

Rights, Camera, Action: Intellectual Property Issues Associated with Documentaries and Biopics

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RIGHTS, CAMERA, ACTION: INTELLECTUAL PROPERTY ISSUES ASSOCIATED WITH DOCUMENTARIES AND BIOPICS

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Biopic/Docudrama vs. Documentary

Definitions:

- **Docudrama** (also docu-drama, drama-documentary, drama-doc or docu-fiction) - A type of drama (usually a film, television show, or play) that combines elements of documentary and drama. It may consist entirely of actors performing recreations of documented events, or, in the case of film and television docudramas, may combine that with contemporaneous footage of the events themselves.
 - **Biopic** - A biographical movie (a work would fall in this category, depending on how much was created for storytelling purposes)

- **Documentary** –is a film or television program, based on written, oral, or photographic record of actual events or facts, or individuals of note. Although not fictionalized, a documentary may contain parts constructed from folklore or history, and/or may include dramatization to highlight specific events or personalities.

Legal Checklist:

- Defamation
- Right of Publicity
- False Endorsement/Advertising (Lanham Act)
- False Light (Invasion Of Privacy)
- Disclosure of Private Facts (Invasion Of Privacy)
- Copyrights/Trademarks
- Licensing
- Talent Concerns
- Content Protection

Mitigating Risk – Biopic/Docudrama

- Disclaimers
 - **Example:** *“The motion picture is a dramatization of the real events that inspired it. Some scenes and characters have been added or changed.”*
- Composite Characters and Groups
 - Joe LaMotta *“Raging Bull”*- composite of real Joe LaMotta and Jake La Motta's best friend, Pete Petrella.
 - Alan Isaacman *“The People vs. Larry Flynt”* - composite of the lawyer representing Flynt and the legal assistants Flynt had employed.
 - Stillwater *“Almost Famous”* - composite of bands and musicians who Cameron Crowe met while working at Rolling Stone. It is said to be likely that guitarist Russell Hammond is based on Gregg Allman of the Allman Brothers, who Crowe went on tour with in 1973.

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Compelling Content: The Gift and the Curse

Compelling content drives audience engagement

- ***New Edition Story Viewership:***

- 29 million premiere week viewers.
- #1 Most Social TV Program for three consecutive days with 6 million social media interactions.

But, compelling content also drives piracy

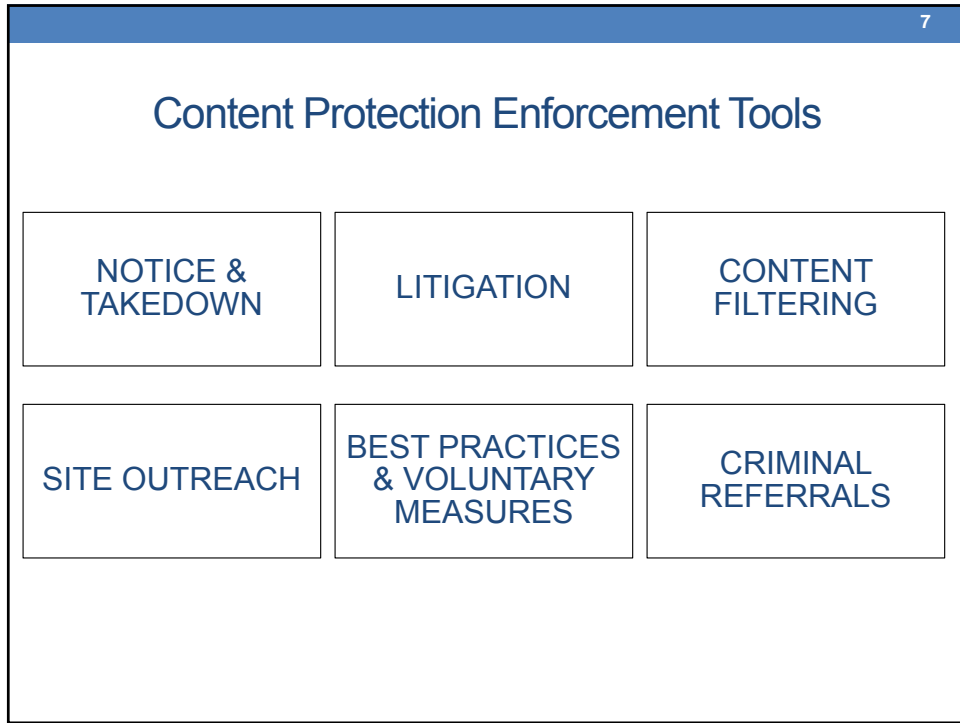
- ***New Edition Story Piracy:***

- ~4k infringing *files* removed

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Mitigating Risk – Documentary

- Clearances/obtaining rights for use of 3rd party assets (examples: video footage, music)
- Consent Forms and releases for appearances and locations.
- Corroboration/Fact Check – Obtain independent substantiation for claims (particularly those potentially defaming someone) from reputable sources.



Content Protection Preparation

- Content security throughout production lifecycle
 - Review systems, processes, and best practices for storing and transferring content
 - Evaluate watermarking: visible deterrent and/or forensic
- Enforcement preparation
 - Rights review
 - Who are the rights-holders by distribution channel, territory, and term?
 - Is enforcement contemplated in relevant agreements?
 - Coordinate with press and marketing teams to identify authorized outlets
 - Evaluate fingerprinting
 - Evaluate engaging vendors

Types of Popular Platforms

- Social and User-Generated
 - Major platforms with well-established copyright removal policies and procedures
 - One user uploads; many stream
- Lockers
 - Cloud storage
 - One user uploads; many download and/or stream
- Peer-to-Peer
 - Decentralized file sharing network
 - Many users make distributed pieces of content available; many download
- Over-the-Top Apps and Add-ons
 - Generally non-infringing hardware similar to AppleTV and Roku
 - Aftermarket apps aggregate and index pirated content on web for streaming

BIOPIC AGREEMENT

"[PROJECT NAME]"

OFFER: [FIRST OFFER DATE]

REVISED: [REVISION DATE]

CLOSED: [DATE CLOSED]

FROM: [OUR NON-UNION SIGNATORY COMPANY / PRODUCTION COMPANY] ("Company")

TO: [NAME OF PERSON DEPICTED IN BIOPIC] ("Artist")

ARTIST'S REPRESENTATIVE[S]:

[AGENT NAME, AGENCY, PHONE, EMAIL]

[LAWYER NAME, AGENCY, PHONE, EMAIL]

PROJECT DESCRIPTION: [half-hour / hour / two-hour] [animated / live-action] fictionalized scripted [pilot ("Pilot") / mini-series ("Mini-Series") / made-for-TV movie ("MFT") / limited series ("Limited Series") / episodic series ("Series")] based on Artist's life. The development and possible production of the [TYPE OF PROJECT] and all ancillary materials are referred to individually and collectively as the "Project," intended for [CHANNEL] ("Channel")

1. CONDITIONS PRECEDENT: This Agreement and the parties' obligations hereunder are subject to the following conditions precedent:
 - a) Artist's execution and delivery to Company of this Agreement in form and substance satisfactory to Company;
 - b) Clear chain-of-title for the Project and Company's receipt and acceptance of any requested chain-of-title documentation; and
 - c) [INSERT REFERENCE(S) TO ANY LABEL RELEASES OR OTHER RELATED AGREEMENTS EITHER WITH ARTIST OR W/ THIRD PARTIES].

2. EXCLUSIVITY:
 - a) During the "Exclusivity Period," which shall begin on the date the parties close this deal as set forth above and shall end 5 years after the date of initial broadcast of the Project, Artist will not:
 - (1) authorize the development or production of Audio Visual Programs (defined below) (i) based on a fictionalized depiction of Artist and the events and people in Artist's personal and professional life ("Biopic") or (ii) featuring a non-fiction depiction of Artist and the events and people in Artist's life ("Documentary"); nor
 - (2) participate as a producer, writer, consultant, actor, investor, or in any other capacity in a Biopic or Documentary developed or produced by a third party production company, studio, network, or streaming programming service or any other individual or entity.
 - b) Artist acknowledges and agrees that Company's ability to promote the Project as the exclusive authorized Biopic during the Exclusivity Period is an essential material term of this Agreement.
 - c) The term "Audio Visual Programs" includes theatrical motion pictures, live theater, and programs produced for exhibition on television or streaming programming services (e.g., Netflix, Amazon Prime, Hulu, etc.).

3. DEVELOPMENT AND CONSULTANT SERVICES:

- a) Artist shall perform the following development and consulting services when, where, if, and as reasonably requested by Company (collectively, "Development and Consultant Services"): [INSERT ALL APPLICABLE SERVICES REQUIRED]
- (i) Participating in a reasonable number of meetings with Company executives, writers, producers, and/or cast members, including one or more rehearsals;
 - (ii) Being available to participate in meetings regarding casting;
 - (iii) Participating in location scouting;
 - (iv) Using good faith efforts to assist Company in procuring releases and cooperation from music labels, music publishers, and/or individuals featured in the Project; and
 - (v) Providing Company along with producers and writers engaged by Company, if appropriate, with access to and a perpetual gratis license to use and incorporate pre-existing material owned or controlled exclusively by Artist (e.g., photographs, footage, books, poems, home videos, etc. (collectively, "Pre-Existing Material")) into the Project and in related ancillary materials, advertisements and promotional materials for the Project, all of which may be exploited, in whole or in part, in any manner and form of media now known or developed later, worldwide, in perpetuity.
- b) Development and Consultant Services Fee: \$ [REDACTED], this amount is an advance against the Biopic Production Fee set forth in Paragraph __ below.

4. PROMOTIONAL SERVICES: Artist also agrees to make a reasonable number of promotional appearances in support of the Project for no additional compensation, including participating in each of the following, if requested by Company: (a) Channel Upfronts; (b) TCA; (c) a reasonable number of print, radio, online, and television interviews (both national and local media) during the 2-week period before or after the premiere of the Project; (d) promotional screenings; (e) satellite media tours; (f) photography sessions conducted by Company's and/or CHANNEL's photographers conducted on location or elsewhere; and (g) a reasonable number of public or non-performing personal appearances for non-paying audiences. In addition, in accordance with Company's and CHANNEL's instructions and under Company's and CHANNEL's control Artist will participate in CHANNEL's promotional campaigns on Twitter, Facebook Live, CHANNEL.com and any other CHANNEL-approved social media outlets, for no additional compensation. Collectively, all of the services referenced in this Paragraph and any other promotional services performed by Artist shall be referred to as "Promotional Services"). If Artist is required to travel to a location that is more than 75 miles from Artist's primary residence, Artist will be entitled to the rights described below in Paragraph __ (Travel).

5. BIOPIC PRODUCTION FEE: Provided all Conditions Precedent have been satisfied and Artist is not in material breach of this Agreement or any other Agreement with Company (or Company's licensee, successor or assignee), Artist shall be entitled to receive [\$ [REDACTED]], payable __% after signing this Agreement, __% at the start of principal photography, and __% after completion of principal photography, as all-inclusive consideration for Artist's Development and Consultant Services, Promotional Services, Pre-Existing Material, and all other promises and obligations in this Agreement.

6. REPRESENTATIONS/WARRANTIES: In addition to the representations set forth in the attached Standard Terms, which are incorporated herein, Artist represents, warrants and agrees that:

- a) Neither Artist (nor anyone acting under the authority or on behalf of Artist) has granted any party the right (or an option to acquire the right) to develop, produce, or otherwise exploit an Audio Visual Program based upon Artist's life;
- b) Information and materials Artist provides to Company (or its successors, licensees, assignees, or designees) for use in the Project will be true and will not defame or violate the right of publicity, privacy, or any other right of any individual or entity;
- c) Artist has not and will not enter into any other contracts, agreements, or assignments to authorize, promote, produce or otherwise participate in a Biopic or Documentary;
- d) There have been no prior Biopics or Documentaries other than as explicitly disclosed to Company in writing; and
- e) Artist will not grant, encumber or otherwise dispose of rights granted to Company hereunder.

7. ACKNOWLEDGEMENTS AND RELEASE:

- a) Artist understands, acknowledges, and agrees that Company may fictionalize aspects of Artist's life for dramatic purposes, including by: creating composite or fictional characters and storylines that may or may not be based or suggested by individuals or events in Artist's life; altering, exaggerating or creating events, characters, and dialogue to create suspense, excitement, drama, or continuity; and mixing fictionalized events and characters with actual events and individuals.
- b) Artist, on behalf of Artist and Artist's heirs, next of kin, spouse, guardians, legal representatives, employees, executors, administrators, agents, successors and assigns (collectively, the "Releasing Parties"), agrees not to bring any claim or legal action against Company, CHANNELN=, or their licensees, successors, assigns, parent companies, affiliates, and financiers, or any of the principals, employees, agents, officers, directors, shareholders, and contractors of the foregoing ("Released Parties"), arising from or in any way related to Company's depiction of Artist and Artist's life in the Project.
- c) Artist releases and discharges the Released Parties from all claims, demands or causes of action that Artist may now have or may have on the ground that the Project or exploitation of any elements thereof constitutes defamation, infliction of emotional distress, invasion of privacy or right of publicity, infringement of copyright or violates any other right that Artist may have under any legal theory.

8. APPROVALS / CONTROL: As between Company and Artist, Company has all financial, business and creative controls and approvals with respect to the Project (including with respect to writers, showrunners, producers, directors, cast, crew, and their respective agreements).

9. TRAVEL: If Company requires Artist to travel to an overnight location more than 50 miles from Artist's permanent residence (or then-current location, if different), Company will provide Artist (on an if-available, if-used basis): (a) one round-trip business class ticket; (b) hotel accommodations (covering room and tax only); (c) ground transportation to/from airports; and (d) Company's standard per diem (excluding travel days). All travel arrangements must be made through Company's travel department and shall be subject to Company's travel guidelines.

10. USE OF PUBLIC DOMAIN MATERIAL: Nothing in this Agreement shall be construed to restrict, diminish or impair the rights of Company to use freely, in any work or media, any elements of the Project which may be in the public domain, including, any fact, story, idea, plot, theme, sequence, scene, episode, incident, name, characterization or dialogue based upon Artist's life, from whatever source derived (collectively, "Public Domain Elements"). Company

at all times remains free to enjoy and exploit Public Domain elements to the same extent as a member of the public, and Company shall have the right to use such Public Domain Elements without any obligation to Artist.

11. NON-GUILD AGREEMENT: Artist's services are not intended to be subject to any collective bargaining agreement.
12. CONFIDENTIALITY: The terms of this Agreement are confidential. Artist shall have a continuing duty to keep all non-public information relating to the Project confidential. In addition, customary confidentiality restrictions including will apply. Artist's confidentiality obligations hereunder will apply to any and all media whatsoever, including social networking sites. Personal photography and/or audio or video recording of cast, crew, or sets (of any such photographs or video) are strictly prohibited without Company's and CHANNEL's prior written approval.
13. RIGHTS:
 - a) Company owns all rights in and to the Project.
 - b) Company and Company's successors, assignees, and licensees, shall have the perpetual, irrevocable and nonexclusive right, but not the obligation, to use, and authorize others to use, Artist's name, voice, likeness, and biographical information pertaining to Artist in connection with the Project and ancillary uses thereof, in all media (now known or hereafter devised) in perpetuity throughout the universe, including, without limitation, for the purpose of advertising, publicity, marketing, promotional and commercial tie-in purposes in connection with the Project and/or any other motion picture or other works based upon the Project, the Material and/or the Rights, all allied and subsidiary rights therein and thereto (including, without limitation, merchandising and commercial tie-in rights and over the Internet), or any other use of the Project, as well as in or in connection with promotional materials for CHANNEL and/or their respective programming services, affiliates and/or sponsors, and other CHANNEL programs, and for the institutional purposes of the cable industry generally, in any manner or media now known or developed later.
 - c) Artist grants Company the irrevocable, perpetual non-exclusive right to use trademarks owned by Artist in the Project or any advertising, promotion or ancillary materials for the Project, worldwide, and in any manner or media now known or developed later.
14. CROSS-DEFAULT: A material breach by Artist of this Agreement may be deemed as a breach of the [INSERT NAME OF OTHER AGREEMENT, E.G., NON-WRITING EXECUTIVE PRODUCER AGREEMENT] Agreement, at Company's election. A material breach of the [INSERT NAME OF OTHER AGREEMENT] Agreement may be deemed to be a breach of this Agreement, also at Company's election. If Company terminates and/or suspends this Agreement, Company shall have the right to terminate the [INSERT NAME OF OTHER AGREEMENT] Agreement. If Company suspends and/or terminates the [INSERT NAME OF OTHER AGREEMENT] Agreement, Company shall have the right to terminate this Agreement.
15. MISCELLANEOUS:
 - a) The term "Agreement," as used herein, shall include the terms hereof, the Standard Terms, attached hereto as Exhibit ___, and all other exhibits and attachments hereto, if any, all of which (to the extent not previously incorporated herein) are incorporated herein by this reference. The word "including" (or any derivative thereof) shall not be construed to limit the general interpretation of the words accompanying the term "including."

- b) In the event of any conflict between any provision of this Agreement and any statute, law, regulation or applicable collective bargaining agreement provision, the latter will prevail; however, in such event, the provision(s) of this Agreement so affected will be curtailed and limited only to the minimum extent necessary to permit compliance with the requirement(s) of such statute, law, regulation or provision, and all other terms of this Agreement will continue in full force and effect.
- c) This Agreement contains the entire understanding of Company and Artist, supersedes any and all prior agreements, negotiations and communications (written or oral) with respect hereto, and may not be modified except by an instrument in writing signed by the parties hereto.
- d) This Agreement shall be governed and construed in accordance with the internal laws of the State of New York applicable to contracts entered into and fully to be performed therein.
- e) This Agreement may be executed in counterparts, but all such counterparts together shall constitute one and the same instrument. Facsimile signatures and signatures obtained through e-mail PDF shall be deemed originals for all purposes.

[OUR ENTITY / PRODUCTION COMPANY]

[ARTIST'S NAME]

x _____
By: _____
Its: _____

x _____

ALTERNATE PROVISIONS

PROJECT DESCRIPTION

IF THE DEAL IS WITH A SUPPORTING CHARACTER, REPLACE:

“based on Artist’s life”

with

“which includes a character based on Artist”

IF WE’RE OPTIONING AND POTENTIALLY ACQUIRING ACTUAL INTELLECTUAL PROPERTY (E.G., A BOOK, MUSIC, ETC. INSERT THE FOLLOWING AND ATTACH A SHORT FORM OPTION AND SHORT FORM ASSIGNMENT AS EXHIBITS:

OPTION: By signing below, Artist irrevocably grants Company (and its successors, licensees, and assigns) the exclusive option (“Option”) to acquire all right, title, and interest in and to the Granted Rights (defined below).

INITIAL OPTION PERIOD / FEE: The initial option period shall begin on the date of this Agreement and shall extend through and include the date that is [12/ 18] months after the date Company receives this Agreement signed by Artist. Company shall pay Artist the sum of [INSERT AMOUNT] promptly following Company’s receipt of this Agreement, signed by Artist. The Initial Option Period Fee shall be credited toward and applied against the Purchase Price for the Granted Rights.

EXTENDED OPTION PERIOD / FEE: Company may extend the Initial Option Period automatically for an additional [12 /18] months upon sending Artist written notice on (or at any time prior to) the expiration of the Initial Option Period accompanied by an Extended Option Period fee of [INSERT AMOUNT]. The Initial Option Period and Extended Option Period are hereafter referred to collectively as, “Option Period.” Company shall pay Artist the sum of [INSERT AMOUNT]. Half of the Extended Option Period Fee shall be credited toward and applied against the Purchase Price for the Granted Rights. **[The Extended Option Period Fee shall not be credited toward and applied against the Purchase Price for the Granted Rights.]**

DEVELOPMENT DURING OPTION PERIOD: Company shall have the right throughout the Option Period to engage in all customary development and pre-production activities in connection with the Project, including the preparation and submission of treatments, screenplays and all other writings based in whole or in part upon the Granted Rights. All of the results and proceeds of any such activities shall at all times be the sole and exclusive property of Company whether or not the Option is exercised.

EXTENSION FOR CLAIMS, FORCE MAJEURE, BREACH. The Option Period shall be automatically suspended and extended by written notice to Owner for any period during which: (i) a bona fide third party claim with respect to the Granted Rights has been asserted and remains unresolved (whether or not taken to the level of formal litigation), if such claim would adversely affect Company’s rights in connection with the Granted Rights and/or Company’s ability to develop and/or produce the Project; (ii) Company’s development and/or production activities in connection with the Project is interrupted or postponed due to the occurrence of any event of force majeure, including any guild or union strike; and/or (iii) Artist is in breach of this Agreement. In the event the Initial Option Period or the Extended Option Period otherwise would expire on a Saturday, Sunday or national holiday, said period shall be extended without notice until the end of the next following business day.

EXERCISE OF OPTION: The Option may be exercised by giving written notice to Artist at any time on or before the expiration of the Option Period and paying the Purchase Price, less the Initial Option Period Fee and half of the Extended Option Period Fee, if applicable.

PURCHASE PRICE: [INSERT AMOUNT], less the Initial Option Period Fee and half of the Extended Option Period Fee.

Granted Rights: Upon exercise of the Option and payment of the Purchase Price, Artist shall be deemed to assign to Company (and its successors, licensees, and assigns), the following rights in and to the [INSERT IP WE'RE ACQUIRING] ("Property"):

- (a) The right to include the Property in the Project, which Artist acknowledges may be exhibited, distributed, and exploited by Company (and its successors, licensees, and assigns) in any manner, in all forms of media now known or developed later, worldwide, in all languages, in perpetuity without any monies due to Artist except as expressly set forth in this Agreement; [INSERT]

Artist acknowledges and agrees that the term "Granted Rights" shall not be construed to include biographical facts about Artist, which are in the public domain.

APPROVALS / CONTROL

OK TO GIVE THE FOLLOWING CONSULTATION RIGHTS. IF REQUESTED, INSERT THE FOLLOWING AFTER THE APPROVALS CONTROL PARAGRAPH:

CONSULTATION RIGHTS: Artist shall have meaningful consultation rights regarding key creative elements (e.g., teleplay, principal cast, etc.), subject to the exigencies of production and the following restrictions:

- a) Artist's consultation rights must be exercised in a reasonable and timely manner and so as not to frustrate Company's full and timely development, production and/or exploitation of the Project;
- b) Artist's consultation rights are personal to Artist and cannot be exercised by a designee or representative without Company's written approval;
- c) Artist's consultation rights cannot be assigned to a third party and shall be extinguished automatically upon Artist's death.

In the event of a disagreement between Company and Artist regarding key creative elements, Company's decision shall be final. Artist will not be entitled to enter into any agreements with third parties in connection with the Project without Company's express written approval in each instance.

IF WE AGREE TO CHANGE THE GOVERNING LAW FROM NEW YORK LAW TO CALIFORNIA LAW, REPLACE THE RELEASE PARAGRAPH WITH THE LANGUAGE BELOW:

#. RELEASE: Artist agrees that it is of the essence of this Agreement that Artist releases and discharges Company, Company's employees, agents, licensees, successors and assigns from any and all claims, demands or causes of action that Artist may now have or may hereafter have for libel, defamation, infliction of emotional distress, invasion of privacy or right of publicity, infringement of copyright or violation of any other right arising out of or relating to Company's use

of the Granted Rights or based upon failure or omission to make use thereof. Artist hereby waives any rights Artist may have, known and unknown, pursuant to Section 1542 of the California Civil Code which provides:

“A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with the debtor.”

Artist agrees that the facts and perceived circumstances to which Artist’s release herein relates may hereafter turn out to be other than or different from the facts and perceived circumstances now known or believed to be known by Artist and expressly assumes the risk of the facts and perceived circumstances turning out to be different and agrees that the release contained herein shall be in all respects effective and not subject to termination or rescission by reason of such different facts or perceived circumstances.

RIGHT TO USE PSEUDONYM: Artist agrees that Company may refrain from using Artist’s real name and may use a pseudonym which may be dissimilar to Artist’s real name, if Company so elects; however, such agreement does not preclude Company from using Artist’s real name should Company in Company’s sole discretion so elect, whether Artist’s real name is used in conjunction with factual or fictionalized material, or both.

INSERT THE FOLLOWING IF THE AGREEMENT AND BIOPIC FEE ARE WITH MULTIPLE INDIVIDUALS: [NEED TO FIND MORE STREAMLINED LANGUAGE]

JOINT AND SEVERAL RESPONSIBILITIES: All payments to be made to Team are expressed as totals for Team’s services as a team and all payments made to Team for Team’s services will be shared as specifically set forth in this Agreement. The liability of each individual comprising the Team for either of their breach of this Agreement will be joint and several only with each other. All representations and warranties made by each individual comprising the Team is made individually by such individual as well as jointly only with each other. In the event of the incapacity and/or default of one (or, if applicable, more than one), but not all, of the individuals comprising Team, as the case may be, Company may exercise its remedies (including its rights of suspension and/or termination) either as to such incapacitated and/or defaulting individual(s) or as to all members of the Team. If Company suspends and/or terminates only the incapacitated and/or defaulting individual(s) comprising Team, then, thereafter, with respect to any fee that becomes payable and any then as-yet unvested contingent compensation under this Agreement, the remaining individual(s) comprising Team will be entitled to a *pro rata* portion of the fee which s/he would have been entitled absent such incapacity and/or default.

OK TO GIVE IF REQUESTED:

PREMIERE: In the event Company hosts a premiere of the Project, Artist and one (1) guest shall be invited to such premiere. Nothing herein shall require Company to hold any such premiere or to provide Artist or Artist’s guests with transportation or accommodations in connection therewith.

OK TO GIVE IF REQUESTED

INSURANCE: Company will cover Artist as an additional insured under Company’s errors and omissions liability policy and Company’s comprehensive general liability insurance policy during customary periods of production and distribution of the Project, subject to the limitations, restrictions and terms of such policy, for all damages and claims resulting or arising out of the distribution, advertising or exploitation of the Project, other than any such damages or claims that result from: (a) any material supplied by Artist (i.e., not (i) furnished by Company to Artist, (ii) altered by Company or at

Company's direction, or (iii) included from third parties hired or directed by Company), (b) any default or breach by Artist of this Agreement, or (c) malfeasance, recklessness, intentional misconduct, negligence, and/or other tortious acts or omissions committed by Artist and/or any agent, employee, guest or invitee of Artist, excluding any persons engaged directly by Company to render services in connection with the Project.

CHANNELN ROYALTY: In consideration for the promotional benefit Artist will receive from the Project, Artist will pay CHANNELN the following royalties:

- a) [10% / 5%] of Artist's gross income from [INSERT REFERENCE TO IP FEATURED IN THE PROJECT] earned (even if not received) beginning from the premiere date of the Project through the date that is [24 / 12] months thereafter ("Promotion Period")
- b) Reporting / Payment [TJ to finish inserting]

Docudrama/Biopic-Documentary Case Law Citations and Summaries

Defamation:

Cite: Carter-Clark v. Random House, Inc., 768 N.Y.S.2d 290 (N.Y. Sup. Ct. 2003).

Summary: Daria Carter-Clark, an adult literacy librarian in Harlem, claimed that the librarian in Joe Klein's 1996 best-selling book *Primary Colors* was based on her and was libelous. Plaintiff claims that some people whom she knows who have read the book believe that one of the characters in the book was based on her, which has caused damage to her reputation. In the book, presidential candidate Governor Jack Stanton, whom the author admitted is based on President Bill Clinton, was visiting a Harlem library where he notices a librarian miss a step on the stairs and reaches out to help her. Soon after, there is a scene in the book where Governor Stanton and Ms. Baum are coming out of the bedroom in Governor Stanton's hotel suite where he is buttoning his open shirt and Ms. Baum is "arranging herself," and described as seeming "a bit dazed" and trying "to maintain the appearance of propriety." In real life, President Clinton did make a campaign appearance at a Harlem library where plaintiff worked, but plaintiff was not a librarian, but instead was a site advisor and only had some similarities to the minimal physical description of Ms. Baum in the book. Plaintiff, defendants and President Clinton all had agreed on a prior motion that plaintiff and President Clinton never had an intimate relationship.

The court dismissed the claim, holding the burden of a very high level of identification in fictional portrayals was not met, and the resemblance between the character and woman was speculation. Further, the reliance by plaintiff on minimal superficial similarities between her and Ms. Baum, and speculative gossip by some people who knew plaintiff is not enough to create an issue of fact to be tried in this action.

Cite: Bryson v. News Am. Publ'ns., 672 N.E.2d 1207 (Ill. 1996).

Summary: Plaintiff Bryson alleged that she was defamed by the article entitled *Bryson*, written by defendant Lucy Logsdon and published by defendant News America Publications, Inc. The article was written in the style of a first-person narrative and recounts a conflict between the unidentified speaker and her high school classmate, Bryson. In addition to naming Bryson, the article described Bryson's appearance by noting her hair color, eyeshadow color, and clothes. Plaintiff's complaint alleged that defamatory language appeared "in that the article referred to the plaintiff as a 'slut' and implied the plaintiff was an 'unchaste' individual."

The court held the context in which the vulgar term was used in the article, the innocent meaning of the term did not apply. Further, the court stated, "the fact that the author used the plaintiff's actual name makes it reasonable that third persons would interpret the story as referring to the plaintiff despite the fictional label." Therefore, the court concluded the statement may reasonably be interpreted as stating

an actual fact and therefore falls outside the protection of the first amendment and reversed the trial court's dismissal of the complaint.

Cite: Springer v. Viking Press, 457 N.Y.S.2d 246 (N.Y. App. Div. 1982).

Summary: Plaintiff and defendant Tine, the author of the novel in question, attended Columbia University from 1974 to 1978. They met, and a close personal relationship developed. In 1978 Tine completed the draft of "State of Grace" a novel dealing with Vatican finances and politics. Plaintiff and Tine discussed the plot during the volume's hatching stage and plaintiff, at Tine's request, reviewed the book for editorial purposes. Indeed, Tine informed plaintiff that he had loosely patterned the relationship between the hero, the papal private secretary, and the heroine, an investigative reporter and the daughter of one of Italy's most influential and powerful industrialists, on the relationship between them. In Chapter 10 of the novel, the story depicts sexual exploits in the relationship between the Italian industrialist and his mistress, Lisa Blake. Plaintiff contends the portrayal of Blake is a portrayal of her based on their common first name and physical similarities and that a number of persons who knew both Tine and plaintiff, knew and understood Blake and plaintiff to be the same person and therefore asserts that the depiction of Blake as a "whore" is defamatory of her.

The court held that for a defamatory statement to be actionable about a character in a fictional work, the description of the fictional character must be so closely akin to the real person claiming to be defamed that a reader of the book, knowing the real person, would have no difficulty linking the two. However, in this case, the court stated the superficial similarities are insufficient as is the common first name.

The Right of Publicity

Cite: Ruffin-Steinback v. De Passe, 17 F. Supp. 2d 699 (E.D. Mich. 1998).

Summary: Plaintiff Cheryl Ruffin-Steinback is the daughter of the late David Ruffin, a former member of the singing group 'The Temptations'. Plaintiff sought injunctive relief because of defendant's projected joint production of a television mini-series on the "real-life drama of the lives of The Temptations" to prevent these broadcasts. Plaintiff alleged, on behalf of her estate, state law tort claims for violation of the right of publicity, unjust enrichment, conspiracy and invasion of privacy.

The court stated the injunction would be a prior restraint on defendants' free speech and the restraint would be an immediate and irreversible sanction. Further, the right of publicity, relying on a diversity of jurisdictions, "does not extend to prohibit depictions of a person's life-story."

False Light

Cite: Seale v. Gramercy Pictures, 949 F. Supp. 331 (E.D. Pa. 1996).

Summary: Plaintiff Bobby Seale was a founding member of the Black Panther Party and contended defendant used, without consent, his name and likeness (use of an actor called Bobby Seale) in a film produced by the defendant about the Black Panther Party, along with promotion of the film and soundtrack in violation of his common-law right of publicity. Plaintiff further alleged the defendants' portrayal of him in the film violated his right of privacy by portraying him in a "false light." Further, plaintiff alleged defendants' use of his name and likeness to promote and advertise the film constituted unfair competition and false advertising in violation of section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a).

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 the false portrayal was made with actual malice by clear and convincing evidence. The court held plaintiff sustained his burden of raising a genuine issue of material fact showing that the Defendants violated his right of privacy by portraying him in a false light in the film. Plaintiff met this burden by demonstrating specific falsities including untruthful illegal purchases of firearms and verbal confrontations with fellow party members of whether the party should engage in acts of retaliatory violence against police officers and stated how these falsities negatively impacted his image as a leader of the Black Panther Party.

Disclosure of Private Facts:

Cite: Tyne v. Time Warner Entm't Co., L.P., 204 F. Supp. 2d 1338 (M.D. Fla. 2002).

Summary: In October 1991, the *Andrea Gail* was caught in a severe storm, and lost at sea. All of the crewmembers aboard the vessel, including Frank William "Billy" Tyne, Jr., the captain of the vessel, and Dale R. Murphy, were presumed dead. Due to interest in the unusual meteorological forces that caused the storm, the loss of the *Andrea Gail* became the subject of news stories and a best-selling book, *The Perfect Storm*, by Sebastian Junger. In June 2000, Warner Bros. released *The Perfect Storm* film based on the book and the events that occurred during the "storm of the century." Plaintiff filed action asserting claims for unauthorized commercial appropriation of decedents' likenesses, unauthorized commercial appropriation of Plaintiffs' likenesses, common law invasion of privacy - false light, and common law invasion of privacy based on disclosure of private facts.

Plaintiffs contended that "the depiction in the Picture of Debra Tigue as being intimately involved with another man who is about to supplant the role of decedent Murphy in the lives of both Debra Tigue and Dale R. Murphy, Jr. is likewise entirely fabricated and has been advanced by Warner as alleged in the

complaint, in knowing or reckless disregard of the truth". However, the *Restatement (Second) of Torts* has recognized that an essential element of the tort of public disclosure of private facts is that the facts at issue be true. See *Leidholdt v. L.F.P., Inc.*, 860 F.2d 890, 895 (9th Cir. 1988); *Restatement (Second) of Torts, Special Note to § 652D*. However, in this case, Plaintiffs argued the Picture's entire depiction of Tigue and Murphy, Jr. is fabricated and false. Therefore, because none of the facts disclosed by the picture are alleged to be true, Plaintiffs had no cause of action for invasion of privacy based on public disclosure of private facts.