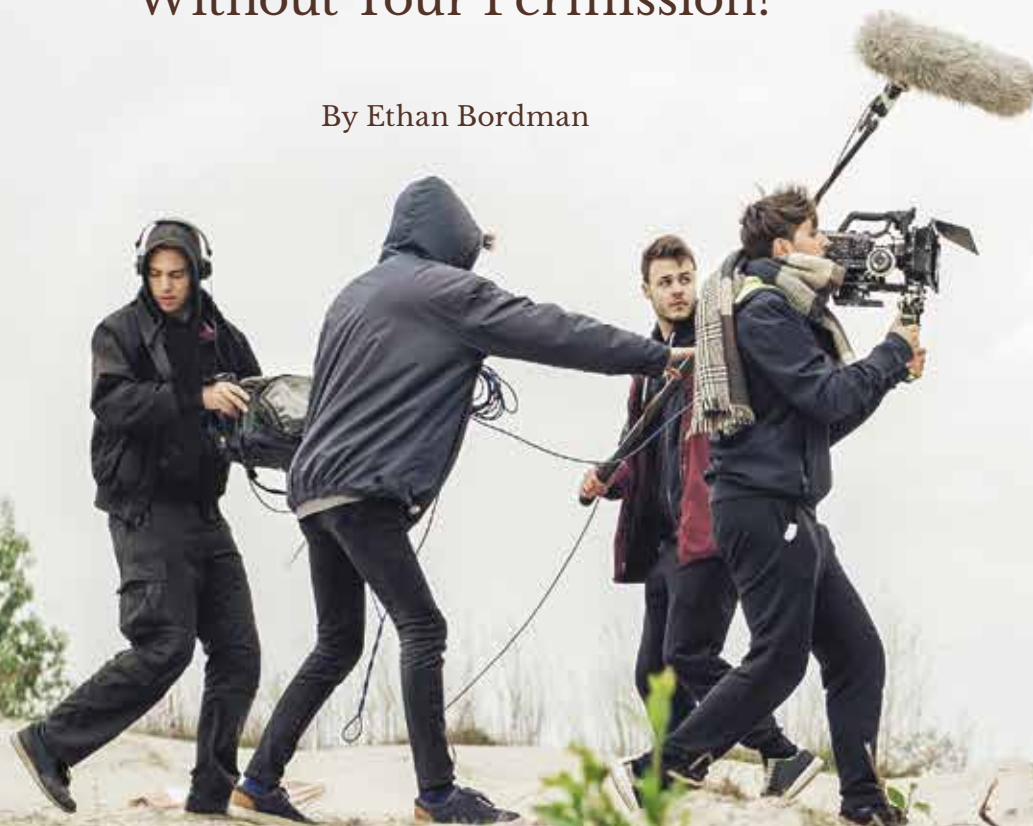


The Right of Publicity

Can Your Life Story Be Changed Without Your Permission?

By Ethan Bordman



BASED ON A TRUE STORY

In 2013, a New York trial court made a decision that stunned the entertainment industry. Christopher Porco, convicted of the murder of his father and attempted murder of his mother, received a judgment enjoining the broadcasting of a Lifetime Television movie, *Romeo Killer: The Christopher Porco Story*.¹ Porco, who had not viewed the film, claimed the network violated New York Civil Rights Section 51, the state's publicity rights statute, by using his "name, portrait, picture...for the purposes of trade without the written consent first obtained."² Porco further asserted that the film was a "substantially fictionalized account" of events surrounding his criminal activities, while Lifetime argued that although some of the film was fictionalized "the essential elements of the movie are true and accurate and based on court and police records, interviews with persons involved, and historical and other documents."³ According to the network, other versions of the story had appeared on CBS's *48 Hours Mystery* and TruTV's *Forensic Files* without issue, and the judge ruled that the network's admission of fictionalization was satisfactory to show it was used for purposes of trade.⁴ Moreover, the judge stated he was not concerned that the injunction represented a "prior restraint" on free speech rights.⁵

Lifetime immediately filed an emergency appeal to vacate the injunction, stating "[w]hile plaintiff may not want the story of his crime repeated in a television movie, the constitutional protection of speech and press on matters of public concern flatly prevent the issuance of an order enjoining the broadcast of the movie."⁶ After receiving a favorable ruling, Lifetime broadcast the movie and used the publicity surrounding the case to its advantage by promoting the film as the "Lifetime Original movie Chris Porco doesn't want you to see."⁷ The case is ongoing.

In recent years, several cases have been filed against broadcasters by individuals who did not approve of their portrayal in docudramas—dramatized reenactments of real events. Film star Olivia de Havilland sued FX networks in 2017 over her portrayal in the miniseries *Feud*, which explored the rivalry between her contemporaries, Joan Crawford and Bette Davis.⁸ The 101-year-old actress argued that Catherine Zeta-Jones's portrayal in the series depicted de Havilland as a "vulgar gossip."⁹ The network argued for dismissal, asserting that the First Amendment protects the right to use someone's name or likeness in expressive speech, which includes motion pictures and TV shows.¹⁰ The trial court allowed the case to move forward, as the creators of the film received a financial benefit from broadcasting their work without obtaining de Havilland's permission or compensating her.¹¹ On appeal, the three-judge panel dismissed de Havilland's defamation case, ruling that a person, famous or not, "does not own history. Nor does she

or he have the legal right to control, dictate, approve, disapprove, or veto the creator's portrayal of actual people."¹²

The initial decisions in these cases—allowing them to move forward—have generated significant concern among writers, producers, and networks. Previously, right-of-publicity cases involving life stories were initially dismissed based on the First Amendment and "newsworthiness."¹³ Moreover, prior restraints have historically been used in cases where irreparable injury may result from disclosure of trade secrets or confidential information.¹⁴ This is not the case for movies based on public facts or public prosecutions. The right of publicity is intended to prevent nonconsensual commercial appropriation of a person's name, portrait, or picture—such as advertising a product or service—as opposed to taking a real event, news story, or matter of public interest and adapting it into a movie. In *de Havilland*, the trial court used the economic value of a person's persona to allow the case to move forward.¹⁵ This creates a wide range of concerns considering the large number of documentaries, biographies, songs, films, and other works that are based on someone's life, whether created with or without the individual's permission.

The New York legislature is considering adapting the state's right of publicity into a "property right" that will exist up to

AT A GLANCE

The right of publicity is being used in court cases to cease motion picture and television productions when individuals object to their portrayals in those productions.

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According to recent court decisions, when a production "fictionalizes" or receives a financial benefit from the depiction of an individual, it is considered "commercial" and cannot be broadcast without the individual's consent—raising free speech concerns for the entertainment industry.



Those in front of and behind the camera benefit from preservation of creative freedoms that allow the retelling of history in an engaging and compelling way.

40 years after a person's death.¹⁶ The Screen Actors Guild supports this,¹⁷ further advocating that the right of publicity be transferable and descendible to protect future income streams for actors because of concerns about avatars—versions of themselves created using computer-generated imagery (CGI). The idea of replacing actors using CGI has become an important issue, given the rise of “deepfaking”¹⁸—integrating an actor's likeness into explicit content. Michigan has no statutory right of publicity, though the U.S. Court of Appeals for the Sixth Circuit has used a two-part test in determining if a person's right of publicity has been exploited.¹⁹ In *Parks v LaFace Records*, the Court found that for a right-of-publicity action to be successful, a plaintiff must demonstrate a “pecuniary interest” in his or her identity and that the “identity has been commercially exploited by a defendant.”²⁰

In reversing the lower decision, the appeals court in *de Havilland* stated that the trial court ruling would have created a Catch-22 for the entertainment industry.²¹ If a person is portrayed accurately in an expressive work but without compensation, the industry faces a right-of-publicity lawsuit.²² Alternatively, if the portrayal is in any way fictitious, the industry faces a false light lawsuit.²³ In its conclusion, the appeals court referenced *Comedy III Productions, Inc v Saderup, Inc*, declaring that for the right of publicity to be consistent with the First Amendment, it cannot be the right to censor disagreeable portrayals.²⁴

A requirement to present every moment in a story as 100 percent accurate would be impossible for writers and directors attempting to reenact a period of history in a two-hour movie. This scenario would eliminate an entire genre of fact-based motion pictures, including *The Post* (about the Pentagon Papers), *Band of Brothers* (about an army regime in World War II), and *All the President's Men* (about the Watergate scandal). The appeals court decision in *de Havilland*, supporting free speech and expression in depicting events, benefits the viewers by giving them a new perspective on history. Those in front of and behind the camera benefit from preservation of creative freedoms that allow the retelling of history in an engaging and compelling way. ■



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