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To Acquire Or Not To Acquire Life Rights For A Movie

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

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

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

Public Domain Facts vs. Copyrightable Expression

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

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

The essential ingredient present in creations, but absent in facts, is originality. That is what a court said in regards to a copyright suit between CDN, the publisher of Coin Dealer Newsletter, and Kenneth Kapes, the operator of a coin business who put together a compilation of the retail prices of many coins using CDN's wholesale price lists. It seems obvious that a wholesale price list would be considered a list of pure facts, yet the court concluded that CDN's prices contained sufficient originality to merit copyright protection. The list of prices qualified for copyright because CDN used "its considerable expertise and judgment" to construct the list and overall the prices were "created, not discovered."

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

already been told? Or am I using facts to create my own story?

So Why Should I Acquire Life Rights?

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

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

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

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

A life story rights agreement is not really an acquisition of an underlying right because, as discussed above, all of the facts of this person's life are in the public domain. Rather, it is a person's waiver of certain personal rights and an agreement by them to cooperate and consult in the making of the film of which they are a subject. The agreement is formatted like a normal acquisition of underlying rights because that is the tradition in Hollywood, and because most lay persons have the notion that they own something called life story rights. Besides, no one would sign it if it were correctly labeled as a "waiver of right to sue no matter how badly you muck up My life."

The Amy Fisher Story

One of the best examples of the interplay between public domain facts and life story rights is the Amy Fisher story. Amy Fisher was a 17-year-old girl who claimed to have had an affair with body shop owner Joey Buttafuoco. Three different television networks made her story into three different movies. Here is the chronology:

May 19, 1992: Fisher goes over to Buttafuoco's split-level house on Long Island with a gun. Buttafuoco's wife, Mary Jo Buttafuoco, answers the door and takes a bullet to the head.

May 20, 1992: The story is fast becoming the hottest tabloid tale of the moment.

June, 1992: NBC purchases the life story rights of Amy Fisher. Tri-Star purchases the life story rights of the Buttafuocos. ABC purchases nothing: They will rely on public domain material.

Dec. 1, 1992: Amy Fisher enters a plea bargain and is sent to jail for five to 15 years.

Dec. 28, 1992: NBC airs "Amy Fisher: My Story," starring Noelle Parker. This is the tale told through the eyes of Fisher herself.

Jan. 3, 1993: ABC airs "Beyond Control: The Amy Fisher Story," starring Drew Barrymore. They base it exclusively on public domain facts as they were reported in the transcripts of the trial and in the press.

Jan. 3, 1993: CBS airs "Casualties of Love: The Long Island Lolita Story," starring Alyssa Milano. This is the Buttafuoco side of things.

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

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

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

The Many Faces of Nelson Mandela

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

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

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

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

Some Practical Advice

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

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

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

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

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

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

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

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

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