



LEGAL UPDATE

January 24, 2008

By: Stephen B. Rodner

LIFE STORY RIGHTS: WHAT'S POSSIBLE AND WHAT'S NOT

My client, a film producer, calls very excited and tells me she has established a close relationship with a well-known newsmaker. She has made a deal with this person to acquire exclusive life story rights for a film, and she asks me to draft an "iron clad" agreement giving her life story rights, including the right to fictionalize events and the right to depict other parties -- both public figures and non-public figures -- that have played a part in this person's life.

My client also wants to make sure that this agreement would prevent anyone else from doing a film or television production based on the subject's life story.

Having been involved in many of these situations, this time I give my client some bad news: the best she can hope for is to get a release from the subject that will enable her to produce a film, to use the subject's name and likeness, and to use the events from his life story. She will also be able to fictionalize events, shield herself from liability for libel if the document is drafted properly, and be able to prevent the subject from authorizing any other life story project and/or giving personal documents or information to third parties.

She may not, however, be able to depict in the film certain non-public figures, such as family members, without further releases, or to use certain events that may appear in only one source -- such as a book biography -- for which she has not obtained film rights and that are not found in news articles or other places.

The really bad news for my client is that she cannot prevent another producer from making a film or television show, or from writing a book, based upon the subject's life. The law is clear, and has been for many years, that non-commercial speech, (and a biographical film constitutes non-commercial speech) has First Amendment protection and that releases are not necessary to depict public figures.

The case that made this crystal clear was *Ginger Rogers v. Grimaldi*, 695 F. Supp. 112 (S.D.N.Y. 1988). This was not a case involving a biography, but the use of the names of Fred (Astaire) and Ginger (Rogers) in the title of a film directed by Federico Fellini. The U.S. District Court for the Southern District of New York (affirmed on appeal) in 1988 held that, even though the film was not a biography of Fred Astaire and Ginger Rogers, the contents of the film were reasonably related to the use of their names. The Court stated that "having determined that the speech in question is artistic expression, ... the speech at issue here is not primarily intended to serve as a commercial purpose, the prohibitions of the Lanham Act do not apply and the film is entitled to the full scope of protection under the First Amendment."

This rule applies even to films that use a public figure's name or likeness for non-biographical material so long as the use is reasonably related to the content. And it is especially true for material that is biographical. There have been, over the years, several attempts to prevent biographical films and live stage productions by the subjects of the productions. These attempts have been unsuccessful.

I represented a television producer who had a deal with a major cable broadcaster to produce a biographical picture based upon the life story of a very well known world figure. The producer did not obtain a release from the subject but from someone with whom he was associated and who had written a biographical book.

I received a cease and desist letter from a well-regarded entertainment attorney saying that his client (another well known personality) was intending to produce a biographical film based on the same subject and had acquired the rights to a book written by one of the subject's family members. I knew that his client was in litigation with yet another person who was also claiming life story rights and wanted to produce a life story film. I wrote to the attorney saying that that his client was obviously free to produce its film, and if they wanted to use material from the book that they acquired, they were free to do so. I said that my client would not to use any material that was only contained in his book about the subject and that my client had the right to produce a film on this person's life story.

I never heard from the attorney again. My client produced its film, which got nominated for an Emmy and two Cable Ace awards and the other parties never produced theirs.

Many years ago that there were two well publicized television movies of the week based on the Amy Fisher and Joey Buttafuoco story. There were threats of litigation between the two networks involved, to no avail.

There have been several cases that have allowed the use of fictional events in biographical films, even though no permission was obtained from the subjects or their estates. The cases involved the silent film star Rudolph Valentino (*Gugliemi v. Spelling Goldberg Prods*, 25 Cal.3d 860, 1979), the mystery writer Agatha Christie (*Hicks v. Casablanca Records*, 464 F.Supp. 426, SDNY 1978) and the former Black Panther Bobby Seale (*Seale v. Gramercy Pictures*, 964 F. Supp. 918, E.D. Pa. 1997).

The only causes of action a celebrity or public figure has against the use of his/her name, likeness or life story in non-commercial speech is for false light or libel. In the Bobby Seale case, while certain events were fictionalized in the film "Panther," the court held that the film did not either portray Seale in a false light or constitute libel although Seale tried to argue both points. However, the court held that Seale's name and likeness on a CD related to the film constituted a commercial use of his name and likeness and was prohibited without a release.

While one cannot prevent a third party from producing a biographical picture based on a life story of a public figure or celebrity, there are advantages to signing life story rights agreements. And there are several clauses that are important to include in life story rights agreements. The agreement should include a very broad release of all rights to the producer, including any moral rights and any causes of action for libel. The producer should also specifically be granted the right to fictionalize and to change names in its sole discretion.

It is important to have a restriction on the subject's right to authorize any other biographical work based upon his/her life story and to provide personal documents or information to third parties relating to this life. 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.

The agreement should also contain a clause, if possible, that requires the subject to obtain written releases from family members who may not be public figures. If this is not possible, at least the producer should be able to obtain the subject's obligation to cooperate with the producer in obtaining these releases. The producer might also want to consider trying to make releases from certain key family members or friends of the subject contingent on payment to the subject.

Other matters to consider including in life story rights agreements are obtaining the subject's obligation to participate in the marketing and publicity for the film and to act as a consultant to the screenwriter and giving the writer access to documents and information that may not otherwise be available from other sources.

An issue that sometimes causes the most contentious negotiations in life story rights agreements, and one which I have known to kill deals, is script approval. 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.

No studio or financier will accept this. If granted, an approval right would give the subject the power to control development of the production and even conceivably to shut it down. Even if an actual approval right is not given, any language in the contract that agrees to portray the subject in a "truthful" or in a "non-derogatory" manner is fraught with danger and should be avoided.

The producer might want to also consider obtaining options for film rights in any previously published biography of the subject, to the extent that this is possible within reasonable financial constraints. This could allow the Producer to use certain facts and events that may appear only in this biography which could possibly be protected under copyright and it would also prevent third parties from obtaining rights from the author of the biography.

The threshold question for a producer intending to produce a biographical film of a public figure is whether to try to get a release from the subject or to produce the film without a release under her First Amendment rights. As I have tried to point out, there is no such thing as "iron clad" release, but a properly negotiated and drafted agreement can be advantageous.

The foregoing is merely a discussion of life story copy rights, it is not intended to provide legal advice. If you would like to learn more about this topic or about how Pryor Cashman can serve your legal needs, please contact Steve Rodner at srodner@pryorcashman.com or 212-326-0150.

ABOUT THE AUTHOR



STEPHEN B. RODNER

Partner

Direct Tel: 212-326-0150

Direct Fax: 212-798-6344

srodner@pryorcashman.com

Steve's practice includes transactional matters in all areas of the entertainment field involving theatre, film, television, home video, Internet and e-commerce. He has an extensive intellectual property practice, including the prosecution of trademark applications in the United States and throughout the world and representation of clients in connection with all trademark related matters. He also advises clients on issues of copyrights and copyright related matters.

Steve's work in the area of Entertainment, Media and Communications includes counseling clients and providing advice with respect to all aspects of motion picture and television production legal matters, as well as all matters relating to music licensing for motion pictures, television and live theatre. Steve also negotiates and drafts:

- Celebrity endorsement and sponsorship deals and merchandising, commercial tie in and licensing agreements
- Contracts for producers, creative personnel, composers, lyricists, playwrights, directors, designers and performers for live theatre productions
- Motion picture distribution agreements
- Motion picture, television and live theatre option/purchase agreements
- Motion picture, television and stage talent agreements
- Negative pick up deals
- Pilot and series television deals for writers, producers and talent
- Subsidiary rights, motion picture rights, stock and amateur productions, foreign productions and tours with respect to live theatre productions

Steve also provides counsel to clients on issues relating to:

- Errors and omissions
- Exploitation of entertainment properties across multiple platforms and media
- Financial matters, including preparation and review of offering papers and investment agreements for live theatre productions
- Union and guilds

Steve's work in the Intellectual Property field includes:

- Advising on the proper use of trademark rights and trade names throughout the world
- Negotiating, providing advice and drafting relating to transactional matters involving copyrights and trademarks, including licensing agreements, distribution agreements and confidentiality agreements
- Providing advice in all aspects of copyright registration and protection
- Trademark selection, procurement and all aspects of trademark registration and trademark clearance