

The Lives of Others: Unauthorized Depictions of Public Figures in U.S. Film and TV Drama

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This article examines the unauthorized depiction of public figures in contemporary U.S. film and TV from a legal perspective, particularly the conflict between free speech and reputational damage. These issues are historicized by reviewing the earliest cases brought against film producers in the 1910s and 1920s, and by analyzing the main practices employed in the film industry to minimize the legal risks of dramatizing real people. The second section considers changes in the legal standing of films and their representation of real people over time, including the extension of First Amendment protection, the revision of defamation standards, and the emergence of publicity rights. Finally, the article examines the recent case brought by Olivia de Havilland over her depiction in the miniseries *Feud: Bette and Joan*. Testing the validity of publicity rights laws, the case depended on whether her depiction was “transformative” rather than realistic and thus protected as free speech.

Keywords: law, historical drama, defamation, publicity rights, free speech

The film *Stillwater* (McCarthy, 2021) tells the story of an American exchange student who is falsely convicted of murdering her roommate while studying in Europe. Amanda Knox, who served four years in an Italian prison on very similar charges, took exception to the film, objecting firstly to its unauthorized and misleading appropriation of her experiences and secondly to the use of her name and image in its media coverage. Writing in *The Atlantic*, she asked:

Does my name belong to me? Does my face? What about my life? My story? Why is my name used to refer to events I had no hand in? I return to these questions again and again because others continue to profit off my identity, and my trauma, without my consent. (Knox, 2021, para. 1)

Almost 40 years earlier, Elizabeth Taylor voiced similar complaints about a TV movie due to be based on her life. Upon convening a press conference, she declared:

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I am suing ABC television network because they plan on doing a story of my life which is completely fictionalized unless there was somebody under the carpet or under the bed during my 50 years. . . . No matter who portrays me, she will not be me, I will not be she. I am my own commodity. I am my own industry. The way I look, the way I sound, that is my industry and if somebody else portrays me and fictionalizes my life, it is taking away from me. (Lewin, 1982, p. 1).

At stake in both complaints was the right of an individual to control the way she is represented in film or television drama: to provide or withhold consent, to be financially compensated, to prevent the invention of biographical information or the disclosure of embarrassing facts. Conversely, the cases also concerned the rights of filmmakers and TV creators to freely dramatize real incidents involving real people: to represent the past without the approval or compensation of every implicated party, to take inspiration from history without the obligation of absolute factual accuracy, to creatively render historical figures and events as historical fiction.

The legal terrain in which dramatic representations of real people are produced and contested is complex and has evolved significantly over the past century. In the United States, the law has sometimes protected individual privacy rights, but at other times it has favored free speech. The lives of public figures have sometimes been treated as commercial properties under exclusive ownership but, in other cases, as part of the public domain. The lives of public and private figures have been given differing levels of protection, but the distinction between public and private has always been difficult to define. The impact of this legal uncertainty is highlighted by the efforts of Taylor and Knox to control their representation on screen. Taylor's lawsuit persuaded ABC to abandon the production of its TV movie in 1982, but in 1993 a very similar injunction against NBC for another biopic failed, and the broadcast went ahead (Cashmore, 2016). Knox did not take legal action against *Stillwater* (McCarthy, 2021) and she has acknowledged that the filmmakers were not legally obliged to obtain her permission (Knox, 2021). But in 2011, while still on trial in Italy, she filed suit against Lifetime over their TV movie *Amanda Knox: Murder on Trial in Italy* (McLoughlin, 2011), leading to the removal of a dream sequence in which a dramatized Knox killed her roommate.

At a time when material based on the lives of real people proliferates—particularly in true crime stories, direct adaptations of journalism, and other “ripped from the headlines” drama (Stubbs, 2023, p. 1607)—the relationship between screen and legal practice is particularly relevant. The representation of historical and biographical material in film and TV has always operated in dialogue or in conflict with the law, shaping what can and cannot be said. As Coombe (1998) has argued, the law should be understood not simply as a legitimizing discourse but “as a central locus for the control and dissemination of those signifying forms with which difference is made and remade” (p. 37). Examination of the legal protection and proscription of historical films and TV shows provides an opportunity to examine what Coombe (1998) calls the “social life of law’s textuality and the legal life of cultural forms in the specific practices of socially situated subjects,” examining legal discourse in terms of its cultural resonance (p. 59). As such, this article examines the dramatic representation of life stories within the context of U.S. law, drawing extensively on court documents and legal scholarship. How have legal standards for the representation of public figures changed over time, and how have film and TV producers responded to these changes? How have courts dealt with the demands of public and private figures for privacy, defamation, and the ownership of one’s

image? And how have they resolved the attending conflict between these individual rights and the constitutional protections afforded to free speech? This is a broad topic, so this article approaches it through a review of pertinent and seminal cases. In so doing, this article brings an important and complex aspect of U.S. law into the field of media studies, where its implications are significant. This article also considers the broader relationship between history and fiction in film and TV. As de Groot (2015) suggests, "fictions challenge, 'pervert,' critique, and queer a normative, straightforward, linear, self-proscribing History," opening a discursive space where ideas about the past may be debated (p. 2). The active blurring of the line between history and fiction may thus be regarded as an aesthetic or ideological strategy, enabling the conventional terms of historical representation to be critiqued. But as I will argue, this blurring also serves a more practical purpose by limiting the liability of film producers to certain legal charges.

The article begins by focusing on the operations of the American film and TV industry over the past century, outlining and assessing the institutional strategies they have developed to minimize legal exposure arising from biographical or historical representation. Section two looks at the same issue from a legal point of view, examining how precedents pertaining to the representation of real people in film and TV have developed over time, particularly in relation to the First Amendment. By placing film industry and legal approaches to unauthorized representation side by side, it becomes possible to compare their differing perspectives and priorities. The final section analyzes the highest-profile unauthorized representation case of recent years, concerning Olivia de Havilland and the miniseries *Feud: Bette and Joan* (Murphy, 2017). De Havilland's complaint was initially supported by the courts, which would have stymied the production of historical material throughout the entertainment industry. However, the decision was later overturned, with the appeals court affirming that de Havilland's depiction was "transformative" and thus protected as free speech.

The Industry Context: Unauthorized Representation and Risk Mitigation

The history of legal action against unauthorized depiction can be traced back to the earliest days of American cinema. In 1913, a naval telegraph operator sued the Vitagraph Company over a 1909 film that reenacted a recent collision between two steamships. He alleged that the film "held him up to public ridicule and contempt" and sued for invasion of privacy (*Binns v. Vitagraph*, 1913, p. 54). The court ruled in his favor, determining that the film was inaccurate and that its purpose had been to "amuse" rather than to "instruct." Individual privacy rights were also upheld in a decision concerning *The Red Kimono* (Lang, 1925). The screenwriters based the film on a real murder case and used the real name of a woman involved, allowing her to argue that the film invaded her privacy by publicizing intrigue from her past (Friedman, 2007). However, the legal decision that most directly influenced Hollywood in this era was made not in a U.S. court but in England. It concerned the MGM film *Rasputin and the Empress* (Boleslawski, 1932), which dramatized the 1916 assassination of the notorious Russian mystic. The character Prince Chegodieff was evidently modeled on Prince Yusupov, a conspirator in Rasputin's murder. Yusupov did not object to being portrayed as a murderer, but his wife, Princess Yusupova, argued that the film libeled her by suggesting that she had been raped by Rasputin. The case depended on whether a character in the film, named Princess Natasha, was in fact a representation of Yusupova. Lawyers representing MGM contended that the film did not represent her and that it was historically inaccurate in general, but this argument was weakened by a prologue printed on screen that declared: "A few of the principal characters are still alive. The rest met death with violence" (Napley, 1990, p. 62). The film was thus positioned not as a work of fiction but as a

depiction of the real experiences of living people. The judge ruled in Yusupova's favor, arguing "it is difficult to imagine a worse libel on a woman . . . than she had been seduced or ravished by such a villain as Rasputin" (Napley, 1990, p. 195). The plaintiffs were awarded £25,000, and a restraining order was made against screenings of the film in England. With legal action pending in the United States, MGM settled and paid an additional, undisclosed sum.

These enormous costs led Hollywood studios to become more circumspect in their representation of real people. It is often asserted that the *Rasputin* case, decided in 1935, prompted the use of protective legal disclaimers in Hollywood films, in which the resemblance between real people and the characters portrayed on screen is claimed to be either unintended or coincidental (Davis, 1987). In rather vague language, studios thus attempted to establish a creative distinction between real and dramatized events. But such disclaimers were not implemented consistently, and some studios opted not to use them at all. One of the earliest examples appears in the prologue to Warner Bros.' loosely historical film *The Charge of the Light Brigade* (Curtiz, 1936): "With the exception of known historical characters, whose actual names are herein used, no identification with actual persons, living or dead, is intended or should be inferred" (00:01:49). The same text was used in *The Life of Emile Zola* (Dieterle, 1937), asserting the same selective fidelity to the historical record. Films presented as fiction also began to use disclaimers, typically employing much plainer language. In *His Girl Friday* (Hawks, 1940), for example, a disclaimer asserts that all characters are fictitious and that any similarities are coincidental. But by the mid-1940s, the language used in films based on real events began to converge with the language used in fiction films. For example, the disclaimer in the World War II drama *They Were Expendable* (Ford, 1945) was closer to that of *His Girl Friday* (Hawks, 1940) than to *The Charge of the Light Brigade* (Curtiz, 1936): All characters and incidents depicted were said to be fictitious, even though the story was based on the recent exploits of real U.S. Navy officers. Whereas earlier historical films highlighted a partial connection to the lives of real people, later historical films began to disavow any such link.

Regardless of their formulation, the practical value of these disclaimers was limited. As Davis (1987) suggests, the terms "coincidence" and "fictitious" are "inadequate summaries of the truth status of many films to which they are appended" (p. 458). As a legal defense, their effect was undermined almost as soon as they became commonplace. In 1948, a U.S. naval commander sued the producers of *They Were Expendable* (Ford, 1945) for depicting him in a manner he regarded as libelous. Deciding in his favor, the court dismissed the film's disclaimer as "disingenuous," arguing that the average viewer would regard it as "tongue-in-the-cheek" given that the film was adapted from a nonfiction book of the same name and that its supposedly fictional characters included General MacArthur (*Kelly v. Loew's*, 1948, p. 485). Disclaimers nevertheless remain very widely used in contemporary film and TV—both historically based and fictional—although they are typically relegated to the final seconds of the end credits. In some cases they have proven legally effective. One court dismissed a lawsuit alleging unauthorized representation in the Lifetime TV movie *Romeo Killer: The Chris Porco Story* (Ferris, 2013) and ruled that a disclaimer, which described the film as a dramatization in which some events were fictionalized, helped ensure that viewers were not misled into regarding it as a true story (*Porco v. Lifetime*, 2021). The following year, however, a defamation lawsuit brought against the fictional miniseries *The Queen's Gambit* (Frank, 2020) gave them rather less value. By upholding the plaintiff's original complaint, the court asserted that the show's disclaimer was "not dispositive," that is, not sufficient to resolve the case (*Gaprindashvili v. Netflix*, 2022).

A second strategy used to mitigate risk in the representation of real people is the so-called Life Rights Agreement (LRA)—typically a contract between a producer and the individual depicted on screen, providing legal clearance typically in exchange for a fee. LRA contracts may secure a subject’s cooperation, including access to personal materials such as diaries and photographs, and can include terms designed to prevent negative publicity (Appleton & Yankelevits, 2018). However, LRAs have never been legally required to dramatize the lives of real people, whether living or dead. Numerous high-profile productions, including *The Social Network* (Fincher, 2010) and *The Crown* (Morgan, 2016–2022), have been made without them. This lack of legal standing was confirmed in a 1997 decision by the Court of Appeals in California:

The industry custom of obtaining “clearance” establishes nothing, other than the unfortunate reality that many filmmakers may deem it wise to pay a small sum up front for a written consent to avoid later having to spend a small fortune to defend unmeritorious lawsuits such as this one. (*Polydoros v. 20th Century Fox*, 1997, p. 326)

The reason for this is clear. As Basin (2019) notes, “there is no such thing as a ‘life right’ under any form of property law in the United States” (p. 65). A written autobiography may be protected by copyright law, but life itself is not regarded as a form of intellectual property. A 1968 decision stated that public figures do not have exclusive rights to their own life stories, and that consent or permission is not required to write their biography (Lawrence, 1985). The U.S. Court of Appeals later affirmed that “since facts do not owe their origin to any individual, they may not be copyrighted and are part of the public domain available to every person” (*Miller v. Universal City Studios*, 1981 p. 1369). Were this not the case, the reporting of basic events relating to specific individuals as news would be fraught with difficulty. An LRA is thus essentially a defensive measure intended to limit legal exposure; a deed of consent and a pledge not to sue. As Basin (2019) puts it, their “hallmark feature . . . is a broad waiver of all claims, all of which arise within the general arena of privacy law” (p. 65).

A third protective strategy associated with the representation of real people involves a comprehensive script clearance process, conducted during preproduction by an in-house legal team, often following guidelines prepared by the production’s insurance company. The key element in the clearance process is an annotated screenplay, containing references to the underlying works consulted during the research process (Gerdes, 1990). Such documents are legally sensitive and are thus closely guarded, but a version of the annotated screenplay used to clear *JFK* (Stone, 1991) was published as a book in response to intense criticism of the film’s manipulation of the historical record. In the book, extended footnotes—as many as seven per page—cite legal documents, memoirs, and interviews to support dialogue written for the film and to justify chronological rearrangements and the invention of scenes (Stone & Sklar, 1992). According to Gerdes (1990), screenplay annotations should include the following:

Each character, company or other entity in the script must be categorized as living, dead, real, fictional, or composite. . . . Each line of dialogue must be categorized as accurate, probably accurate, or fictional. Also, the sources of each line of dialogue must be identified. . . . Care must be taken to ensure that the dialogue creation can be supported by the source’s information or that such dialogue is innocuous. (para. 9)

The clearance guidelines enforced by individual studios or broadcasters may be even more stringent. During the 1980s and 1990s, ABC's "Program Standards" expressly forbade the inclusion of "events that did not occur" in dramas based on real events, although they did allow the creation of "composite" characters in minor roles (Grunfeld, 1992; Lawrence, 1985). The clearance process thus depends on the exhaustive separation of documented fact from undocumented invention. However, information can be documented and still be untrue, and it does not follow that undocumented information is necessarily fictional. As Rosenstone (1995) has suggested, invented elements in historical films "may still be considered true . . . in that they carry out the overall meaning of the past which can be verified, documented, or reasonably argued" (p. 128). Nevertheless, clearance demands a high level of caution and diligence, and in practice, it is probably the most effective means to mitigate legal risk. If a living person should file a lawsuit, the clearance process also ensures that evidence to counter the charges is immediately accessible.

If these preventative measures—script clearance, LRAs, disclaimers—fail, a further course of action is to simply deny that the person in question was in fact represented at all. The "fiction defense," as it might be called, depends on the fact that films based on real events and living people change so many details that their relationship to those people and events is made intangible. If a narrative contains elements of fiction in addition to elements of fact, should it not be regarded as work of fiction when taken as a whole? This was, in essence, MGM's unsuccessful defense in the 1935 *Rasputin* case. It resurfaced in 2020 when Samantha Barbash sued over her depiction as the protagonist in *Hustlers* (Scafaria, 2019), alleging that the film was produced without her consent and defamed her. In response, lawyers representing the film argued that it did not depict Barbash at all. They asked a judge to dismiss the complaint and stated, "There is no question that *Hustlers* is a work of fiction . . . the statements at issue are not 'of and concerning' Plaintiff, but rather, a fictional character" (*Barbash v. STX*, 2020, p. 12). At the same time, *Hustlers* was not positioned exclusively as a work of fiction. It was promoted as being based on events that really happened; text printed on screen as the film opens states that it was inspired by a true story. This was acknowledged in an alternative argument put forward by the lawyers for *Hustlers*. If the film was found to represent Barbash, they proposed, its representation of her would in fact be accurate: "Taken as a whole, as the law requires, *Hustlers* is substantially true and therefore cannot form the basis of Plaintiff's defamation claim" (*Barbash v. STX*, 2020, p. 20). As such, lawyers sought certain legal protections by positioning the film as a work of fiction but argued for other protections by stressing its accuracy. The legal ambiguity created around *Hustlers*, and many other contemporary Hollywood films and TV shows based on real events, is evident. As de Groot (2015) writes of the historical novel, such texts "cleave to fact and authenticity, even as they point out their own falsehood" (pp. 13–14). They are fictional but "substantially true," "inspired" by true stories but not actually true stories.

The Legal Context: Unauthorized Representation and Free Speech

As the film and TV industry sought methods to reduce the risks associated with unauthorized depiction, the legal context in which real people are represented on screen also developed, particularly in relation to the protection of free speech. Decisions handed down by the U.S. Supreme Court have proven to be particularly influential. The two most significant cases concerned the question of whether films should

be protected as free speech by the First Amendment of the U.S. Constitution. In *Mutual Film Corp. v. Industrial Commission of Ohio* (1915), the U.S. Supreme Court ruled, somewhat tendentiously, that the First Amendment did not apply to motion pictures because the film industry had a different standing to the press: it was “a business, pure and simple, originated and conducted for profit” (p. 230). Individual states were thus free to censor films as they saw fit. In *Joseph Burstyn, Inc. v. Wilson* (1952), however, the Supreme Court revisited the issue and ruled that the New York Board of Regents had been wrong to censor *The Miracle* (Rossellini, 1948) on religious grounds. The court overturned the 1915 precedent, described cinema as “a significant medium for the communication of ideas,” and concluded that “expression by means of motion pictures is included within the free speech and free press guaranty of the First and Fourteenth Amendments” (*Joseph Burstyn v. Wilson*, 1952, p. 495). With implications that extended to defamation and privacy invasion charges brought by private citizens, the case conveyed a clear message to the lower courts. Film was thus deemed a form of free speech and granted full constitutional protection.

The Supreme Court further transformed the legal context for the representation of real people with decisions relating to defamation and publicity rights. In *New York Times v. Sullivan* (1964), the court ruled that public officials are defamed only when statements about them are made with “actual malice.” In other words, plaintiffs must prove that the person responsible for the defamatory statement either knew the statement was false or acted with “reckless disregard” for the statement’s truth or falsity. In practice, actual malice is very difficult to prove: it is hard to produce evidence about a defendant’s state of mind at the time their statement was made. The significance of actual malice increased following *Curtis Publishing v. Butts* (1967) when the Supreme Court expanded the standard to include “public figures” as well as “public officials”—individuals with fame or influence who are therefore subject to public scrutiny. The effect of this decision was demonstrated when the State Department and military personnel represented in the film *Missing* (Costa-Gavras, 1982) brought a case for defamation against the film’s producers. The court ruled that the plaintiffs were public figures, thus obliging them to prove that they had been depicted with actual malice. The case was dismissed after the plaintiffs failed to produce such evidence (Grunfeld, 1992). According to Basin (2019), the actual malice standard “usually proves insurmountable” for plaintiffs bringing cases of defamation against films and TV shows (p. 73). As such, the decision placed serious limits on the viability of defamation charges, leading individuals who seek reparation for unauthorized depiction into different legal areas.

If the actual malice standard impeded legal action by public figures depicted in films, *Zacchini v. Scripps-Howard* (1977) appeared to open new pathways. In a case concerning the broadcast of a human cannonball act on a local TV news program, the Supreme Court ruled that the First Amendment did not protect the news media from liability if they reproduced the “entire act” of a performer without permission. In the process, the ruling contributed to the development of publicity rights in U.S. law—the right of individuals to control the use of their name or likeness for commercial purposes (Appleton & Yankelevits, 2018). Publicity rights emerged from the prior recognition given to privacy rights in U.S. jurisprudence. As Gaines (1991) puts it, the right of publicity was “wrested out of the right of privacy” (p. 13). But whereas privacy invasion is regarded as a form of psychological damage, the infringement of publicity rights causes commercial damage—it limits the ability of an individual to profit from their work. As Rothman (2018) suggests, publicity rights are thus treated as a form of intellectual property and may be given precedence over the First Amendment on this basis. In some states, this property aspect allows publicity rights to be

inherited following the death of their creator—a further distinction from privacy rights. Publicity rights typically recognize the investment of time and resources in the creation of a marketable image or performance. For this reason, they are normally possessed by public figures and celebrities. But the distinction between public and private figures is unstable, and it is certainly possible for individuals to derive economic value from their name or image without becoming public figures.

The publicity rights endorsed at state level in *Zacchini v. Scripps-Howard* were soon added to the legal tools used by lawyers to build unauthorized depiction cases. Their implications for biographical or historical film and TV were tested in two rulings made by lower courts in 1978 and 1979. *Hicks v. Casablanca Records* (1978) was a right of publicity case brought by the heirs of Agatha Christie that sought to prevent the release of the film *Agatha* (Apted, 1979). The decision of the New York court centered on the fact that much of *Agatha* was invented by the filmmakers—the film was a highly speculative dramatization of an 11-day period in 1926 when the author disappeared without explanation (Lawrence, 1985). The court identified *Agatha* as a work of fiction and ruled that the First Amendment protection given to fiction outweighed the plaintiff's publicity rights. A more wide-ranging defense of unauthorized depiction as protected speech was made in *Guglielmi v. Spelling-Goldberg* (1979). The California Supreme Court rejected a publicity rights complaint from a relative of Rudolph Valentino about the TV movie *The Legend of Valentino* (Almond, 1975). As with *Agatha*, the film heavily fictionalized the biography of its subject. The court defended the right of artists to dramatize the lives of the rich and famous without fear of reprisal, writing:

The right of publicity derived from public prominence does not confer a shield to ward off caricature, parody and satire. Rather, prominence invites creative comment. Surely, the range of free expression would be meaningfully reduced if prominent persons in the present and recent past were forbidden topics for the imaginations of authors of fiction. (*Guglielmi v. Spelling-Goldberg*, 1979, p. 869)

The ruling also considered the significance of defamation because of the plaintiff's attempt to import the "actual malice" standard into their right of publicity case. In rejecting this effort, the court followed *Hicks v. Casablanca Records* by highlighting the status of the film as a work of historical fiction:

In defamation cases, the concern is with defamatory lies masquerading as truth. In contrast, the author who denotes his work as fiction proclaims his literary license and indifference to "the facts." There is no pretense. All fiction, by definition, eschews an obligation to be faithful to historical truth. (*Guglielmi v. Spelling-Goldberg*, 1979, p. 871).

As the arguments used in the *Hustlers* (Scafaria, 2019) case illustrate, lawyers may refute defamation charges by insisting that the film in question is fictional. But the *Guglielmi* court went further, asserting firstly that films that fictionalize historical events have no obligation to be factually accurate at all, and secondly that historical films that are accurate are equally protected by the constitution. At the same time, the notion that historical fiction should be "denoted" as such is open to interpretation: How should this be established? What happens if markers of fictionality are not evident to readers or audiences? What about works that make claims of authenticity as well as fictionality?

Nevertheless, this broad defense of historical film and TV as free speech has been cited in several similar cases. In *Rogers v. Grimaldi* (1988), brought by Ginger Rogers against Federico Fellini's *Ginger and Fred* (1986), a court ruled that the First Amendment should take precedence over publicity rights so long as the film under consideration is not "an advertisement in disguise." More recently, the Ninth Circuit Court of Appeals used the precedent in a wide-ranging defense of unauthorized depiction in a case brought by Jeffrey Sarver, an army bomb disposal expert who was allegedly represented in the film *The Hurt Locker* (Bigelow, 2008). The court confirmed that Sarver possessed publicity rights, but they concluded that the use of his identity in the film was protected by the First Amendment. They wrote:

The Hurt Locker is speech that is fully protected by the First Amendment, which safeguards the storytellers and artists who take the raw materials of life—including the stories of real individuals, ordinary or extraordinary—and transform them into art. (*Sarver v. Chartier*, 2016, p. 4)

Rather than aiding lawsuits concerning unauthorized depiction, then, publicity rights cases made after *Zacchini v. Scripps-Howard* have prompted several courts to produce expansive defenses of historical productions.

Following these developments, the pathways to overcome constitutional protection of films and TV shows that represent real people have become limited. First, plaintiffs may argue that their portrayal is defamatory: that a false statement of fact was made about them, that the statement was published, that the statement caused injury to the plaintiff's reputation, and that the defendant was at fault in publishing the statement (Appleton & Yankelevits, 2018). As discussed earlier, defamation against public figures must also meet the onerous "actual malice" standard. Against this, defendants may argue that the portrayal is true, or that the plaintiff was not in fact portrayed—in other words, that the representation is fictional. Second, plaintiffs can also argue that their portrayal is an invasion of their privacy, specifically that it places them in a "false light." For this to be actionable, it must be shown that the depiction is highly offensive to a reasonable person and that the defendant was at fault in producing it. For public figures, actual malice must also be proven. False light and defamation charges are very similar in practice, and they tend to have little practical value, particularly for public figures, (Basin, 2019). In 1996, for example, civil rights activist Bobby Seale was unable to convince a court that the biopic *Panther* (Van Peebles, 1995) portrayed him in a false light even though it depicted him buying illegal weapons (*Seale v. Gramercy Pictures*, 1996). Finally, plaintiffs can argue that their portrayal infringes their publicity rights—that their name or likeness has been appropriated without consent, for the defendant's commercial advantage (Basin, 2019). In theory, publicity rights provide public figures with a significant legal weapon and pose a serious problem for film and TV producers seeking to dramatize real events. But as discussed earlier, courts have tended not to give publicity rights precedence over the First Amendment in cases involving biographical or historical films.

Efforts to apply publicity rights in a range of different cases, including unauthorized representation in film and TV, prompted courts to develop a range of "balancing tests" to determine whether individual claims should take precedence over the First Amendment (Rothman, 2018). Most

notably, the “transformative-work test” was introduced by the California Supreme Court in *Comedy III Productions v. Gary Saderup* (2001). The case concerned Gary Saderup, an artist who painted celebrity portraits and sold them on T-shirts, including an image of the Three Stooges. Comedy III, the company that owned the Three Stooges’s image rights, sued for infringement of publicity rights, and the court found in their favor. Importing principles from copyright law, the court argued that Saderup’s portrait was not protected by the First Amendment because it was not “transformative,” merely a realistic imitation of the comedians that did not add significant creative elements. In the process, however, the court asserted that if a representation of a celebrity *was* deemed to be transformative, it was “especially worthy of First Amendment protection” (*Comedy III v. Saderup*, 2001, p. 9). The implications for historical films, which “transform” historical figures into new creative forms, are clear. However, transformative use tests remain undeveloped, and they are not followed in all states. A recent Supreme Court decision concerning Andy Warhol’s use and possible “transformation” of a photograph of Prince placed little value on the doctrine (*Warhol v. Goldsmith*, 2023).

Representation and Transformation: Olivia de Havilland and *Feud: Bette and Joan* (2017)

Despite several attempts, the publicity rights of public figures are yet to be upheld in an unauthorized depiction case, nor have the arguments around them been tested in the courtroom. The case that provided the most extensive examination of these legal boundaries—causing a significant scare to the film and TV industries in the process—concerned the actor Olivia de Havilland and the historical miniseries *Feud: Bette and Joan* (Murphy, 2017). The miniseries dramatized the fractious relationship between Bette Davis and Joan Crawford as they sought to sustain their acting careers in the 1960s. A disclaimer briefly on screen at the very end of the credits described it as “a dramatization of the real events that inspired it,” adding, “dialogue is simulated, some characters are added and some events are created” (Murphy, 2017, 00:59:42). Crawford and Davis may well have objected to the way they were dramatized, as might numerous other Hollywood luminaries also featured, including Jack Warner, Frank Sinatra, and Joan Blondell—but they did not live to see it. However, Olivia de Havilland (played by Catherine Zeta-Jones) was very much alive, and she instructed her lawyers to file suit. She had not signed a “life rights agreement” with the show’s producers or with FX, the network that aired it, and she had not otherwise given her approval. According to de Havilland’s lawyers, FX did in fact obtain permission from the only other living person depicted in the show, even though his appearance lasted just a few seconds (Howarth & Smith, 2020). de Havilland’s complaint alleged that *Feud* (Murphy, 2017) violated her publicity rights and invaded her privacy by portraying her in a false light. On the latter charge, her lawyers stated that the show falsely depicted de Havilland as a hypocrite and a gossip, making negative comments about Frank Sinatra and Joan Fontaine (her sister) in “crude and vulgar” language. This, they asserted, stood “in stark contrast with Olivia de Havilland’s reputation for good manners, class and kindness” (Plaintiff’s Complaint, 2017, p. 6). On the former charge, they alleged that *Feud* (Murphy, 2017) violated de Havilland’s publicity rights by using her name, likeness, and identity without consent. In so doing, the defendants gained commercial benefits while causing de Havilland financial harm.

A key contention in the complaint was that *Feud’s* (Murphy, 2017) untruthful depiction of de Havilland was deceptively realistic. It “meticulously include[ed] specific details from real life” and thus “intended for the audience to believe that the events depicted and the statements made by role players in

Feud were accurate, and were actually quotes from real people, including Olivia de Havilland" (Plaintiff's Complaint, 2017, p. 4). This, they alleged, was conceded by the defendants, who "promoted and advertised that *Feud* was intentionally designed to look as if it was reality" (Plaintiff's Complaint, 2017, p. 5). To this end, the complaint repeatedly described *Feud* as a "pseudo-documentary-style television series" or a "pseudo-documentary" (Plaintiff's Complaint, 2017, p. 4). But although the show's production design is detailed and broadly realistic, it hardly resembles a documentary. The complaint also stated—incorrectly—that the consent of celebrities or their legal representatives must be obtained if their name, identity, or image is used in film or TV.

In response, lawyers representing *Feud*'s (Murphy, 2017) producers and broadcaster (henceforth FX) filed a motion to dismiss the complaint. The volume of evidence that they included in their motion—including proof that de Havilland had spoken negatively on Fontaine and was once recorded using vulgar language—indicated that the scripts had been through an extensive clearance process. However, these documents were not made public. Against the false light claims, FX argued that the depiction of de Havilland was "substantially true," that viewers would have understood the show to be a "dramatic interpretation of historical events" (Rostamian, Hughes Leiden, & Tsukerman, 2018, p. 18), and that the producers of the show did not act with malice because they conducted extensive research to ensure that the show had a factual basis. Against the right of publicity charges, they argued that publicity rights did not prevail over the First Amendment protections given to films and television shows, and that *Feud*'s economic value stemmed not from de Havilland's fame but rather from the work of the entire cast and crew. In an argument that would become key to the case, the motion drew on *Comedy III v. Saderup* to argue that the show's depiction of de Havilland was "transformative" and thus protected from right of publicity laws. Did *Feud*'s representation of de Havilland contain sufficient "creative elements" to make it "transformative?" The plaintiffs argued that it did not—hence their prior emphasis on the miniseries' realistic, imitative, "pseudo-documentary" quality. But FX argued that de Havilland's depiction, and the show in general, was transformative: not only did it draw on the talent of skilled artists, but also it "created new expression by dramatizing a decades old rivalry so as to comment on modern-day Hollywood and current social issues" (Rostamian et al., 2018, p. 18).

The trial court denied FX's motion, ruling that de Havilland's preliminary evidence was sufficient to suggest a likelihood of success at trial. In a written decision, the court asserted that certain statements attributed to de Havilland, including her use of the word "bitch," were not factually accurate; that the show might lead viewers to regard de Havilland as a gossip who used vulgar language; and that the producers acted with actual malice in their disregard for the truth. Considering the right of publicity claim, the court rejected the argument that historically based films and TV shows are entitled to blanket First Amendment protection. They also rejected FX's argument that *Feud* (Murphy, 2017) was transformative, adopting the plaintiff's reasoning that the show's supposedly realistic style prevented filmmakers from incorporating original creative elements: "because the Defendants admit that they wanted to make the appearance of Plaintiff as real as possible, there is nothing transformative about the docudrama" (*de Havilland v. FX Networks*, 2017, p. 13). Quoting from *Comedy III v. Saderup*, the court wrote, "When artistic expression takes the form of a literal depiction or imitation of a celebrity for commercial gain . . . the state law interest in protecting the fruits of artistic labor outweighs the expressive interests of the imitative artist" (p. 14).

The apparent realism of *Feud* (Murphy, 2017) rendered it an imitative work, and it was thus denied First Amendment protection.

The court's decision surprised many, and its implications caused significant concern in the film and television industries. If the reasoning was upheld at trial, any moderately realistic film or TV production based on real events was likely to attract lawsuits. As an editorial in *The Los Angeles Times* put it, "Bye-bye, historical fiction" ("Olivia de Havilland's Legal Loss," 2018, para. 1). FX appealed the decision. They were supported by several "Amicus Curiae" briefs submitted to the appellate court from within the film industry, including the Motion Picture Association of America (MPAA) and Netflix, the A&E channel, and the International Documentary Association. The brief from the MPAA and Netflix was particularly strident, arguing that the court's "deviation from decades of case law" threatened to "doom entire genres of fact-based motion pictures" (Brief for the MPAA, 2018, p. 10). It also highlighted an apparent contradiction in the court's reasoning:

The trial court's analysis puts creators of docudramas and other fictionalized works about or inspired by real people or events in an untenable Catch-22: the court reasoned that any docudrama that portrays its subjects too realistically is actionable for violating their right of publicity, yet any docudrama that portrays its subjects with anything less than absolute, literal accuracy is actionable under false light. (p. 16)

Once again citing *Guglielmi v. Spelling-Goldberg*, the brief further argued that the transformative test does not apply to "fictionalized motion pictures such as docudramas and biopics" (Brief for MPAA, 2018, p. 11) and that such works are in fact entitled to full First Amendment protection.

The opinion of the California Court of Appeals was handed down in March 2018. In a strongly worded statement, it overturned the trial court's decision and granted FX's motion to strike de Havilland's complaint. Against the false light charges, they questioned whether viewers were likely to regard *Feud*'s dialogue as actual statements spoken by de Havilland and argued that her depiction would not be highly offensive to a reasonable person. Indeed, it was "overwhelmingly positive" when taken in its entirety. Against the right of publicity charges, the court affirmed the *Guglielmi v. Spelling-Goldberg* decision, noting that truthful and fictional accounts have equal constitutional stature. Quoting from the *Hurt Locker* (Bigelow, 2008) decision, the court affirmed that the First Amendment "safeguards the storytellers and artists who take the raw materials of life . . . and transform them into art" (*De Havilland v. FX Networks*, 2018, p. 19). The court also determined that *Feud*'s depiction of de Havilland did constitute "significant expression" in its own right and was thus transformative under the terms outlined in *Comedy III v. Saderup*. Noting that de Havilland appeared on screen for just 4.2% of the miniseries' overall running time, they also argued that the economic value of the show did not derive primarily from de Havilland's fame but rather from the creativity, skill, and reputation of its creators and actors. Concluding their critique of the prior decision, the court adopted and expanded the analogy made in the amicus brief submitted by the MPAA and Netflix:

The trial court's ruling leaves authors, filmmakers, playwrights, and television producers in a Catch-22. If they portray a real person in an expressive work accurately and realistically without paying that person, they face a right of publicity lawsuit. If they

portray a real person in an expressive work in a fanciful, imaginative—even fictitious and therefore “false”—way, they face a false light lawsuit if the person portrayed does not like the portrayal. (*de Havilland v. FX Networks*, 2018, p. 37)

False light charges thus threaten depictions that are imaginative, and right of publicity charges proscribe representations that endeavor to be realistic. Were the case to proceed, it might render all but the most hagiographic material impossible to film.

The case against *Feud* (Murphy, 2017) ended in a clear victory for FX and a further affirmation of the right of film and TV producers to dramatize the lives of real people without their permission. de Havilland attempted to appeal the decision at the California Supreme Court, but her request for review was declined. In January 2019, her final legal avenue was closed when the Supreme Court also denied a petition to take up the case. The following year, she died aged 104. At the same time, the decision has by no means resolved the issue of unauthorized depiction in films and TV, not least because many of the court’s arguments would not apply in other cases. Notably, Rostamian and colleagues (2018) highlight the court’s assertion that the depiction of de Havilland in *Feud* (Murphy, 2017) could not be defamatory because it was “overwhelmingly positive,” which suggests that other representations might be vulnerable if they are perceived to be negative (p. 19). More important, the initial validation of de Havilland’s false light and publicity rights charges at the lower court suggests that the legal status of historical films and biopics is still open to interpretation. The First Amendment protections affirmed in numerous cases since the 1970s should thus not be regarded as a guarantee of safety for historical films and TV shows seeking to represent real people without permission.

Conclusion

As this article has shown, the issue of unauthorized representation has long been wrestled over, both in the entertainment industry and in legal discourse. Film and TV producers have employed various contractual and textual devices to protect their products from legal action: prefacing their work with disclaimers, negotiating contracts with the subjects they represent, and scrutinizing screenplays line by line before putting them into production. In parallel, U.S. law has by turns widened and narrowed the legal options available to public figures wishing to take action against unauthorized depictions. After First Amendment protection for films was established in 1952, the defamation and false light standards for plaintiffs depicted without their permission became harder to meet. In cases where studios have risked going to trial on such charges, they have typically settled with plaintiffs out of court.¹ The emergence of publicity rights in the late 1970s suggested new courses of legal action, but courts have thus far chosen not to uphold them over free speech. The case brought by Olivia de Havilland over her depiction in *Feud: Bette and Joan* (Murphy, 2017) provided one such example of this. The miniseries featured a disclaimer and almost certainly involved a script clearance process, but the producers did not seek de Havilland’s permission. The trial court found merit in her charges, but the appellate court did not, recognizing that the original ruling would potentially make it impossible to represent public figures in anything other than the most reverent terms. In the legal context, free speech protections have generally been upheld over

¹ Out-of-court settlements have been agreed upon in cases brought by living people depicted in several historical films, notably *Boys Don’t Cry* (Peirce, 1999).

individual rights, particularly where public figures are involved. For media producers, unauthorized representation has thus become something of a calculated risk, attracting lawsuits from offended individuals that are bothersome but can generally be defended.

These conflicts over unauthorized representation have occurred in the context of a possibly unprecedented flourishing of historical and biographical material in U.S. film and TV, particularly miniseries on streaming platforms. Depictions of public figures have caused controversy in many instances. Basketball executive Jerry West strongly objected to his depiction in *Winning Time* (McKay, 2022–2023), and his lawyers demanded a retraction from the broadcaster HBO (Schulman, 2022). The same year, Pamela Anderson made it clear that she had been depicted in *Pam & Tommy* (Craig, 2022) without her permission, despite the show's attempt to address topical issues of consent and sexual exploitation (Horton, 2022). More lawsuits are sure to follow. But the legal ramifications of unauthorized representation continue to be shaped by the particular ambiguities of historical fiction. In the current context, works of art that are considered to "transform" the experiences of real people into other forms are protected as free speech. The transformation of historical fact into historical drama, interpolating elements of fiction and nonfiction, is thus not only a strategy for adaptation but also a legal defense, helping to position historical dramas outside the reach of the law.

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