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The Life Story Rights Puzzle

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ABSTRACT

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

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

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INTRODUCTION

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

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

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

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

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

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

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

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

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

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

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

There's only one problem: "life story rights" do not exist.[7] They have been referred to by entertainment industry insiders as a legal fiction,[8] a misnomer[9] and an urban myth.[10] No source of American law secures to individuals the exclusive right in the facts that comprise the narrative of their lives. Quite the contrary: copyright law explicitly reserves all facts, including the facts that make up life stories, to the public domain. Nor does trademark law prevent studios from freely making features based on true life facts, absent confusion about false endorsement or source of origin. Moreover, courts have generally interpreted the First Amendment's Speech Clause to bar any laws from restricting expressive speech based on its content (life stories or otherwise).[11]

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

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

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

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

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

[10] *See* Anonymous Interview #4 at 7 (calling the idea of life story rights "almost like this urban myth").

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

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

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

> (1) the producer's authorization to use and adapt factual events concerning the subject,
> (2) the subject's release of the producer from liability for claims arising from the production, whether for defamation, violation of the right of publicity, or otherwise,
> (3) a prohibition against the subject's cooperation with any other producer on a similar project and
> (4) the producer's access to the subject for consultation and interviews, as well as a commitment to provide further information and/or documents, photographs and other artifacts.

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

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

[12] *See* Sections I.C and I.D, *infra*.
[13] *See* Section I.B, *infra*.

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

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

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

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

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

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

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

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

I. NO RIGHT TO ONE'S STORY

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

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

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

there is no vested property interest in the facts that comprise one's life story.[18]

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

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

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

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

[20] *Id*.

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

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

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

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

A. Copyright

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

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

[24] *See* 17 U.S.C. § 102(a).

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

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

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

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

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

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[28] *Feist*, 499 U.S. at 345.

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

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

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

[32] A similar copyright claim was made under English law in 1994, when Sir Stephen Spender sued the publisher of a novel that was allegedly based on Spender's autobiography, published in 1951. The case settled with the publisher's agreement to withdraw the novel from the market. *See* David Streitfeld, *Publisher Kills Novel over Pilfered Plot*, WASH. POST, Feb. 17, 1994, https://www.washingtonpost.com/archive/politics/1994/02/17/publisher-kills-novel-over-pilfered-plot/765ca239-abc9-40c8-9ea9-b9403f97af8b/ (the authors thank Professor Michael Madison for bringing this episode to our attention).

B. Right of Publicity

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[43] *See* Post & Rothman, *supra* note 21. R

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

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

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

Different courts have come to very different conclusions concerning the right of publicity and fictionalization due to the tension between the plaintiffs' interest in their identity and the defendants' First Amendment rights. The *Sarver* and appellate *de Havilland* courts situated the plaintiffs' right of publicity claims as content-based speech restrictions, which unsurprisingly led to the defendants prevailing. But the *de Havilland* trial court asked a question less favorable to the studios—was the use of the subject's identity transformative?[48]—which led to a preliminary victory for the plaintiff.[49] And the Missouri Supreme Court in *TCI Cablevision* asked a more plaintiff-friendly question still—whether the use of the defendant's identity was predominately commercial or expressive[50]—eventually resulting in an eight-figure judgment for the plaintiff on remand. Given this doctrinal variance, with its outcome-determinative implications, studios cannot be confident about what law will apply, let alone what the outcome may be.

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

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

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

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

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

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

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

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

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

C. Public Disclosure of Private Facts

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

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

Consider an example: a television studio is making a dramatized feature based on a story from a local paper about an otherwise obscure man's battle with cancer. The production team interviews the man's family and friends to learn more about his life, and in one such interview, the subject's

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

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

[55] Id.

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

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

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

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

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

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

[59] 420 U.S. 469, 492-96 (1975).

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

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

D. Defamation

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

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

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

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

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

[63] *Id.* § 580A (1977).

[64] *Id.* § 580B (1977).

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

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

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

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

[67] *Id.* at *6-8.

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

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

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

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

E. False light

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

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

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[70] *Id.* at *8-9.

[71] *Id.*

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

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

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

[75] *Id.*

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

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

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

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

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

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

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

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

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

F. Trademark

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

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

G. Conclusion

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

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

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

[83] *Id.*

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

[85] *Id.* at 1001.

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

II. SOLVING THE LIFE STORY PUZZLE

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

A. History of Docudramas and Life Story Rights

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

New York's 1903 Civil Rights Law[89] was the first indication that the producers of such dramatized works, as opposed to documentary or news productions, might require the consent of the individuals that they depicted. The law, for the first time, expressly prohibited the use of an individual's "name, portrait or picture" in trade without that person's prior

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

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

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

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

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

John R. ("Jack") Binns was the wireless telegraph operator on the steamship *Republic* when it collided with another vessel in 1909.[94] Thanks to Binns's quick dispatch of the telegraphed distress code "C.Q.D.," another ship came to the rescue and saved the passengers and crew of the *Republic*. Shortly after this newsworthy event, Vitagraph produced a short film titled "C.Q.D. or Saved by the Wireless; A True Story of the Wreck of the *Republic.*" In the film, Vitagraph staged scenes using actors and sets constructed to resemble parts of the ship.[95] Binns sued to enjoin distribution of the film under the New York Civil Rights Law. In ruling for Binns, the court reasoned that, unlike a newsreel, Vitagraph used an actor portraying Binns "to amuse those who paid to be entertained."[96] The statute was clear that such uses in trade, without the prior written consent of the subject, were prohibited.[97]

Lawsuits like the one brought in *Binns* raised a cautionary flag among motion picture producers and caused them to begin to seek permission from real life subjects before making films about them. It was not until World

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

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

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

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

[94] *Id*. at 1109.

[95] *Id*.

[96] *Id*. at 1111.

[97] *Id*. at 1109.

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

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

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

The earliest assignment of life story rights for a film that we have identified was made by Sergeant Alvin C. York, one of the most famous American heroes of World War I.[99] In 1919, film producer Jesse Lasky saw the potential for a film focusing on the war hero. But when Lasky offered to buy York's story, the soldier is reported to have replied, "My life is not for sale."[100] After a series of failed overtures by Lasky, York finally agreed in 1940 to sell the motion picture rights to his life story for $50,000.[101] The

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

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

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

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

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

The expansion of television to homes throughout the United States in the 1950s led to an increasing number of televised docudrama movies and miniseries based on true stories.[103] Yet it appears that life story rights were still acquired predominantly in the motion picture industry, most likely for budgetary reasons. Even so, not all life story acquisitions during this period commanded the sums paid to Sergeant York. For example, in 1956, Christine Sizemore, the psychiatric patient whose case first brought multiple personality disorder to the attention of the public, sold her life story rights to Twentieth Century-Fox for $7,000.[104] The result was the popular 1957 film *The Three Faces of Eve*, for which Joan Woodward won an Oscar playing a fictionalized version of Sizemore.[105]

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

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[102] *See id.*

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

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

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

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

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

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

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

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

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

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

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

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

B. The Mechanics of Acquiring Life Story Rights

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

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

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

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

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

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

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

1. Fictionalization

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

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

[113] Lawrence, *supra* note 108, at 278. R

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

[115] *See* AQUINO, *supra* note 86, at 26. R

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

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

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

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

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

[119] *The Stranger* (Netflix, 2022).

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

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

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

2. From Whom Are Life Story Rights Acquired?

a. Sources of Life Story Rights

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

[121] *See* AQUINO, *supra* note 86, at 53. R

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

[123] *Id*.

[124] *See* Grunfeld, *supra* note 29, at 516. R

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

did produce the aforementioned one-hour documentary episode that recounted Sorokin's story.[126]

b. Uncooperative Subjects

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

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

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[126] See id.

[127] *See* Grunfeld, *supra* note 29, at 516; Perot, *supra* note 7, at 205. R

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

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

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

[131] *See* notes *infra* 181-183 and accompanying text. R

c. Centrality of the Character

Even a docudrama that focuses intensely on one particular character usually depicts other individuals — friends, relatives, neighbors, colleagues, teammates, opposing counsel, police officers, victims, and the like. A producer must decide which of these individuals warrant the acquisition of life story rights, and which may require only a release[132] or, if the subject is uncooperative, how to proceed absent the subject's cooperation. Unlike a principal character, a secondary character may more readily be depicted in a non-controversial and accurate manner or fictionalized to a degree that the real person is no longer represented.[133]

d. Living Persons

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

3. Insurance Coverage

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

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

[132] *See* discussion *infra* Part II.D.

[133] *See supra* Part II.B.1.

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

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

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

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

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

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

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

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

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

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

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

[142] *See* Front Row, *supra* note 137, at 46 ("a possible result of not getting permission from a celebrity to do a docudrama could be a much higher E&O deductible . . . In some cases your deductible could jump from around $10,000 to as high as $250,000 for that one item"); Perot, *supra* note 7, at 199-200, 206. R

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

4. Life Story Rights Across Media

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

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

[144] Rosemont Enterprises, Inc. v. Random House, Inc., 294 N.Y.S.2d 122, 125 (Sup. Ct. 1968).

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

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

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

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

C. Basic Elements of a Life Story Deal

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

1. Grant of Rights

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

> A perpetual, exclusive, and irrevocable right, throughout the universe, to depict the subject, whether wholly or partially factually or fictionally, and to use the subject's name, likeness, voice, and biography, in any and all media and by any and all means whether now known or hereafter developed and in all advertising and exploitation thereof [and] to portray, im-

[148] *See* JORGE L. CONTRERAS, INTELLECTUAL PROPERTY LICENSING AND TRANSACTIONS: THEORY AND PRACTICE 149 (2022) (describing grants of rights in intellectual property licenses).

[149] Rudell, *supra* note 105. R

> personate, and simulate the subject in any way in which the producer in his sole discretion may determine.[150]

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

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

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

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

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

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

[153] *Id.* (implying that granting the right to portray the subject's life fictionally was necessary to allow the grantee to do so).

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

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

2. Liability Waiver

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

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

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

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

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

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

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

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

3. Exclusivity

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

Studios desire exclusivity in part because preventing a subject from cooperating with other production companies will make it harder for them to make competing films, notwithstanding their general ability to depict known facts.[164] Moreover, the more the details of the subject's story become widely known, the less public appetite is likely to remain for the production once it is released. While there are instances of multiple docudramas being released on the same subject, the later market entrant has often had its thunder stolen by the earlier one.[165] For example, the 2005 Truman Capote biopic, *Capote*, won widespread critical acclaim, was a box office hit, and won an Oscar for Philip Seymour Hoffman.[166] The 2006 film *Infamous* also dram-

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

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

[162] Anonymous Interview #3 at 5.

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

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

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

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

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

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

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

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

[167] *See* Turan, *supra* note 166.

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

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

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

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

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

4. Access and Cooperation

Life story agreements secure subjects' cooperation with a project both by engaging their help with the production and by preventing disparagement.[173] Many docudrama subjects are not well known enough that the details of their lives are in the public record.[174] Extensive research can be necessary to acquire enough detail to tell the subject's story richly. Many life story agreements thus include provisions requiring subjects to be interviewed at length and to provide access to source material, such as journals, news clippings, notes, photographs, or family albums, that may help the writers to tell their story.[175] Access clauses may also obligate subjects to secure the cooperation of other people essential to the project, such as friends and family members.[176]

One principal feature of access clauses is to require subjects to be available to give commentary and advice on the script or film during its produc-

[172] *See* Anonymous Interview #5 at 10 (indicating that these clauses are enforced informally by reminding subjects of their existence rather than via litigation); *cf*. Anonymous Interview #8 at 14 (recalling no instances of breach of life rights agreements in their practice experience). A studio would, however, be more likely to aggressively enforce an exclusivity provision in the event of a more consequential breach, such as where a subject sought to execute another life story rights deal with a competing studio. In that case, the breach would threaten the viability of the studio's project, rather than just marginally sating the public appetite for information about the subject.

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

[174] Anonymous Interview #8 at 2 (explaining that life rights agreements secure access to "things that aren't accessible publicly" such as "photos and home videos and whatever else").

[175] *See* Anonymous Interview #3 at 6 (observing that the subject may "have access [to] materials that you really want that are going to enhance the story or the script. And so you get that cooperation even if, under the law, you don't need it.").

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

tion, in some cases in exchange for additional compensation. Studios may want, perhaps even need, some subjects to advise on the project to assure realism. They will want other subjects to stay away to avoid unwanted interference.[177] For example, with *Inventing Anna*, Anna Sorokin consulted on the Netflix production, including by meeting with actress Julia Garner, who played her, while Sorokin was still in prison.[178] And consulting with a subject, especially one who may be opinionated or even hostile toward the project, can assure that they approve, or at least do not feel blindsided by, the final version.[179]

Access clauses may also prohibit the subject from publicly disparaging a production. Especially where the subject of a life-based project is well known, the project could fail both critically and commercially if the subject were to trash it in the press.[180] For example, in 2011, Equinoxe Films released *Winnie Mandela*, a dramatization based on an unauthorized biography of Mandela.[181] The filmmakers did not secure a life story agreement with Mandela and declined her requests to be involved in its production. Before the film release, Mandela publicly distanced herself from the project, questioning its truthfulness and calling it an "insult."[182] Likely in part because its beloved subject disparaged it before it even hit theatres, *Winnie Mandela* failed at the box office and was panned by critics.[183] This fiasco may have been avoided had the studio secured Mandela's cooperation, or at least prevented her public disparagement of the project.[184] Life story agreements may thus seek to secure the goodwill of both the subject and the public. As

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

[178] Baker, *supra* note 6. R

[179] Anonymous Interview #5 at 8.

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

[181] Winnie Mandela (Equinoxe, 2011).

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

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

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

basketball legend Ervin "Magic" Johnson said of the recent HBO docudrama *Winning Time*, which did not seek cooperation from him or other team members, "You gotta have the guys."[185] Even though a subject's story may be told without executing a life story agreement, telling a story—especially the story of a sympathetic subject—without their permission can create bad optics for studios and generate negative PR.[186]

5. Valuing Life Stories: Compensation

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

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

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

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

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

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

> lion or more on the production, plus $25-$35 million more in [print and advertising.][189]

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

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

In addition to up-front payments for the acquisition of life story rights, producers occasionally offer subjects a small percentage of the film's net profits. In theory, this form of "back end" compensation incentivizes subjects to root for the project's success and to cooperate more willingly with the producer. Nevertheless, given the economics of the film industry and the aggressive accounting mechanisms used to compute a film's net profits, few productions actually result in the payment of this form of compensation to subjects.[193]

Why are compensation amounts low, at least as compared to the astronomical dollar values sometimes paid to top actors, directors and studio

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

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

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

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

[193] *See* Anonymous Interview #1 at 9 (making this point by reference to financial practices designed to shortchange performers, a practice known as "Hollywood accounting").

executives? One reason is that a key feature of life story agreements is the subject's waiver of claims against the producer. Even if a subject could win a defamation or right of privacy lawsuit against a major film studio, reputational damages tend to be modest, especially for the majority of docudrama subjects who are not famous. So, at a price point above about a million dollars, studios could be better off making the film and letting the subject sue them.[194]

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

6. Granularity

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

Disputes can arise if agreements are not specific enough in this regard and a subject lives past the period that was originally depicted in a production. For example, when Christine Sizemore sold her story to Twentieth Century-Fox in 1956 for *The Three Faces of Eve*, the obvious subject of interest was her experience with, and treatment for, multiple personality disorder. More than thirty years later, however, Sizemore wrote a book about her post-treatment life and granted an option for its film dramatization to actress Sissy Spacek.[196] Twentieth Century-Fox, however, claimed that it owned rights in the entirety of Sizemore's life and contested Spacek's option.[197]

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

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

[196] Rudell, *supra* note 105. R

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

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

7. Creative Control

As discussed above, life story deals typically require subjects to waive their right to make claims based on the how they are depicted in a film or television show. Some industry insiders stress that the very point of a life story deal is that the studio can make whatever film it wishes about the subject.[203] Nevertheless, against the advice of counsel,[204] producers sometimes give their subjects the right to review or approve these depictions at certain stages during the production. Such approval rights, if granted, usually occur at the stage of the treatment (story outline), selection of screen-

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

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

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

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

[202] *See* Grunfeld, *supra* note 29, at 516. R

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

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

writer, casting of talent, or review of a draft script, but seldom at the final script stage, and never after filming has commenced.[205] Traditionally, such approval rights have only been granted to famous subjects like Hugh Hefner[206] and George M. Cohan,[207] though there appears to be an increasing use of these clauses in recent years.

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

D. Life Story Acquisitions versus Releases and Other Agreements

It is important to distinguish life story agreements from other types of agreements used in the entertainment industry. The first is the simple "appearance" or "depiction" release, in which a subject agrees not to sue the producer on any theory, usually premised on accurately representing the subject.[209] As this latter condition indicates, the simple release is most common for documentary subjects as well as individuals briefly portrayed in docudramas.[210] Given the multiplicity of legal claims that may be brought by even minor characters depicted in a production, E&O insurance carriers often require that a producer at least obtain releases from all living persons recognizably portrayed in a production.[211]

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

[206] *Id*.

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

[208] Anonymous interview #9, Anonymous interview #10.

[209] *See* Anonymous Interview #8 at 6-7 (describing the simple "appearance release").

[210] Anonymous Interview #4 at 11-13 (explaining that documentaries often execute simple releases rather than full life story rights agreements with their subjects, and that the same is true with more peripheral characters in docudramas). Studios will also use the simple release to secure the right to portray individuals inadvertently included in any scene shot in a public place, often for no or little consideration. Anonymous Interview #1 at 12 (production assistants will often give people in the background of shots in public venues $100 in exchange for signing a quick appearance release).

[211] *See* Grunfeld, *supra* note 29, at 530 (noting that in the docudrama *Kent State*, the producers were required to obtain depiction releases from 85 individuals). *See* R

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

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This Part II offers a solution to the puzzle posed in Part I: Why do studios pay to acquire life story rights if they don't exist? The answer is that life story deals do not convey affirmative property-like interests, but instead comprise complex agreements with a remarkably stable character. This Part has adumbrated the core features of those deals, which comprise a grant of rights, a waiver of claims and covenant not to sue, an exclusivity commitment and an agreement to cooperate with production. In Part III, we turn to the bigger-picture themes raised by this descriptive account.

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also notes 138-139, *supra*, and accompanying text (discussing requirements for E&O insurance). R

[212] *See* Part II.C, *supra*.

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

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

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

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

III. DECONSTRUCTING LIFE STORY RIGHTS

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

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

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

Over the past several decades, scholars have shown how norms can fill in the "negative spaces" left unprotected by intellectual property law. This work tends to follow a common model: the creative production of some community is unprotected by intellectual property law, and that community reacts by creating an extralegal system of protection for that content. For example, stand-up comedians' jokes are unprotected by copyright because

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

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

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

they are told extemporaneously during in-person performances, hence not fixed in any tangible medium of expression.[220] Sprigman and Oliar showed that comedians have reacted to this lacuna in IP law by forging a norm-based system of protection that uses a combination of shaming, exclusion, and even violence to discourage comedians from using one another's jokes.[221]

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

The entertainment industry that trades in life story rights has several indicia of a close-knit community. First, it possesses a degree of the geographic concentration (if not isolation) that characterized the ranchers that Ellickson studied. While film and television productions today are made globally, the epicenter of the business of entertainment in the United States continues to be Los Angeles. LA is not only the headquarters of the relatively small number of major studios and firms in show business, but it is also where a disproportionate percentage of the human and industrial capital

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

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

[222] ELLICKSON, *supra* note 217 at 167. R

necessary to produce film and television is located.[223] The industry is also notoriously insular as compared to many other contemporary businesses, so much so that it operates to a large extent by reputational capital and word of mouth.[224] One industry insider told us that there are only a dozen or so law firms in LA that specialize in the industry to the degree that they all know one another and their respective practices, and view outsiders as lacking the requisite industry experience and knowledge to make deals efficiently.[225]

Second, and relatedly, norms arise within close-knit communities only if they are iterated frequently over time. This matters because norms, unlike state-created law, lack an external referent to make their existence and content unambiguous. Through repeated practice, though, norms become "internalized" in actors, so that they are made effective even in the absence of a statute or judicial decision enshrining them.[226] Here, the practice of acquiring life story rights from the subjects of docudramas is the subject of repeat play in several senses. The practice of securing life story rights is as old as the docudrama itself, one that dates back at least as far as the 1940 *Sergeant York* film.[227] In the more than eight intervening decades, it is likely that Hollywood executives have inked thousands of these deals. The insistence on these deals by influential external players, such as insurers and distributors,[228] reinforces the norm. These multiple points of iteration over a long span of time have caused industry insiders to internalize the life story deal as a practice, even though it is not explicitly required by law.

Finally, the enforcement mechanism for life story rights seems obvious: courts could intervene to enforce these agreements as a matter of contract law. Yet, this is not the account that industry insiders tell. In fact, violations of life story agreements are so rare that most interview subjects could not

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

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

[225] Anonymous Interview #10.

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

[227] *See* Part II.A, *supra*.

[228] *See* Section II.B.3, *supra*.

recall a single instance of a subject flouting them or a claim of breach by either studios or subjects. This absence of state enforcement suggests that enforcement is also a matter of norms rather than law. This norm-based enforcement has two valences. One is endogenous. The entrenched character of life story deals in the entertainment industry means that industry actors have internalized the norm in favor of honoring such deals, and they follow it reflexively. Cooter has shown that most norms systems rely to some extent on internalization, with actors complying due to their own distaste for deviation rather than fear of some external sanction.[229] One industry insider reported that while Hollywood players are thought of as amoral "sharks," there is some intrinsic sense of morality that leads them to respect norms and agreements, and that this in part explains the industry's near-perfect rate of compliance with agreements granting life story rights.[230]

Internalization is not the only source of enforcement for life story deals. There are exogenous pressures toward compliance as well. Dealmakers who may otherwise be willing to flout norms are to a large extent deterred by the risk of social sanctions in the form of exclusion from professional relationships. The entertainment industry's close knit character means that reputational capital is at a premium and exclusion sanctions can be killers.[231] Several industry insiders explained that failing to respect an executed life story deal would brand the violator as untrustworthy and complicate if not end their career.[232] Even more than threats of litigation, studios appear to comply with life story deals because they recognize that if they do not, then (as the old Hollywood shibboleth runs) they'll never work in that town again.[233]

Subjects of docudramas are not necessarily members of the entertainment community and so may not be constrained by internalization. Interview subjects reported, though, that even when subjects complained to studios about their portrayal, those complaints rarely resulted in litigation.

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[229] *See* Cooter, *supra* note 219 at 1694 (arguing that the internalized compulsion to comply with norms is equally if not more effective in controlling behavior than the threat of external sanctions for norm violation). *See also* Dave Fagundes, *The Social Norms of Waiting in Line*, 41 L. & SOC. INQUIRY 1179, 1189 (2017) (citing research showing that people queue more because of internalized norms than externalized threats of sanction). R

[230] Anonymous Interview #11 at 13.

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

[232] *See, e.g.*, Anonymous interview #12.

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

Rather, aggrieved subjects almost invariably submit to the *in terrorem* effect of an agreement once studios remind them of the broad language to which they agreed.[234]

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

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

This discussion illustrates that the question should not be whether this, or any, regulatory system is driven by norms or law. While some may be products almost entirely of one or the other, the institution of life story rights bears features of each. The formation of these deals is more a matter of rearranging the law's baselines through private agreements due to practical cost-benefit calculations. But the enforcement of these deals involves neither legal sanctions nor their threat. It is instead stitched together by an internal-

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

[235] *See supra* note 15 (estimates of percentage of docudramas involving life story acquisitions). R

ized sense of right and wrong as well as a fear of being deemed a bad cooperator. Framing the question whether a regulatory system is norm- or law-based wrongly assumes a binary choice between two options. Perhaps the better way to think about the issue is that regulation may contain features of both norms and law, and that the two can work in combination (as here) to supplement each other.

B. Transactional Efficiency

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

1. Modularity, Standardization and Information Costs

Modularity is a concept that is useful across all fields that involve the interaction of components and systems within a whole. Whether a product is a commercial jetliner, a software operating system or a smartphone, its myriad subsystems are often developed independently and assembled to operate with one another through a series of common interfaces.[236] Modularization of this kind goes hand in hand with standardization: while it is beneficial for a product designer to organize a complex system into a series of more manageable subunits, it is even more beneficial for those subunits to be interchangeable and available from any producer that adheres to a common set of protocols. The ability of different manufacturers to produce the components of a complex system enables greater specialization in compo-

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

nent design and manufacture[237] and can result in greater efficiency, reduced costs and improved quality of both the standardized components and overall systems.[238]

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

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

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

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

When life story rights are conceptualized as a single legal module, rather than a bundle of diverse jural relations, similar efficiencies are

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

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

[239] Smith, *Property as Platform*, *supra* note 236, at 1058. R

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

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

achieved. Most Americans understand, at a high level, what legal rights they obtain when they rent a car. Because automobile rental contracts are largely standardized, parties can effectuate highly efficient transactions. Rather than worrying about the contractual details, a consumer renting a car can focus primarily on price versus make and model, perhaps giving some attention to the various insurance options offered by the rental company.

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

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

This is not to say, of course, that life story deals are entirely standardized along the lines of residential mortgages or corporate debentures.[243] In addition to features that vary among even the most standardized contracts (e.g., price and asset description), life story agreements can differ both at to their principal terms (e.g., exceptions to exclusivity, scope of authorization, nature of cooperation)[244] and secondary terms (e.g., degree of creative control). These variations are typically negotiated by experts (lawyers), but subjects can have strong preferences concerning, and even emotional responses to, some of them. Nevertheless, the existence of variations among life story

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

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

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

deals does not mean that life story rights have not been modularized in a manner that is efficiency-enhancing. In the end, despite the differences, industry veterans observe that most life story deals look more similar than not.[245]

2. Litigation Avoidance

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

Subjects from whom life story rights are acquired are occasionally upset about their portrayal in docudramas, but they rarely sue. As noted in Subpart III.A, this may be because when irate subjects approach a producer to complain about their depiction, the producer's lawyers can produce the life story agreement, which clearly shows that the subject gave permission to depict them in any manner, however fictional and unflattering, and that they have given up the right to sue the producer. According to the industry insiders that we interviewed, nearly all subjects drop the issue at this stage without filing a claim[247] presumably due, at least in part, to the language granting the producer the right to fictionalize the subjects' lives.

Thus, even if, as shown in Part I, legal claims brought by depicted individuals under publicity, privacy, copyright and trademark theories are unlikely to succeed, such claims can delay a production, increase costs and introduce at least some risk that the production itself will be enjoined. Acquiring bundled life story rights increase the efficiency of film and television production by eliminating potentially disruptive litigation risks before they are incurred. In other words, the decision not to acquire life story rights for a particular project involves a gamble by the producer: the gamble could pay off and a project could be released successfully without legal challenge by a subject, as was the case with Mark Zuckerberg (portrayed in *The Social Net-*

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

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

[247] E.g., Anonymous Interviews #8, #15.

work) and Queen Elizabeth II (portrayed in *The Crown*). On the other hand, an irate and determined subject like former LA Lakers coach Jerry West (portrayed in *Winning Time*) could bring expensive and disruptive litigation costing far more than the initial acquisition of life story rights might have.[248]

3. The Signaling Function of Life Story Acquisitions

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

In a similar vein, life story acquisitions, the general parameters of which are often made public in the trade press, blogs and social media, send various signals to the market. First, they generate positive "buzz" for a project, thus building public interest and, presumably, greater viewership and reviews once it is released. Second, the acquisition of a life story acquisition by a producer signals to other producers that a project covering a particular story is in the works, potentially dissuading others from pursuing a compet-

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

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

[250] *Id*.

[251] *See, e.g.,* Clarissa Long, *Patent Signals*, 69 U. CHI. L. REV. 625, 626 (2002) (patents convey information about an inventor to the capital markets); Jorge L. Contreras, *Patent Pledges*, 47 ARIZONA ST. L.J. 543, 573–92 (2015) (identifying motives for unilateral pledges of patent rights including attempts to influence product markets, regulators and the public); Clark D. Asay, *The informational effects of patent pledges*, *in* PATENT PLEDGES: GLOBAL PERSPECTIVES ON PATENT LAW'S PRIVATE ORDERING FRONTIER (Jorge L. Contreras & Meredith Jacob eds., 2017) (analyzing signaling function of patent pledges).

ing project of their own.[252] Finally, a subject's sale of his or her life story to a producer can signal to the public the value and authenticity of the subject's story, potentially leading to interviews, guest appearances, endorsement deals, book contracts and other related gains for the subject.

CONCLUSION

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

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