer will have to complete certain clearance analyses intended to spot areas of potential liability. The insurer provides an extensive questionnaire which requests information regarding the nature of the project and provides guidelines for clearing a script, to which the insured's attorney must use his or her best efforts to adhere.

- If the production is in any way based on actual facts, it must be ascertained if the source material is primary (e.g., direct interview, court records) and not secondary (e.g., another copyrighted work). Use of secondary sources may be permissible, but full details must be provided to Company in an attachment to the 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, and if such person is a minor, the minor's consent must be legally binding. If the recognizable or identifiable person is deceased, releases must be obtained from the personal representative of such person. Releases of the type described in the preceding two sentences may not be required in certain instances, but full details must be provided Company in an attachment to the application. Releases are not necessary if the recog-

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351. Gerdes, supra note 14, at 36.
352. The production must be categorized as: (1) entirely fictional; (2) entirely fictional, but inspired by specific events and/or occurrences; (3) a portrayal of actual events which includes significant fictionalization; (4) a true portrayal of actual facts or happenings; or (5) other than above. Fireman's Fund Insurance Companies, Motion Picture, Radio and Television Producers Liability Insurance Schedule and Application, at 2 [hereinafter Fireman's Fund].
353. Id. at 1.
izable person is part of a crowd or background shot and his image is not shown for more than a few seconds or given special emphasis. . . .

7. All releases must give the Insured the right to edit, modify, add to and/or delete any or all of the material supplied by the releasor. Releases from recognizable persons must grant the Insured the right to fictionalize the Insured's portrayal of the releasor. . . .

13. It must be determined that the Insured production does not contain any material which constitutes defamation, invasion of privacy or violation of the right of publicity or of any other right of any person, firm, or corporation. 354

In addition, in assessing the potential liabilities, the application states, "Is there a plausible risk that a living person could claim (without regard to the merits) to be identifiable in the production (whether or not the person's name or likeness is used or the production purports to be fictional)?" 355 Part of the clearance process requires the writer to provide an "annotated script" which indicates the source of information for all dialogue, scenes, and characters. 356 Dialogue may be invented, but the writer must show that its "creation can be supported by the source's information or that such dialogue is innocuous." 357 Scenes are analyzed in the same way. At least one network, ABC, requires that locations, circumstances and the chronology of events be accurate, and that evidence supporting their accuracy be submitted with the annotated script. Although events may be telescoped, they must be chronologically accurate, and events that did not occur cannot be invented. Furthermore, the passage of time must be clearly indicated, by dialogue, supers, dissolves or other visual techniques. 358

Each character must be "categorized as living, dead, real, fictional or composite." 359 In addition, a character's demeanor, attitude and personal characteristics must be supported; and if a portrayal is particularly uncomplimentary or controversial, a more detailed investigation will be required. 360 The review process is extensive and multi-layered. At ABC, for example, the docudrama is reviewed numerous times through every stage of development from treatment through final cut. 361 This clearance process should preclude any claim of defamation by a public figure or official (because plaintiff will not be able to prove "reckless disregard for the truth"), and will make it very unlikely that a private figure could

354. Id. at 2.
355. Id. at 1.
357. Id.
358. Sobel, supra note 4, at 6.
360. Sobel, supra note 4, at 6.
361. Id. "[A]pplicant and its counsel must continually monitor the production at all stages, and in light of any special circumstances, to make certain that the production contains no material which could give rise to a claim." Fireman's Fund, supra note 352, at 3.
prevail upon a showing of negligence. The clearance process will also
highlight potential suits for invasion of privacy, copyright infringement,
and false light, and the risks can be weighed against the importance of
the material, pursuant to the analyses above.

Even in the event that new characters are created, or the characters’
names and locales have been changed, additional protective measures are
advised (and most likely mandated by the insurer). Companies, such as
de Forest Research, Inc., research the potential legal risks which may
result from a production. The service covers many areas, including
checking “all character names to ensure that those selected do not iden-
tify actual persons; all fictitious business names to ensure that your imag-
inary corporation does not have a real-life counterpart; all product
references for possible trademark and/or copyright infringement.”

This is a critical part of the clearance process because coincidental identi-
fications may result in litigation. For example, in Smith v. Huntington
Publishing Co., the defendant wrote an article about a woman and her
drug-addicted son. As agreed upon with the actual subjects, the names
used in the articles were fictitious. By coincidence, the fictitious names
chosen were the same as the plaintiffs (mother and son), and the boy
described matched the son’s age and general description. Although the
defendant prevailed, partially as a result of a disclaimer, it is costly to
defend any claim, and particularly unnecessary when the basis for the
suit may be so easily avoided.

C. Defenses

The primary defenses available to a media defendant are privilege,
when rights are not secured, and consent, when rights have been ob-
tained. As discussed above, the First Amendment privilege provides the
media defendant with a great deal of protection against claims for defa-
mation, invasion of privacy, and related torts. Meticulous clearance pro-
cedures should provide ample evidence to rebut a charge of actual malice
or reckless disregard of the truth. Similarly, careful drafting of releases
and waivers should provide considerable protection against tort liability
when the parties have consented to media portrayal. The remaining pro-
tective measure or defense which warrants discussion is the disclaimer.

Disclaimers are used to shield producers from suits involving defa-
mation and invasion of privacy. The disclaimer attempts to explain away
liability by informing the viewer that any similarities between fictional
characters and real people are purely coincidental, a program is purely

362. de Forest Research, Inc. promotional brochure, at 1.
fictitious, the presentation is from a particular perspective (author, participant, or attorney), artistic license has been taken with the facts, or characters may be composites or strictly fictional. For example, ABC's telecast of *Marilyn: The Untold Story* was preceded by the disclaimer, “The following is a dramatization of the life of Marilyn Monroe, based on the book by Norman Mailer and other sources. Some composite characters and time compression have been used for dramatic purposes.”

There are primarily two types of cases which arise where courts have applied the use of a disclaimer as a defense: fictitious names cases and character fictionalizations. When the plaintiff sues over the coincidental use of his or her name, the media defendant will most likely prevail. “The courts generally have agreed that when names have been changed . . . absent convincing indicators that the subject of the report was the complainant, a disclaimer manifesting in general terms the types of changes made is sufficient to preclude liability.” The basis of the decisions is that the plaintiff will be unable to prove the characterization is of and concerning him or her.

The more problematic use arises when the disclaimer pertains to fictionalized elements of a fact-based story. Since a docudrama purports to contain both fact and fiction, the plaintiff will have an easier time asserting that the portrayal is of and concerning him or her. In analyzing these sorts of claims, the courts consider the relative significance of the character to the production. If the character played a relatively small part in the docudrama, courts are unwilling to assess liability. If the character is more prominent and there is a relationship between the defendant and plaintiff, a disclaimer alone will not avoid liability. Ultimately, disclaimers should be regarded merely as supplemental devices and should not be relied upon in lieu of careful clearance procedures.

364. Gerdes, supra note 14, at 58.
365. Sobel, supra note 4, at 6.
367. Id. at 79.
368. Id. at 84 (“the law does not care for, or take notice of, very small or trifling matters”).
369. Id.
370. Id. at 86. See, e.g., Fetler v. Houghton Mifflin, 364 F.2d 650 (2d Cir. 1966) (novel character resembled author’s brother too closely to overcome disclaimer); Bindrim v. Mitchell, 155 Cal. Rptr. 29 (Ct. App. 1979) (those who knew plaintiff could identify him as character in novel). But see also Davis v. Costa-Gavras, 654 F. Supp. 653, 658 (S.D.N.Y. 1987) (“minor fictionalization cannot be considered evidence or support for the requirement of actual malice”).
V

Conclusion

There is great potential for litigation in the production of docudramas. The easiest way for the producer to avoid liability is by securing all rights in the subject matter depicted. Careful drafting of the acquisition agreement and depiction releases can virtually eliminate all potential risks. In circumstances where acquiring rights is not always feasible or desirable, a producer may utilize public domain sources. In those instances, the potential liabilities (e.g., defamation, invasion of privacy, etc.) may be mitigated through diligent clearance procedures and careful legal analyses. It is clear that the popularity of docudramas will continue, and consequently, the financial incentives for producers and distributors will insure their continued production. As society becomes more litigious, and the complexities of acquiring rights and protecting against tort litigation increase proportionately, the role of the attorney is increasingly becoming an integral part of the creative process of producing docudramas.