

BY-LINED ARTICLE

As Long as They Spell My Name Correctly: Truth, Fiction and Biopics

By Mark A. Fischer and Franklin H. Levy

January 20, 2011

Duane Morris LLP



How much can real people be fictionalized in the movies? Two recent films make that point—*The Social Network* and *All Good Things*. Though these movies often blend truth and fiction, the legal implications that can result are very real. This article will examine the privacy rights of those public figures whose lives are portrayed before the camera and in the written word. What legal defenses are available, and what is the likelihood of a favorable outcome for the real people in these cases?

The Social Network

The Social Network is generally regarded by moviegoers and critics as a terrific film. In the words of David Kirkpatrick, author of *The Facebook Effect*, it is "a compelling movie that maintains a taut sense of drama from its opening moments to the final scene." But one person central to the story is reported to be keeping his two thumbs pointing down. Mark Zuckerberg, according to press reports, has not exactly "friended" the film.

The movie is based on the book, *Accidental Billionaires—The Founding of Facebook: A Tale of Sex, Money, Genius and Betrayal*, by Ben Mezrich. Neither Zuckerberg nor Facebook employees cooperated with Mezrich. The script was written by Aaron Sorkin, and he too had no access to Zuckerberg. According to Sorkin, this had no effect on him. He told *New York* magazine that he was more interested in telling a great yarn than in being scrupulously accurate. According to Sorkin, "What is the big deal about accuracy purely for accuracy's sake, and can we not have the truth be the enemy of the good?"

If the movie were to be taken as fact, then one would believe that the creation story of Facebook begins with Zuckerberg's being dumped by his girlfriend. Just as there would be no *Iliad* or *Odyssey* had Helen stayed home with Menelaus, so too there would be no Facebook had Erica Albright stuck with Mark Zuckerberg. The movie portrays Zuckerberg somewhat unflatteringly, completely devoid of social skills yet overwhelmingly interested in climbing Harvard's elite social ladder. This approach appears to work well in setting up the irony of his becoming the greatest social networker of all times. The only problem: It's just not true.

Writing in *The Daily Beast*, Kirkpatrick answers "what's true in the Facebook movie." Although there's much in the movie that is accurate, the writers take significant literary license. Part of the drama unfolds with flashbacks and flash-forwards to depositions in two cases involving claims that other individuals were entitled to pieces of the rather large Facebook pie. Zuckerberg spends a great deal of time as a defendant in claims brought by others involved in the birth of Facebook.

The Winklevoss twins sued Zuckerberg for allegedly stealing the concept of Facebook from them; the lawsuit eventually settled for \$65 million in 2008. Zuckerberg's former close friend, Facebook co-founder and ex-CEO,

Eduardo Saverin, recently launched a lawsuit against Zuckerberg after Zuckerberg allegedly reduced Saverin's share in the company following corporate disagreements. The lawsuit has since been settled.

The question posed here is what if Zuckerberg wanted to become a plaintiff? Or, to put it more broadly, what rights do subjects of unauthorized biographies have against their authors?

Kitty Kelley, celebrity author of a controversial biography of Frank Sinatra's life, answered this question with a forceful "none" after Sinatra withdrew a \$2 million lawsuit against the author in 1986." The life of a public figure," Kelley victoriously responded, "belongs to us, the average American citizen." Commentators have long debated the validity of Kelley's premise, chronicling the court's struggle to balance constitutional guarantees of free expression with personal reputational and privacy interests.

Since the U.S. Supreme Court's 1967 ruling in *New York Times v. Sullivan*, it has been harder for public figures to succeed on defamation claims than it has been for private individuals. Public figures must prove that false statements were made with either "actual malice" or a "reckless disregard for the truth." As such, public figures often end up enduring the effects of targeted defamatory statements without legal recourse. What would be considered sloppy journalism rarely constitutes the malice or reckless disregard required by *Sullivan*.

Because defamation claims of libel and slander are often unsuccessful for public figures attempting to prevent unauthorized portrayals of their lives, they—like Sinatra and conceivably Zuckerberg—would turn instead to tort law. Privacy law developed from four separate torts, and the two most relevant to Zuckerberg's circumstances are false light invasion of privacy and commercial appropriation of identity. The latter is better known as the right of publicity.

False light invasion of privacy is hardly distinguishable from defamation, and the two are often conflated, differentiated only by the requirements of state law. Commonly, however, plaintiffs asserting a false light claim are required to demonstrate that the false light in which they were portrayed would be "highly offensive to a reasonable person," in addition to the *Sullivan* requirements.¹

Right of publicity claims are also defined by state law and generally protect the right of individuals to control how their identity (name, likeness, image, etc.) is commercially exploited, usually in the context of advertising or merchandising.² California law recognizes publicity rights as transferable property rights, which since 1985, survive even after an individual's death.³ New York, though explicitly granting a statutory right of publicity to a living individual, has not established the transferability of this right to a decedent's beneficiaries—despite a 2008 amendment proposing the recognition of postmortem publicity rights.⁴

These differences in state law have recently resulted in tensions between how Marilyn Monroe's publicity rights have been defined in New York, where a case was originally tried, and in California, where another was subsequently tried. Both courts refused to recognize the transcendence of Monroe's publicity rights—but for different reasons. New York simply does not recognize postmortem publicity rights. California gives them life for 50 years.

However, following the California court decision, the California State Legislature amended the state statute, thus approving recognition of postmortem publicity rights for 70 years after the individual's death. Monroe's estate filed for reconsideration in California.

For the living, such as Zuckerberg, his present publicity rights remain central to a potential lawsuit if he had to bring one. *The Social Network* is a classic "docudrama," which despite fictionalizations—or embroideries to some courts—on an otherwise true account, has consistently received First Amendment protection. Courts regularly recognize the importance of motion pictures, often noting that they "are a significant medium for the communication of ideas." Though movies serve to entertain as well as educate, this fact should not lessen their entitlements to free speech and expression.

A Michigan court emphasized such a proposition 10 years ago when it dismissed claims regarding the legality of an NBC miniseries depicting the life stories of Motown legends The Temptations. The *Ruffin-Steinbeck* court held the right of publicity, relying on a diversity of jurisdictions, "does not extend to prohibit depictions of a person's life-story." Entertainment, clearly encompassing docudramas and thus *The Social Network*, falls into a broad category of exemptions generally not recognized as purposes for trade.

Because the right of publicity is rooted in commercial exploitation of another's identity, this exception for works of entertainment may not necessarily trigger actionable publicity rights, immaterial of whether a commercial advantage was successfully obtained as a result of an unauthorized use of another's identity. *The Social Network*'s popularity actually makes no difference after all. The court's advice to Temptations band member David Ruffin's heirs equally could have applied to Zuckerberg: When alleging dissemination of false information, the proper action is for false light invasion of privacy—not the right of publicity. The Florida Supreme Court reminded lost crewmember Billy Tyne's heirs of this in 2005 after they asserted publicity rights in response to a dramatized narrative of their father's life story and tragic death aboard the *Andrea Gail* in the movie, *The Perfect Storm*.

Ruffin-Steinbeck's holding perhaps clarifies those of earlier courts, which evaluated the constitutional protection of fictionalizations against the First Amendment—absent a categorical exception for works of entertainment. In *Hicks*, a New York court determined that famed mystery writer Agatha Christie's publicity rights did not attach when a fictionalized account of her real-life 11-day disappearance was depicted in a book or movie. Because the fictionalized account was neither presented as true nor contained deliberate falsifications, the *Hicks* court refused to recognize Christie's publicity rights. Zuckerberg would likely be able to make a stronger case than Christie—the only factual information involved in her account were names and the occurrence of the disappearance itself—but it appears as though courts have been following more of a *Ruffin-Steinbeck* and *Tyne* line of reasoning.

While courts suggest that false light privacy actions should be a plaintiff's friend, pursuit of these claims has proven as unsuccessful as claims for publicity rights. A court would likely require Zuckerberg to demonstrate that the producers of *The Social Network* publicized him in a light highly offensive to a reasonable person and to then demonstrate that the producers maintained knowledge of or a reckless disregard for the falsity involved.

Bobby Seale, leader of the historic Black Panther Party, is also familiar with reluctance or unwillingness of courts to enforce false light violations against defendant moviemakers. A film that documented the Black Panther Party, albeit with fictitious characters representing the organization's true-life leaders, was deemed to not have placed Seale in a false light. Success on false light claims, a Pennsylvania court held, depends on whether there was a major misrepresentation of character, history, activities or beliefs in which serious offense could have been reasonably anticipated. Unimportant yet deliberate false statements would not be enough. Even if a plaintiff can satisfy the high burden of proving a major misrepresentation of identity beyond minor inconsistencies, it must still be proven that the false portrayal was made with actual malice by clear and convincing evidence. This, as demonstrated through *Seale v. Gramercy Pictures*, is no easy task.

A recent *New York Times* story⁵ illustrates a similar, but starker issue—a depiction of Robert A. Durst, who was implicated in three killings.

Ryan Gosling plays Durst. Kirsten Dunst plays his wife, whom he is suspected of murdering. The film uses no actual names, except for that of the late Senator Daniel Patrick Moynihan.

Perhaps somewhat philosophically, Durst is quoted in the *Times* as saying, "The movie, I did think, is as reasonably accurate as anything out there, a whole lot more accurate than those endless TV documentaries. And this doesn't pretend to be a documentary." The *Times* also reported that others depicted in the film were less willing to accept the portrayals, but at this time, no suits have been filed.

While it may appear to be to Zuckerberg's advantage that Sorkin followed Mezrich's account, an account which has itself been noted for inconsistencies and dramatizations, this collaboration is in no way dispositive of actual malice. Again, courts have set the bar high for plaintiffs. Zuckerberg would either need to show that Sorkin actually entertained serious doubts about *Accidental Billionaires* or that there were obvious reasons to doubt the accuracy or veracity of Mezrich's book.

Ray Davis, a public figure and then-chief of the United States Military Group on a suspect mission to Chile during the time of the Allende coup in 1973, sued the filmmakers who documented this mission in the film *Missing*. Though Davis' last name was never used in the film, he claimed that movie producers—relying on details in a book about the Chilean operation—characterized him as being responsible for ordering the death of Charles Horman, an American living in Chile who was suspected to have known too much about the United States' military presence in the country.

A New York court found in favor of the moviemakers, determining that Davis did not show that the defendants maintained the requisite malice or disregard for the truth. While the Pulitzer Prize-nominated book, *The Execution of Charles Horman: An American Sacrifice*, was written by Thomas Hauser, a highly regarded author, these credentials need not be maintained by every book-based movie. As long as the book is not "suspect," movie producers are not under a strict obligation to investigate. Without more, the New York court noted, mere proof of failure to investigate the truth cannot alone establish a disregard for it.

Whether Mezrich's account of Facebook's origins is by the court's definition "suspect" remains a theoretical issue. Mezrich, according to *New York* magazine, is an author with a "hyperbolic writing style," known to "craft his nonfiction." However, it can be contended that Mezrich authored *Accidental Billionaires* with a double-edged pen. If his style can be characteristically classified as dramatic, then it seems less likely that the public would mistake his account for absolute truth. This fact, however, does not resolve the issue of whether Sorkin and the creators of *The Social Network* outright ignored what should have been investigated.

Various sources indicate that Sorkin conducted independent research, despite his sharing notes with Mezrich. Sorkin does not deny that his screenplay contains inconsistencies. In a *New York* magazine article, he states, "Several different—and sometimes contradictory—versions of the story were told . . . I didn't choose one and decide that it was the truth. I dramatized the fact that there were conflicting stories." Whether this is an argument that would stand up in court does not entirely matter. Public figures, like Zuckerberg, often encounter steep legal hurdles and practical consequences when bringing suit against their unauthorized biographers. In the unlikely event that Zuckerberg would prevail in court, the lawsuit would effectively open his entire life to probing inquiries. Whereas *The Social Network* remains a fact-based speculation of Zuckerberg's life, a lawsuit, where depositions and testimony are given under oath, would publically bring forward all that Zuckerberg may be attempting to keep private. Zuckerberg's decision to refrain from litigation, although certainly not as good as deciding to start Facebook, does not seem to be a bad one either.

[Mark A. Fischer's](#) law practice is focused on solving problems and making deals for innovative companies, institutions and individuals. Mr. Fischer's clients are typically in the creative industries such as new media, social networking, music, interactive entertainment, information technology, software, television and publishing.

[Franklin H. Levy](#) has over thirty years of diverse experience. Much of his career has been spent in Boston as a trial lawyer, focusing his practice on business and personal litigation, including trademark and copyright, securities fraud, contracts, fraud, trade regulation and trade secrets.

Special thanks to Alicia Parmentier, a second-year student at Northeastern School of Law.

Disclaimer: This article is prepared and published for informational purposes only and should not be construed as legal advice. The views expressed in this column are those of the authors and do not necessarily reflect the views of the authors' law firm or its individual partners.

Notes

1. *Restatement (Second) of Torts* § 652E (1976).
2. *Restatement (Third) of Unfair Competition* § 46 (1995).
3. *N.Y. CLS CIV. R.* § 50 (2000); <http://rightofpublicity.com/statutes/2008-amendment-to-nys-rop>.
4. *CAL CIV. CODE* § 3344.1(a) (2007).
5. Available at http://www.nytimes.com/2010/11/28/movies/28durst.html?_r=1.