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Entertainment Law Boutique

Chairs: Colin Peng Sue, Netflix; Anna Kadyshevich, HBO;
Carolyn Forrest, Tubi; Alan Friedman, Fox Rothschild

Hypothetical

The Great American Media Entertainment company has decided to make a docudrama about the tumultuous 2020 election and surrounding political events.

GAME has already signed contracts with superstar actors Anton Baldwin and Stacy Johannsen to play the roles of former President Trump and First Lady Melania Trump.  Anton and Stacey both signed standard industry contracts for a feature length movie with a planned national theatrical distribution.

For source material, screenwriters plumbed many of the bestsellers written about the former President’s years in office.

Author Wolf Hound wrote one of the most colorful and gossipy behind the scenes looks at the Presidency.  GAME sought to option Wolf’s book for the movie, but refused to meet Wolf’s demand for $5 million.

GAME did secure releases and life story agreements from the parents of one of the Capitol Hill insurrectionists Bill Viking. The parents, desperately needing money for the legal defense of their son Viking, relayed their son’s history of mental illness and fascination with extremist movements.

GAME has started an online marketing campaign for the movie. It focuses on the attack on the Capitol Building featuring photographs and videos of the attack found on Twitter, Instagram and TikTok. It also recreates verbatim short scenes from The Apprentice featuring many of Trump’s signature phrases.

Issues:

1) GAME wants to release the movie simultaneously in theaters and on its streaming platform. Can GAME do that without the consent of the stars.

2) Author Wolf Hound has gotten hold of a draft screenplay and fired off a cease and desist letter claiming the screenplay copies several of his behind the scenes Oval Office stories. Wolf claims those scenes are entirely fictional and copyrightable. How should GAME respond?

3) GAME wants to know if its depiction of Bill Viking as mentally ill, violent, and racist raises any libel or privacy issues.

4) The parents now allege the release was obtained under duress. How should GAME respond?

5) Does GAMES marketing campaign raise any legal issues?

**THEATRICAL RELEASE VS. STREAMING. WHAT’S THE CONTROVERSY?**

As streaming entertainment becomes ever more popular, its “on demand” capability is upending Hollywood business traditions. Among these are the theatrical “window” for a movie’s release, i.e., how long will a movie be available exclusively in movie theaters before it is available for streaming or other digital distribution. Connected to that are the contracts with entertainment talent where compensation may, by contract or custom, be connected to a particular form of distribution. See, e.g., the Scarlett Johansson v. Disney lawsuit below.

**How the ‘Black Widow’ Battle Could Break the Mold on Hollywood Dealmaking
Hollywood Reporter August 2021**
<https://www.hollywoodreporter.com/business/business-news/how-black-widow-battle-could-change-long-standing-industry-customs-1235002215/>
When Scarlett Johansson sued Disney on July 29 over her Black Widow pay, one community in Hollywood took the development especially personally: the ranks of transactional attorneys who negotiate deals for top talent. For many of them, the suit over the film’s concurrent release in theaters and on Disney+ not only highlights the complexity of compensation in the streaming era, it’s also evidence of massive disruption to relationships.

While dealmakers weren’t all that surprised that studios might bend the rules to the advantage of their affiliated streamers, and many expect “day-and-date” releases to eventually become more routine — after all, understanding the industry’s undercurrents and developing strategies to protect the client is part of the job — it’s Disney’s reaction to Johansson that’s got the community buzzing.

Contrary to what outsiders might expect about Hollywood dealmaking, not every point in an actor’s contract is negotiated to its zenith. A lot of shorthand is used, and the parties accept a great deal of ambiguity almost by design. In fact, as one top talent lawyer puts it (anonymously, of course, to avoid this quote ever being used against clients in court): “If you’re going to ask for something, better be sure you’ll get it. Often, the smart ones conclude it’s in the best interest to not raise the issue. The last thing you wish to create is clarity that you don’t have what you wanted.”

Take Johansson’s situation. In some respects, she may be in a better legal position than other actors upset at how streaming has interfered with the expectation of backend bonanzas. Although it wasn’t highlighted in her suit, her team plans to stress that her Black Widow contract didn’t include a standard “distribution control” provision, which gives studios discretion on how they license a motion picture. Johansson’s camp is also emphasizing a 2019 email from Marvel’s chief counsel Dave Galluzzi stating, “We totally understand that Scarlett’s willingness to do the film and her whole deal is based on the premise that the film would be widely theatrically released like our other pictures. We understand that should the plan change, we would need to discuss this with you and come to an understanding as the deal is based on a series of (very large) box office bonuses.”

**Complaint: Periwinkle Entertainment, Inc., F/S/O Scarlett Johansson v. The Walt Disney Company (Intentional interference with contract & inducing breach of contract)**
<https://deadline.com/wp-content/uploads/2021/07/Complaint_Black-Widow-1-WM.pdf>

To maximize these receipts, and thereby protect her financial interests, Ms. Johansson extracted a promise from Marvel that the release of the Picture would be a “theatrical release.” As Ms. Johansson, Disney, Marvel, and most everyone else in Hollywood knows, a “theatrical release” is a release that is exclusive to movie theatres. Disney was well aware of this promise, but nonetheless directed Marvel to violate its pledge and instead release the Picture on the Disney+ streaming service the very same day it was released in movie theatres.

The reasons for this were twofold. First, Disney wanted to lure the Picture’s audience away from movie theatres and towards its owned streaming service, where it could keep the revenues for itself while simultaneously growing the Disney+ subscriber base, a proven way to boost Disney’s stock price. Second, Disney wanted to substantially devalue Ms. Johansson’s agreement and thereby enrich itself.

**Disney’s Motion to Compel Arbitration**
<https://s3.documentcloud.org/documents/21046887/disney-motion-to-compel-arbitration.pdf>

Periwinkle agreed that all claims “arising out of, in connection with, or relating to” Scarlett Johansson’s acting services for Black Widow would be submitted to confidential, binding arbitration in New York. Whether Periwinkle’s claims against Disney fall within the scope of that agreement is not a close call: Periwinkle’s interference and inducement claims are premised on Periwinkle’s allegation that Marvel breached the contract’s requirement that any release of Black Widow include a “wide theatrical release” on “no less than 1,500 screens.” The plain and expansive language of the arbitration agreement easily encompasses Periwinkle’s Complaint. In a futile effort to evade this unavoidable result (and generate publicity through a public filing), Periwinkle excluded Marvel as a party to this lawsuit––substituting instead its parent company Disney under contract-interference theories. But longstanding principles do not permit such gamesmanship.

**RECENT DEVELOPMENTS IN LIBEL & PRIVACY SUITS OVER DOCUDRAMAS AND FICTIONAL DRAMA**

**C.D. Cal.: Russian Chess Master Sues 'Queen's Gambit'**
In September 2021, Soviet-era chess champion Nona Gaprindashvili sued Netflix for defamation and false light over a line in the series that allegedly disparages her accomplishments as a women chess champion, i.e., that she “never faced men” when, in fact, she had played and beaten several male opponents. The line in the drama states: ““Elizabeth Harmon’s not at all an important player by their standards. The only unusual thing about her, really, is her sex. And even that’s not unique in Russia. **There’s Nona Gaprindashvili, but she’s the female world champion and has never faced men.** My guess is Laev was expecting an easy win, and not at all the 27-move thrashing Beth Harmon just gave him.” (Emphasis added).
<https://storage.courtlistener.com/recap/gov.uscourts.cacd.831571/gov.uscourts.cacd.831571.1.0.pdf>

Movie scene at: <https://www.youtube.com/watch?v=gUB6P59CUko>

**D. Mass./Mass. Super.: Parent in College Admission Scandal Sues Over Portrayal in Operation Varsity Blues Docudrama**
A business executive, his wife, and son sued Netflix for defamation over their portrayal in the Netflix docudrama Operation Varsity Blues. The case was filed in state court, but removed to federal court by Netflix. Plaintiffs’ motion to return to state court is pending. The father John Wilson is facing criminal charges for allegedly paying bribes to get his children admitted to elite colleges. At a hearing in August 2021, U.S. District Judge Mark L. Wolf said he “tentatively saw” sufficient evidence for the son’s claim to survive a motion to dismiss on allegations that he was falsely depicted as a fake athlete.

**Motion to Dismiss: Wilson v. Netflix**
<https://storage.courtlistener.com/recap/gov.uscourts.mad.234690/gov.uscourts.mad.234690.8.0.pdf>

“[B]ecause the Film is a fair report of the charges brought against Wilson, the defamation claims of all of three Plaintiffs fail as a matter of law. Mrs. Wilson and John Jr.’s claims independently fail because the Film contains no defamatory statements of and concerning them…. On this motion to dismiss, the court can refer to the cited and attached public records, including from the government’s case against Wilson, to determine that Wilson’s complaints about the fairness and accuracy of the Film are baseless as a matter of law. As such, the Complaint fails to state a claim upon which relief may be granted and should be dismissed with prejudice.”

**Opposition Brief**
<https://storage.courtlistener.com/recap/gov.uscourts.mad.234690/gov.uscourts.mad.234690.20.0.pdf>

“Upon learning that the Wilsons were to be featured in an upcoming Netflix film, the Wilsons wrote to Netflix through counsel to inform them of Wilson’s unique situation among the other charged parents and, in particular, to caution them that any suggestion that Johnny Wilson was a “fake athlete” – like the children of other charged parents – would be knowingly false, defamatory, and not a fair or accurate report of the proceedings against Mr. Wilson….. [T]he Film clearly features defamatory statements and innuendo which reasonably could be interpreted by viewers of the Film to refer to Mr. Wilson’s son Johnny Wilson. Nothing more is required…. Johnny Wilson pleads that the Film defames him, in addition to his father, insofar as it falsely implies to the viewers that he was a “fake athlete” who needed to pretend to be a water polo player in order to gain admission to USC, when in fact he was a real, nationally competitive water polo player who became a real member of the USC water polo team…. Even if the Court were to conclude that the Complaint fails to state a claim for defamation on behalf of Johnny Wilson and thus retains jurisdiction over the case, it should nonetheless deny Defendants’ motion to dismiss as to Mr. Wilson because the Film is not an accurate or fair report of even the government’s allegations against him, much less the proceedings as a whole.”

**S.D.N.Y.: Former Prosecutor’s Defamation Suit Over Central Park Five Docudrama Survives Motion to Dismiss**

In 2019, former New York Assistant District Attorney Linda Fairstein sued Netflix and producer Ava DuVernay alleging they defamed her in the miniseries 'When They See Us,' about the wrongful conviction of 5 young men in the infamous Central Park Jogger rape case.

In August 2021, Judge Kevin Castel ruled that several of Fairstein’s claims could proceed to discovery.

“Certain scenes alleged to be defamatory merely show routine and prosaic activities that lack a plausible defamatory meaning. In other scenes, the depictions of Fairstein are privileged against a claim of defamation because they convey the subjective opinions of defendants and could not be understood by the average viewer to be a literal recounting of her words and actions.

Fairstein has plausibly alleged a claim of defamation as to five scenes. These scenes depict Fairstein as orchestrating acts of misconduct, including the withholding of evidence, the existence of ‘tapes’ showing that she ‘coerced’ confessions from the Five, an instruction not to use ‘kid gloves’ when questioning suspects, and directing a racially discriminatory police roundup of young men in Harlem. The average viewer could conclude that these scenes have a basis in fact and do not merely reflect the creators’ opinions about controversial historical events. Separately, the Court concludes that defendants have not demonstrated the substantial truth of a scene depicting Fairstein’s creation of an attack timeline because they rely on public remarks that are inconsistent with her depiction in the scenes. ….

As has been discussed, the average viewer would not understand “When They See Us” to be a documentary that depicts a strictly factual version of events. It stars famous actors, incorporates popular music and includes heavily stylized, non-realistic visual sequences. The average viewer would also understand that “When They See Us” advocates a point of view that is sympathetic to the Five and critical of law enforcement. For example, the well-known protest anthem “Fight the Power” by the hip-hop group Public Enemy plays in the early minutes of Episode 1, and the final episode of the series concludes with a montage where images of the actors portraying the Five dissolve into video portraits of their real-life counterparts. Viewing the entire series in context, the average viewer would understand “When They See Us” to be a Hollywood dramatization that builds its story around the premise that the Five were wrongly prosecuted and convicted.

But the scenes in Episode 2 related to the DNA-marked sock cannot be fairly classified as pure opinion, and instead are actionable mixed opinion. In those scenes, Fairstein explains that the prosecution is in possession of a DNA-marked sock that has not been disclosed to the defense, and that the prosecution will “surprise” the defense by testing the sock on the eve of trial.

After the sock is found not to match to any of the Five, Fairstein suggests that a sixth attacker must have been involved “if it helps a jury believe what we know is true.” These statements and actions attributable to Fairstein have a precise meaning, are capable of being proved or disproved, and even allowing for the artistic context of “When They See Us,” the average viewer could reasonably believe that these depictions were based on undisclosed facts known to the filmmakers. These scenes depict Fairstein concealing evidence from defense counsel – a likely violation of law and of professional responsibility – and manipulatingthe timing of a DNA test with the goal of advantaging the prosecution. The average viewer would not have a reason to conclude that such actions reflect a dramatized opinion of the filmmakers and could fairly conclude that the depiction was based on undisclosed facts known to the defendants.”

Opinion: Fairstein v. Netflix
<https://s3.documentcloud.org/documents/21038990/fairstein-opinion.pdf>

Complaint
<https://storage.courtlistener.com/recap/gov.uscourts.nysd.545262/gov.uscourts.nysd.545262.1.0.pdf>
Motion to Dismiss
<https://storage.courtlistener.com/recap/gov.uscourts.nysd.545262/gov.uscourts.nysd.545262.87.0.pdf>
Opposition Brief
<https://storage.courtlistener.com/recap/gov.uscourts.nysd.545262/gov.uscourts.nysd.545262.91.0.pdf>

**New York Appellate Courts Grants Summary Judgment to Lifetime in Porco Case**

At issue is the 2013 Lifetime movie “Romeo Killer: The Chris Porco Story.” Porco was convicted of murdering his father and attempting to murder his mother with an axe. He is serving a 50-year prison sentence for those crimes. He initially attempted to get a prior restraint to stop Lifetime from airing the movie, getting a short-lived TRO. After that was reversed, he pursued a claim under New York’s statutory privacy law Section 51 for using without consent his name and likeness in the movie for advertising or trade purposes. Porco relied on New York case law holding that a plaintiff can overcome the newsworthiness defense to Section 51 by showing the producers created a “materially and substantially fictitious biography.”

The intermediate appellate court initially ruled that Porco had made sufficient allegations of substantial fictionalization to survive a motion to dismiss and take discovery. Following discovery, the trial court denied Lifetime’s motion for summary judgment. Lifetime appealed, and this time the intermediate appellate court granted summary judgment as a matter of law.

**Porco v. Lifetime Entertainment Servs., LLC, 195 AD 3d 1351 (N.Y. App. 2021)**
<https://scholar.google.com/scholar_case?case=4007877715327778574>

“[T]o ultimately prevail in their cause of action, plaintiffs must demonstrate that the film in question rises to the level of a "materially and substantially fictitious biography where a knowing fictionalization amounts to an all-pervasive use of imaginary incidents," culminating in "a biography that is nothing more than an attempt to trade on the persona of the plaintiff" (147 AD3d at 1254 [internal quotation marks, brackets and citations omitted]). To understand this standard, a discussion of the statutory right to privacy's development and interpretation over time is necessary. There is no common-law right of privacy in New York, prompting the Legislature to long ago create a limited right of privacy, set forth in Civil Rights Law §§ 50 and 51, that provides for criminal and civil liability where "a living person's `name, portrait or picture' [is used] for advertising or trade purposes `without having first obtained the written consent of such person, or[,] if a minor[,] of his or her parent or guardian'" (Messenger v Gruner + Jahr Print. & Publ., 94 NY2d 436, 441 [2000], quoting Civil Rights Law § 50; see Time, Inc. v Hill, 385 US 374, 380-381 [1967]; Lohan v Take-Two Interactive Software, Inc., 31 NY3d 111, 119 [2018]). The statutory language accordingly makes clear that the right is focused upon "the commercial use of an individual's name or likeness" (Arrington v New York Times Co., 55 NY2d 433, 439 [1982], cert denied 459 US 1146 [1983]; accord Lohan v Take-Two Interactive Software, Inc., 31 NY3d at 120), and courts have strictly limited its application to "the use of pictures, names or portraits for advertising purposes or for the purposes of trade only, and nothing more" (Finger v Omni Publs. Intl., 77 NY2d 138, 141 [1990] [internal quotation marks and citation omitted]; see Messenger v Gruner + Jahr Print. & Publ., 94 NY2d at 441).

As a result of both the narrow scope of the statutory provisions and the need to avoid a fatal "conflict with the free dissemination of thoughts, ideas, newsworthy events, and matters of public interest guaranteed by the First Amendment" (Lohan v Take-Two Interactive Software, Inc., 31 NY3d at 120 [internal quotation marks and citations omitted]; see Time, Inc. v Hill, 385 US at 382; Rand v Hearst Corp., 31 AD2d 406, 409 [1969], affd 26 NY2d 806 [1970]), courts have recognized that the provisions "do not apply to reports of newsworthy events or matters of public interest," even if the reports were produced with profit in mind (147 AD3d at 1254 [internal quotation marks and citation omitted]; see Finger v Omni Publs. Intl., 77 NY2d at 141-142; Freihofer v Hearst Corp., 65 NY2d 135, 140 [1985]; Stephano v News Group Publs., 64 NY2d 174, 184-185 [1984]). Newsworthiness is given a broad definition and "includes not only descriptions of actual events," but also descriptions of "political happenings, social trends or any subject of public interest" (Messenger v Gruner + Jahr Print. & Publ., 94 NY2d at 441-442; see Lohan v Take-Two Interactive Software, Inc., 31 1354\*1354 NY3d at 120).

It is therefore clear that "many types of artistic expressions, including literature, movies and theater" (Foster v Svenson, 128 AD3d 150, 156-157 [2015]), whether intended as entertainment or not, can be newsworthy and can further the "strong societal interest in facilitating access to information that enables people to discuss and understand contemporary issues" (id. at 156; see Lohan v Take-Two Interactive Software, Inc., 31 NY3d at 120; Altbach v Kulon, 302 AD2d 655, 658 [2003]; Costanza v Seinfeld, 279 AD2d 255, 255 [2001]; Hampton v Guare, 195 AD2d 366, 366 [1993], lv denied 82 NY2d 659 [1993]). The newsworthiness exception will not apply to the depiction of an individual in such a work, however, if the depiction's "newsworthy or public interest aspect ... is merely incidental to its commercial purpose" (Foster v Svenson, 128 AD3d at 159). Accordingly, where there is a "lack of a reasonable connection between the use [of an individual's name or likeness] and a matter of public interest," or where the purported aim of the work is to provide biographical information "of obvious public interest, [but the] content is substantially fictionalized" and does not serve that interest, it will not be protected by the newsworthiness exception (Davis v High Socy. Mag., 90 AD2d 374, 381 [1982], appeal dismissed 58 NY2d 1115 [1983]; see Messenger v Gruner + Jahr Print. & Publ., 94 NY2d at 445-446; Foster v Svenson, 128 AD3d at 158; University of Notre Dame Du Lac v Twentieth Century-Fox Film Corp., 22 AD2d 452, 455 [1965], affd 15 NY2d 940 [1965]; Goelet v Confidential, Inc., 5 AD2d 226, 229 [1958]).

It is that last qualification that poses a problem in this case, as the film at issue is a docudrama, a genre that "deal[s] freely with historical events[,] especially of a recent and controversial nature" by crafting a dramatic presentation that could, in theory, mislead the viewer into believing that it was entirely accurate (Merriam-Webster Online Dictionary, docudrama [https://www.merriam-webster.com/dictionary/docudrama]; see Davis v Costa-Gavras, 654 F Supp 653, 658 [SD NY 1987]). As plaintiffs were at the heart of indisputably newsworthy events—namely, a sensational crime in which a couple were savagely attacked as they slept and the subsequent efforts to identify and bring the perpetrator to justice—defendant would be entitled to depict plaintiffs in a "news or informative presentation" about those matters, but would not have free rein to further engage in a "commercialization of [plaintiffs'] personalit[ies]" disconnected from them (Gautier v Pro-Football, Inc., 304 NY 354, 359 [1952]). Plaintiffs contend that the film presented itself as a completely accurate depiction of their roles in the newsworthy events while really providing "a materially 1355\*1355 and substantially fictitious biography where a knowing fictionalization amount[ed] to an all-pervasive use of imaginary incidents" (147 AD3d at 1254 [internal quotation marks and citations omitted]), which, if true, would render the depiction little more than an "attempt[] to trade on" the personae of plaintiffs by falsely promising information about their involvement in matters of public interest (Messenger v Gruner + Jahr Print. & Publ., 94 NY2d at 446; see Hicks v Casablanca Records, 464 F Supp 426, 433 [SD NY 1978]; Spahn v Julian Messner, Inc., 21 NY2d 124, 127 [1967]; Davis v High Socy. Mag., 90 AD2d at 381; Goelet v Confidential, Inc., 5 AD2d at 229; Dallesandro v Holt & Co., 4 AD2d 470, 472 [1957], appeal dismissed 7 NY2d 735 [1959]; Sutton v Hearst Corp., 277 App Div 155, 156 [1950]). The film would, in other words, be an "invented biograph[y]" of plaintiffs that would not "fulfill the purpose of the newsworthiness exception" because it would have no purpose at all beyond the actionable one of exploiting their names and likenesses for profit (Messenger v Gruner + Jahr Print. & Publ., 94 NY2d at 446; see Gautier v Pro-Football, Inc., 304 NY at 360; Sutton v Hearst Corp., 277 App Div at 156-157).

A review of the case law illuminates the situations in which a work claiming to depict an individual's connection to matters of public interest was so removed from those matters as to fall outside of the newsworthiness exception. For instance, although the unauthorized biography of a prominent baseball player would provide information of public interest about the player's life if accurate, the biography gave rise to liability because it was knowingly riddled "with material and substantial falsification," had no informational value and served no purpose beyond "commercial[ly] exploit[ing] [the player's] name and personality" (Spahn v Julian Messner, Inc., 21 NY2d at 127, 129; see Messenger v Gruner + Jahr Print. & Publ., 94 NY2d at 446). Similarly, while a daring sea rescue was newsworthy, a filmmaker was held liable for producing and promoting a fanciful dramatization that presented itself as the true story of the rescue and portrayed one of those involved in a manner that bore "no connection whatever with" the incident, did not "instruct or educate" the audience about it, and served no apparent purpose beyond amusing the public and boosting ticket sales (Binns v Vitagraph Co. of Am., 210 NY 51, 58 [1913]; see Molony v Boy Comics Publs., Inc., 277 App Div 166, 172-173 [1950]). With the standard in mind—and noting that the initial burden lies on the party seeking summary judgment to "make a prima facie showing of entitlement to judgment as a matter of law"—we turn to the parties' motion papers (Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]).

As noted above, the sensational facts of the crime, the investigation and the trial of Christopher Porco are indisputably events of public interest, and the film therefore qualifies as newsworthy (see Alfano v NGHT, Inc., 623 F Supp 2d 355, 359 [ED NY 2009]; Freihofer v Hearst Corp., 65 NY2d at 140-141; Bement v N.Y.P. Holdings, 307 AD2d 86, 90 [2003], lv denied 100 NY2d 510 [2003]). The entire "content of the" film must therefore be reviewed to determine whether it dealt with those newsworthy events (Messenger v Gruner + Jahr Print. & Publ., 94 NY2d at 442; see Freihofer v Hearst Corp., 65 NY2d at 140-141). In that regard, defendant provided a copy of the film with a timed dialogue script as well as admissible proof of the underlying facts that included police and media interviews with Christopher Porco and excerpts from the transcript of his criminal trial.[2] A review of those materials confirms that the film is a dramatization that at times departed from actual events, including by recreating dialogue and scenes, using techniques such as flashbacks and staged interviews, giving fictional names to some individuals and replacing others altogether with composite characters. The film nevertheless presents a broadly accurate depiction of the crime, the ensuing criminal investigation and the trial that are matters of public interest. More importantly, the film makes no effort to present itself as unalloyed truth or claim that its depiction of plaintiffs was entirely accurate, instead alerting the viewer at the outset that it is only "[b]ased on a true story" and reiterating at the end that it is "a dramatization" in which "some names have been changed, some characters are composites and certain other characters and events have been fictionalized." In our view, the foregoing satisfied defendant's initial burden of showing that the film addressed matters of public interest through a blend of fact and fiction that was readily acknowledged, did not mislead viewers into believing that its related depictions of plaintiffs was true and was not, as a result, "so infected with fiction, dramatization or embellishment that it cannot be said to fulfill the purpose of the newsworthiness exception."

Plaintiffs responded, in essence, by complaining that aspects of their depictions in the film were inaccurate and offensive to them. As the film made clear to viewers that it was a dramatization of newsworthy events and "that the circumstances involved therein were fictitious," the goal of those inaccuracies was obviously not the actionable one of profiting off of plaintiffs by falsely claiming to give viewers the true story of their actions (Hicks v Casablanca Records, 464 F Supp at 432; see University of Notre Dame Du Lac v Twentieth Century-Fox Film Corp., 22 AD2d at 455). Plaintiffs' complaint therefore amounts to little more than the claim that the film unreasonably placed them in a false light while presenting an account of newsworthy matters with healthy dollops of fiction, but neither a false light claim nor any other common-law privacy tort exists in New York (see Messenger v Gruner + Jahr Print. & Publ., 94 NY2d at 448; Howell v New York Post Co., 81 NY2d 115, 123 [1993]). Thus, as "the right to privacy is governed exclusively by sections 50 and 51 of the Civil Rights Law" in New York, and plaintiffs failed to raise a material question of fact as to whether the degree of fictionalization of the film transformed it into a material and substantially fictitious biography, the purpose of which was an effort to trade off plaintiffs' names and likenesses, defendant was entitled to summary judgment (Howell v New York Post Co., 81 NY2d at 123; see 147 AD3d at 1255).

Finally, plaintiffs' arguments regarding the use of their names and likenesses in promotional and advertising materials for the film are unavailing, as those materials "cannot reasonably be read to assert that plaintiff[s] endorsed or recommended" the film and were ancillary to the protected use in the film itself (Altbach v Kulon, 302 AD2d at 658; see Costanza v Seinfeld, 279 AD2d at 255). Plaintiffs' remaining claims, to the extent that they are not rendered academic by the foregoing, have been examined and lack merit.

**Analysis**

**New York Appeals Court Dismisses Porco v. Lifetime**
By Elizabeth Seidlin-Bernstein
MediaLawLetter June 2021
<https://medialaw.org/new-york-appeals-court-dismisses-porco-v-lifetime/>

The unanimous decision provides much-needed guidance to creators of content about real people and events, making clear that a docudrama about a newsworthy subject cannot give rise to a Section 51 claim unless it misleads viewers into believing that it is entirely accurate…..

Here, the appellate court found, Christopher Porco’s crime and prosecution were “indisputably events of public interest,” and Romeo Killer presented “a broadly accurate depiction of” them, despite some departures from actual events and use of dramatic devices. Notably, the court permitted Lifetime to rely not only on primary source materials such as court records, but also on newspaper and other secondhand accounts of the criminal case, which “served the nonhearsay purpose of showing that the film was based upon, and reasonably connected to, events of public interest.”

“More importantly,” the court continued, the movie made “no effort to present itself as unalloyed truth or claim that its depiction of plaintiffs was entirely accurate.” The court pointed to the disclaimers in the opening and closing credits as evidence that “the goal of [the movie’s] inaccuracies was obviously not the actionable one of profiting off of plaintiffs by falsely claiming to give viewers the true story of their lives.” Thus, the movie was entitled to the protection of the newsworthiness exception.

The Third Department’s decision should allow producers and distributors of docudramas more breathing room to use dramatic devices and creative license—or, as the court put it, “a healthy dollop of fiction”—without fear of liability under Section 51. The court’s confirmation of the limited scope of Section 51 harmonizes New York law with the many other jurisdictions that have held misappropriation and right of publicity claims to be inapplicable to docudramas under state law or the First Amendment, including California in de Havilland v. FX Networks, LLC, 21 Cal. App. 5th 845 (Cal. Ct. App. 2018).

**EMBEDDING PHOTOS AND VIDEOS: IS IT COPYRIGHT INFRINGEMENT**

**RECENT DEVELOPMENTS**

**Nicklen v. Sinclair Broadcasting Group**
<https://scholar.google.com/scholar_case?case=11408885579367034050&hl=en&as_sdt=6&as_vis=1&oi=scholarr>

The Copyright Act's text and history establish that embedding a video on a website "displays" that video, because to embed a video is to show the video or individual images of the video nonsequentially by means of a device or process. Nicklen alleges that the Sinclair Defendants included in their web pages an HTML code that caused the Video to "appear[]" within the web page "no differently than other content within the Post," although "the actual Video ... was stored on Instagram's server." SAC ¶¶ 160-61. The embed code on the Sinclair Defendants' webpages is simply an information "retrieval system" that permits the Video or an individual image of the Video to be seen. The Sinclair Defendants' act of embedding therefore falls squarely within the display right.

The Sinclair Defendants nevertheless insist that embedding is not display and ask the Court to adopt the Ninth Circuit's "server rule." Under that rule, a website publisher displays an image by "using a computer to fill a computer screen with a copy of the photographic image fixed in the computer's memory." Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146, 1160 (9th Cir. 2007). In contrast, when a website publisher embeds an image, HTML code "gives the address of the image to the user's browser" and the browser "interacts with the [third-party] computer that stores the infringing image." Id. Because the image remains on a third-party's server and is not fixed in the memory of the infringer's computer, therefore, under the "server rule," embedding is not display. Id.

The server rule is contrary to the text and legislative history of the Copyright Act. The Act defines to display as "to show a copy of" a work, 17 U.S.C. § 101, not "to make and then show a copy of the copyrighted work." The Ninth Circuit's approach, under which no display is possible unless the alleged infringer has also stored a copy of the work on the infringer's computer, makes the display right merely a subset of the reproduction right. See Jane C. Ginsburg & Luke Ali Budiardjo, Embedding Content or Interring Copyright: Does the Internet Need the "Server Rule"?, 32 Colum. J. L. & Arts 417, 430 (2019) (explaining that the server rule "convert[s] the display right into an atrophied appendage of the reproduction right" and thereby "ignores Congress's endeavor to ensure that the full `bundle' of exclusive rights will address evolving modes of exploitation of works"). Further, the server rule distinguishes between showing a copy possessed by the infringer and showing a copy possessed by someone else. See Perfect 10, 508 F.3d at 1161 (concluding that "Google does not ... display a copy of full-size infringing photographic images for purposes of the Copyright Act" because "Google does not have a copy of the images for purposes of the Copyright Act"). As discussed above, when a copy of a work is shown, the Copyright Act makes no such distinction. See, e.g., Am. Broad. Companies, Inc. v. Aereo, Inc., 573 U.S. 431, 441-48 (2014) (holding that, despite technological complexity concerning the "behind-the-scenes" delivery of images, the defendant violated the exclusive right to "show [an audiovisual work's] images in any sequence," because "whether Aereo transmits from the same or separate copies, it ... shows the same images and makes audible the same sound"). Rather, to "show a copy" is to display it. 17 U.S.C. § 101.

Further, the Ninth Circuit's reasoning in Perfect 10 should be cabined by two facts specific to that case: (1) the defendant operated a search engine and (2) the copyrighted images were displayed only if a user clicked on a link. See Goldman v. Breitbart News Network, LLC, 302 F. Supp. 3d 585, 595 (S.D.N.Y. 2018) (distinguishing Perfect 10 on these grounds). When a user "open[s] up a favorite blog or website to find a full color image awaiting the user, whether he or she asked for it, looked for it, clicked on it, or not," the Ninth Circuit's approach is inapt. See id. This case does not involve a search engine, and Nicklen alleges that no user intervention was required to display the Video's individual images nonsequentially. An individual still image from the Video awaits Sinclair readers whether they click the image to play the video or not. Thus, Perfect 10's test is a poor fit for this case, and the Court declines to adopt it.

Proponents of the server rule suggest that a contrary rule would impose far-reaching and ruinous liability, supposedly grinding the internet to a halt. These speculations seem farfetched, but are, in any case, just speculations. Moreover, the alternative provided by the server rule is no more palatable. Under the server rule, a photographer who promotes his work on Instagram or a filmmaker who posts her short film on YouTube surrenders control over how, when, and by whom their work is subsequently shown — reducing the display right, effectively, to the limited right of first publication that the Copyright Act of 1976 rejects. The Sinclair Defendants argue that an author wishing to maintain control over how a work is shown could abstain from sharing the work on social media, pointing out that if Nicklen removed his work from Instagram, the Video would disappear from the Sinclair Defendants' websites as well. But it cannot be that the Copyright Act grants authors an exclusive right to display their work publicly only if that public is not online.

For the foregoing reasons, Nicklen has plausibly alleged that by embedding the Video without authorization, the Sinclair Defendants violated the display right.

**Hunley v. Instagram**
<https://www.courthousenews.com/wp-content/uploads/2021/09/instagram-copyright.pdf>
In September 2021, a federal district court in California reaffirmed the vitality of the “server test” in the Ninth Circuit.

Hunley argues that the server test should not apply to third-party websites that embed images and videos shared on social media because Perfect 10 addressed a “search engine” and reflected a “highly fact-driven . . . policy judgment.” Opp. at 8–9 (emphasis omitted). That is wrong. Perfect 10 relied on the “plain language of the statute,” not policy considerations, to craft a test for “when a computer displays a copyrighted work” under 17 U.S.C. § 106(5). See 508 F.3d at 1160. Hunley relies on an out-of-circuit district court decision rejecting the server test and suggesting that Perfect 10 should be “cabined” to the search engine context, or contexts in which an Internet user must click a hyperlink to view an image. See Nicklen v. Sinclair Broadcasting Group, Inc., et al, 2021 WL 3239510 (S.D.N.Y. July 30, 2021). But unlike the U.S. District Court for the Southern District of New York, this Court is not free to ignore Ninth Circuit precedent. And in purporting to establish a test for when a computer displays a copyrighted image, Perfect 10 did not state or indicate that its holding was limited to the unique facts presented there. Thus this Court must faithfully apply Perfect 10 absent a contrary Ninth Circuit or Supreme Court ruling.