LIFE STORY RIGHTS LITIGATION: NEGOTIATING FOR A HAPPY ENDING

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INTRODUCTION

Filmmakers, television writers, and authors alike have made millions of dollars in the entertainment industry by telling stories that have already been lived by real people. Not only do these creative works force enormous public exposure upon the real people portrayed, but they often portray these real-life inspirations in inaccurate, or even harmful ways. Furthermore, without an agreement to sell their life story rights, many of these real-life inspirations receive no compensation from the use of their life story in these highly successful creative works.

This is what happened to Samantha Barbash when a studio released the film *Hustlers* based on her life story. Barbash, an adult entertainer, pleaded guilty of a widely-publicized scheme to drug and steal from men who visited the gentlemen's clubs where she worked.[1] Finding this a compelling story, a production company attempted to purchase the right to Barbash's life story, but she turned down the offer.[2] However, even without obtaining the rights to Barbash's life story, the producers continued to release the film *Hustlers* starring Jennifer Lopez in 2019 and grossed over $100 million in the United States.[3] Barbash filed a lawsuit in January 2020 against the producers of the film, claiming that they blatantly disregarded her lack of consent, exploited her likeness and character, and defamed her.[4] By November 2020, the lawsuit was dismissed because the film did not actually use her "name, portrait, picture, or voice" and she was unable to prove that the studio acted with actual malice or reckless disregard for the truth of the statements.[5]

Samantha Barbash is not alone in the challenging endeavor of demanding compensation for an unauthorized use of a life story in a creative work.[6] In the past fifty years, plaintiffs have attempted to bring claims

1. Barbash v. STX Fin., LLC, No. 20cv123, 2020 U.S. Dist. LEXIS 210331, at *3 (S.D.N.Y. Nov. 10, 2020).

2. *Id.* at *2–3.

3. Scott Mendelson, *Box Office: 'Hustlers,' Starring Jennifer Lopez And Constance Wu, Just Topped $100 Million Worldwide*, FORBES (Oct. 3, 2019), https://www.forbes.com/sites/scottmendelson/2019/10/03/box-office-hustlers-starring-jennifer-lopez-and-constance-wu-just-topped-100-million-worldwide/?sh=346380065866 [https://perma.cc/RFY9-WPS7].

4. *Barbash*, 2020 U.S. Dist. LEXIS 210331, at *3–4.

5. *Id.* at *15–16.

6. *See* Complaint and Demand for Jury Trial at 3, Fairstein v. Netflix, Inc., No. 1:20-cv-08042 (S.D.N.Y. Sept. 29, 2020) (noting that Linda Fairstein, a New York City prosecutor, recently sued Netflix and the producer Ava DuVernay for her portrayal in the four-part docuseries *When They See Us*, claiming that the Netflix series portrayed her in a false and defamatory manner, characterizing her as a "racist, unethical villain who is determined to jail innocent children of color at any cost"); Greene v. Paramount

against defendants based on invasion of privacy, right of publicity, and defamation, but have rarely been successful. In fact, plaintiffs almost never win against defendants who used their life story in a creative work without consent.[7] Why, then, do entertainment practitioners continue to purchase life story rights if the threat of losing in court is highly unlikely? Despite the low likelihood that a plaintiff will win, there continues to be an industry-wide practice in which producers and authors feel required to obtain life story rights.

The goal of this Note is to examine the likelihood of success for plaintiffs in life story rights litigation through an extensive case survey in order to better understand why entertainment practitioners continue to obtain life story rights in practice. While previous publications have discussed the different legal claims that a subject of a creative work can bring against a defendant who used the plaintiff's likeness or story without consent, none of the publications have attempted to analyze the likelihood of success of these claims in an extensive case survey. Part II discusses the origin of life story rights in the entertainment industry and explains why people do not have ownership over the facts of their lives. Part III examines the legal claims that a plaintiff will often bring in a life story rights litigation, such as invasion of privacy, right of publicity, and defamation claims. Part IV surveys and analyzes state and federal court cases in the past fifty years in which plaintiffs attempted to demand compensation from the use of their life story in a book, movie, or television series. After determining that there is a low likelihood of success for plaintiffs in these cases, this Note clarifies why plaintiffs are unlikely to win in life story rights cases. The Conclusion will analyze the discrepancy between the low likelihood of plaintiff success and the continuing entertainment industry practice of obtaining life story rights. The continuing practice can be explained by the fact that a life story rights agreement not only significantly reduces the likelihood that a plaintiff will bring a lawsuit, but it also greatly enhances the authenticity of the creative work.

Pictures Corp., 813 F. App'x 728, 732 (2d Cir. 2020) (unpublished) (noting that Paramount Pictures recently defeated a defamation lawsuit filed back in 2015; the former general counsel of Stratton Oakmont sued Paramont for his portrayal in the film *Wolf of Wall Street*, and the film showed him partying with prostitutes and serving illegal drugs); Mossack Fonseca & Co., S.A. v. Netflix, Inc., No. 3:19cv1618, 2019 U.S. Dist. LEXIS 180743, at *1–2 (D. Conn. Oct. 17, 2019) (Lawyers Mossack and Fonseca recently sued Neftlix for their portrayal in the docudrama series *Laundromat*, a series based on the Panama Papers scandal, claiming that the series portrayed them as "ruthless, uncaring . . . lawyers [who are] involved in money laundering, tax evasion, and . . . other criminal activities").

7. See discussion of the case survey results *infra* Section IV.A in which only one life story rights litigation case out of forty-nine found in favor of the plaintiff.

I. THE ORIGIN OF LIFE STORY RIGHTS

The entertainment industry has created films based on real people and actual events since the turn of the twentieth century, and this genre of films continues to be popular today.[8] People are compelled by stories that embellish the retelling of historic events, pry into the private lives of public figures, or a dramatize the lives of private figures with compelling or unusual stories.[9] Today, a life story may be portrayed in the form of a nonfiction biography, documentary film, or television series that clearly identifies the individual and claims to accurately recount a true event. On the other hand, a life story may be modified and fictionalized so much that it bears little resemblance to the actual person or event that inspired the creative work. Creative works may also land somewhere in between fact and fiction, claiming to be "based on a true story." For instance, a "docudrama" documents actual occurrences through a seemingly objective presentation but dramatizes the event through creative and embellished reenactment.[10]

A life story is defined by many different standards. In a typical life story rights agreement, a life story is often defined as whatever a filmmaker or writer determines to be worth sharing and portraying in a creative work. The contents of a life story can range anywhere from the entire life of a person to a single, interesting event within the person's life.[11] While the term "life story rights" indicates that one has rights to his or her own life, the term is misleading. An individual does not have ownership over the facts of his or her life story. Although literary works and motion pictures are considered works of authorship protected by copyright, "life stories" which have not been recorded in a fixed form, such as a novel or film, are not protected.[12] An individual's life experiences are real events and situations that occur in everyday life, and therefore an individual's life story is merely a fact of the world. Because facts are not eligible for copyright protection, individuals cannot have copyright ownership over the facts of their own life.[13]

8. Michelle E. Lentzner, *My Life, My Story, Right—Fashioning Life Story Rights in the Motion Picture Industry*, 12 HASTINGS COMMC'N & ENT. L.J. 627, 630 (1990).

9. Diane Krausz, *Whose Life Is it Anyway?, Clearance of Life Story Rights in Film*, ENT., ARTS & SPORTS L. BLOG (Sept. 8, 2010, 3:32 PM), http://nysbar.com/blogs/EASL/2010/09/whose_life_is_it_anyway_cleara.html [https://perma.cc/GRK2-9HXJ].

10. Lentzner, *supra* note 8, at 630.

11. Scott Meyers, *Movie Story Types: Biopic*, GO INTO THE STORY (Dec. 22, 2019), https://gointothestory.blcklst.com/movie-story-types-biopic-ae005bb5e983 [https://perma.cc/KY27-4CNS].

12. Chris O'Falt, *'Hustlers': When Does a Film Based on True Events Need Its Subject's Life Rights?*, INDIWIRE (Sept. 25, 2019), https://www.indiewire.com/2019/09/hustlers-life-rights-hollywood-legal-based-on-true-events-1202176296 [https://perma.cc/TJ37-L8ZY] ("The concept of life rights is really something of a misnomer, because no one owns the facts that make up the narrative of their life." (quoting attorney John L. Geiger)).

13. Feist Publ'ns v. Rural Tel. Serv., 499 U.S. 340, 357 (1991) (holding that facts are not copyrightable, and although compilations of facts may be, they are not copyrightable per se).

For example, in *Hoeling v. Universal Studios*, an author wrote a book about the Hindenburg disaster, and shortly after, Universal Studios also created a movie based on the Hindenburg disaster.[14] The court found that the author did not have any ownership over the events portrayed in the book because it was a factual event that happened in the world.[15] Therefore, Universal could freely create a film based on the Hindenburg disaster without infringing upon the author's copyright to his novel, as long as Universal did not copy the particular creative way in which he arranged the facts.[16] The court emphasized that "the protection afforded the copyright holder has never extended to history" because "knowledge is best served when history is the common property of all, and each generation remains free to draw upon the discoveries and insights of the past."[17] The scope of copyright protection in historical events is narrow and only extends as far as the original expression of facts.

Therefore, under *Hoehling*, if an individual has written a novel about his or her own life story in a tangible form such as an autobiography, that autobiography has copyright protection, and the owner may be permitted to protest a producer's unconsented use of that biography.[18] However, only the written expression of the facts and events within the biography are copyright protected, not the underlying facts and events of the individual's life. Thus, an individual does not have copyright ownership over the facts of his or her life.

Because life stories are essentially free for the taking, subjects of creative works who want to be compensated for the use of their life story, or are unhappy with the portrayal of their life, are forced to turn to other legal theories. The most common causes of action in a life story rights lawsuit are based on (1) invasion of privacy, (2) the right of publicity, (3) defamation, or (4) breach of contract.[19] One of the earliest lawsuits for the unauthorized use of one's life story in a creative work dates back to the early 1900s, in which a plaintiff successfully claimed a violation of the right of publicity. In *Binns v. Vitagraph*, a filmmaker used the plaintiff's name and picture in a film that dramatized the story of how the plaintiff bravely saved passengers from a shipwreck.[20] The court found that the filmmaker violated the New York Civil Rights Statute section 50 and 51 by using the name and picture

14. Hoehling v. Universal City Studios, Inc., 618 F.2d 972, 975–76 (2d Cir. 1980).
15. *Id.* at 978.
16. *See id.* at 979.
17. *Id.* at 974.
18. Lentzner, *supra* note 8, at 643.
19. *See id.* at 650.
20. Binns v. Vitagraph Co. of Am., 132 N.Y.S. 237, 238–39 (App. Div. 1911).

of the plaintiff "to amuse those who paid to be entertained," contrary to the prohibition of the statute.[21] The court upheld the statute in order to "protect important personal rights of privacy" and awarded liberal exemplary damages "both as a punishment to defendant and in order to deter others from violating the law and invading such rights."[22]

The success of this lawsuit inspired a number of similar lawsuits to follow under invasion of privacy, right of publicity, and defamation claims. The risk of facing an expensive lawsuit and possibly an injunction of a creative work led to an industry-wide practice for producers, authors, screenwriters, and other creative content producers to obtain life story rights.[23] Life story rights agreements became a tool for entertainment practitioners to create a work based on a subject's life story without the risk of a lawsuit based on invasion of privacy, right of publicity, and defamation.

Life story rights agreements were drafted more like promises not to sue for invasion of privacy, slander, or libel, rather than a true grant of life story rights to the purchaser.[24] Often, the main purpose of a life story rights agreement was the release of liability of the purchaser.[25] For example, in *Marder v. Lopez*, the dancer that inspired the popular film *Flashdance* signed a "General Release" purporting to discharge Paramount Pictures Corporation, its subsidiaries, and its executives from claims arising out of the creation of the film.[26] The release granted Paramount Pictures Corporation the right to use Marder's life story to create Flashdance and gave Marder $2,300 in consideration.[27] The release protected Paramount Pictures Corporation from "each and every claim, demand, debt, liability, cost and expense of any kind or character . . . arising out of or . . . connected with . . . the motion picture FLASHDANCE."[28] The focus of this release was to protect the studio from any future lawsuits from using Marder's life story.

Life story rights agreements can be a strong deterrent from lawsuits, and courts are likely to uphold private contracts between parties. For example, when Marder asserted a claim against Paramount for a declaration of her rights as a co-author of *Flashdance*, copyright infringement, right of publicity, and unfair competition, the court held that Marder was barred from

21. *Id.*
22. *Id.* at 240.
23. O'Falt, *supra* note 12 ("It's cheaper for you in terms of business just to head off any potential lawsuit, rather than go through the legal representation for the onus of the material." (quoting UCLA Film and Television Professor Howard Suber)).
24. 6 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 23.07 (2020).
25. 3 ARTHUR KLEBANOFF, ENTERTAINMENT INDUSTRY CONTRACTS FORM 63-1 (2020).
26. Marder v. Lopez, 450 F.3d 445, 447 (9th Cir. 2006).
27. *Id.* at 449.
28. *Id.* at 454.

bringing any claims against Paramount because she signed a release of liability prior to the creation of the film. Even though she was only paid $2,300, which "in hindsight . . . appear[ed] to be unfair to Marder" compared to the $150 million in revenue the film earned,[29] there was nothing in the release that entitled Marder a share in the revenues from the film "FLASHDANCE." Here, the court was unwilling to interfere with a private contract, regardless of whether the terms were unfair in retrospect.

Thus, although true stories are theoretically public domain and "free for the taking,"[30] life story rights agreements originated as a means to avoid the risk of being sued under other legal theories such as invasion of privacy, right of publicity, and defamation. This fear of being sued has transformed into a well-known and industry-wide practice for filmmakers, producers, and writers when purchasing life story rights.[31]

II. LEGAL CLAIMS IN LIFE STORY RIGHTS LITIGATION

This Part provides an overview of the legal claims that can relate to "life story" rights litigation and the challenges that plaintiffs face in bringing these claims to court. Plaintiffs who claim to have their life story stolen will often bring the following claims: (1) invasion of privacy, (2) right of publicity, and (3) defamation. While the right of privacy protects individuals from publicity,[32] the right of publicity protects a person's right to control the publicity of his or her name or likeness.[33] Defamation protects a person's reputation from injury.[34] Often, plaintiffs will bring a combination of these claims against the defendant in order to increase their chances of success under different theories.[35] Because California and New York are often considered the "entertainment capitals of the United States,"[36] this Note addresses three common claims brought in life story rights litigation in these two states.

29. *Id.* at 450.

30. Susan Hallander, *A Call for the End of the False Light Invasion of Privacy Action as It Relates to Docudramas*, 15 SETON HALL J. SPORTS & ENT. L. 275, 280 (2005).

31. *See id.*

32. *See infra* Section III.A

33. *See infra* Section III.B.

34. *See infra* Section III.C.

35. *But see* CAL. CIV. CODE § 3425.3 (West 2016).

> No person shall have more than one cause of action for damages for libel or slander or invasion of privacy or any other tort founded upon any single publication or exhibition or utterance, such as any one issue of a newspaper or book or magazine or any one presentation to an audience or any one broadcast over radio or television or any one exhibition of a motion picture.

Id.

36. Paul Czarnota, *The Right of Publicity in New York and California: A Critical Analysis*, 19 VILL. SPORTS & ENT. L.J. 481, 481 (2012) (discussing the "strikingly different approaches to the right of publicity" in California and New York).

A. INVASION OF PRIVACY

In 1890, Samuel Warren and William Brandeis first introduced the concept of a legally recognized "right to privacy" in a law review article.[37] The right of privacy is the "right to be let alone"[38] and is intended to protect an individual's mental or emotional wellbeing.[39] Because it is a personal right that shields an individual from publicity, private figures are more likely to bring an invasion of privacy claim than public figures.[40]

1. California

In California, Prosser categorized the tort of privacy invasion into four types: (1) intrusion upon the plaintiff's seclusion or solitude, (2) public disclosure of embarrassing private facts, (3) publicity which places the plaintiff in a false light in the public eye, and(4) appropriation of a plaintiff's name or likeness.[41] The last three types of invasion of privacy are common causes of action in life story rights litigation. Although the right of privacy developed through common law, there is also a statutory right in California. Therefore, plaintiffs may bring causes of action for invasion of privacy under both the common law approach and the statutory approach to privacy.[42]

i. Public Disclosure of Private Facts

Life story rights litigation often involves a claim of the second invasion of privacy tort: the public disclosure of embarrassing private facts. The elements include: (1) public disclosure; (2) of a private fact; (3) which "would be offensive and objectionable to the reasonable person"; and (4) which is "not of legitimate public concern."[43] A plaintiff in a life story rights case may claim that a creative work based on the plaintiff's life revealed embarrassing and private information, and therefore the plaintiff is entitled to damages.[44] However, plaintiffs must overcome the challenge that the offensive facts disclosed to the public were private facts.[45] There is generally no liability if the defendant merely gives further publicity to

37. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195 (1890).
38. Melvin v. Reid, 112 Cal. App. 285, 289 (1931).
39. William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 389 (1960); Fairfield v. Am. Photocopy Equip. Co., 138 Cal. App. 2d 82, 86 (1955).
40. Warren & Brandeis, *supra* note 37, at 214–15.
41. Prosser, *supra* note 39.
42. 4 NEIL M. LEVY, MICHAEL M. GOLDEN, & LEONARD SACKS, CALIFORNIA TORTS § 46.01 (2020).
43. M.G. v. Time Warner, Inc., 107 Cal. Rptr. 2d 504, 511 (Ct. App. 2001).
44. *Id.*
45. Forsher v. Bugliosi, 608 P.2d 716, 724–25 (Cal. 1980).

information about the plaintiff that is already public.[46] Therefore, a celebrity or well-known plaintiff may find it difficult to prove that facts in a film or television series were not already publicly known facts. Even if a plaintiff can prove that the publicly disclosed facts were private, the plaintiff must also prove that the facts disclosed would be offensive to a reasonable person.[47]

Finally, the plaintiff must also show that the information disclosed serves no legitimate public need, or that it is not newsworthy.[48] The test of newsworthiness is whether or not the matter is of legitimate public interest, and the test focuses on factors such as the "the social value" of the published facts, the "depth of intrusion" into private affairs, and whether the person consented "voluntarily" to a position of public notoriety.[49] For example, in *Shulman v. Group W Productions*, a television documentary that contained videos and recordings of an accident victim's rescue from a serious car crash was newsworthy as a matter of law and, therefore, could not be the basis for an invasion of privacy claim.[50] The court reasoned that automobile accidents and the medical treatment of accident victims are of legitimate concern to the public because the filming of such accidents and treatments is a critical service that any member of the public may someday need.[51]

ii. False Light Invasion of Privacy

Under the third type of invasion of privacy, false light invasion of privacy, a plaintiff may claim that a defendant's creative work based on the plaintiff's life story placed the plaintiff in a false light. False light claims differ from the disclosure of private facts because the interest protected is that of reputation, which is similar to the protected rights of defamation.[52] The elements of a false light claim include: (1) a public disclosure; (2) which places the plaintiff in a false light; and (3) which is objectionable to a reasonable person. While it is not required that the statement actually be false, it must suggest a false implication or impression about the plaintiff.

If a plaintiff is considered a public figure, the plaintiff must show that the information was disclosed with actual malice, or with knowledge that it would create a false impression or reckless disregard for whether or not it

46. Sipple v. Chronicle Publ'g, Co., 201 Cal. Rptr. 665, 668 (Ct. App. 1984).

47. Briscoe v. Reader's Digest Ass'n, 483 P.2d 34, 42–43 (Cal. 1971) (holding in part that the facts must be so offensive as to shock the community's notions of decency).

48. Shulman v. Grp. W Prods., 955 P.2d 469, 478 (Cal. 1998).

49. M.G. v. Time Warner, Inc., 107 Cal. Rptr. 2d 504, 511 (Ct. App. 2001).

50. Shulman v. Grp. W Prods., 955 P.2d at 488.

51. *Id.*

52. Prosser, *supra* note 39, at 400; *see infra* Section III.C.

would create a false impression.[53] A public figure is one who achieves "such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts," or an individual who "voluntarily injects himself or is drawn into a particular public controversy and becomes a public figure for a limited range of issues."[54] If a publication is an expressive work of fiction, or a combination of fact and fiction, the actual malice test requires that a public figure show that the defendant intended to create a false or misleading impression, or acted in reckless disregard of whether the words or portrayal would be interpreted by the average reader or viewer as a false statements of fact.[55] If the plaintiff is not a public figure, then she or he is considered a private figure and only needs to show the defendant acted with some fault.[56]

In addition, the public disclosure must be offensive to the reasonable person.[57] For example, in *O'Hilderbrandt v. Columbia Broadcasting Systems, Inc.*, a television documentary that recounted a plaintiff's professional and social relationship to the victim of an unsolved murder and displayed the plaintiff's picture alongside the two famous convicted murderers was not so offensive as to "shock the community's sense of decency."[58] Even though the plaintiff claimed the documentary deceitfully associated the plaintiff with a murderer, it was not sufficiently offensive to be considered a false light invasion of privacy.

iii. Appropriation

Finally, the fourth invasion of privacy tort, appropriation, protects a person's right to control the publicity and commercial opportunities that are induced by his or her well-known name or likeness.[59] Appropriation has been equated with the "right of publicity," so this Note will discuss this cause of action in the "right of publicity" Section II.B.[60]

2. New York

While California has both a common law and statutory right of privacy, New York recognizes only a statutory right of privacy.[61] In addition, New York recognizes only one of the four privacy rights in Prosser's analysis:

53. Wolston v. Reader's Digest Ass'n, 443 U.S. 157, 160 (1979).
54. Gertz v. Welch, 418 U.S. 323, 351 (1974).
55. De Havilland v. FX Networks, 230 Cal. Rptr. 3d 625, 646 (Ct. App. 2018).
56. *Gertz*, 418 U.S. at 344.
57. *See* O'Hilderbrandt v. Columbia Broad. Sys., 114 Cal. Rptr. 826, 833 (Ct. App. 1974).
58. *Id.*
59. Lugosi v. Universal Pictures, 603 P.2d 425, 431 (Cal. 1979).
60. *See infra* Section III.B.
61. The 1903 Act was enacted in response to the Court of Appeals' decision in *Roberson v. Rochester Folding Box Co.*, which rejected the existence of a common-law right of privacy. Prosser, *supra* note 39, at 385. The 1903 Act became today's New York Civil Rights Law sections 50 and 51. *Id.*

"appropriation."[62] While the California right of privacy broadly protects the "right to be left alone," New York's Civil Rights Law only prevents public injury to an individual's private persona through the use of that individual's name, picture, portrait, or voice, which is much narrower than the California right of privacy.[63] New York Civil Rights Law, section 50, sets forth the elements of a criminal action, but as a practical matter, there has been no criminal enforcement of this section.[64] Section 51 is the only basis for noncriminal invasion of privacy claims and specifies the civil remedies available to a plaintiff when his or her name, portrait, picture, or voice has been used without consent for advertising or trade purposes. These remedies include: (1) injunction; (2) compensatory damages; and (3) the possibility of exemplary damages where defendant has "knowingly used" the name, portrait, or picture.[65]

The right of privacy is generally of value to those who have an undisclosed private identity rather than celebrities.[66] Warren and Brandeis emphasized that those "whose affairs the community has no legitimate concern" will have a stricter protection of their privacy, while those who have "renounced the right to live their lives screened from public observation . . . [and who are the] subject of legitimate interest to their fellow citizens" are given a broad definition of the right to privacy.[67] Therefore, a plaintiff that brings a right of privacy claim must show that their life is not of public interest and that they are not a public figure, or else they may waive their right of privacy. For example, in *Koussevitzky v. Allen, Towne & Heath, Inc.*, a music conductor was deemed an important public figure because of his prominent achievements as a musician that constantly placed him before the public eye.[68] Because his life was "well within the orbit of public interest and scrutiny," the biography about his life and career was deemed outside the scope of the New York Civil Rights Law section 51 protection for the right of privacy.[69]

62. N.Y. CIV. RIGHTS LAW §§ 50–51 (McKinney 2003).

63. *Id.*; *see also* Wojtowicz v. Delacorte Press, 395 N.Y.S.2d 205, 206 (App. Div. 1977) (holding in part that because the family's names, portraits, or pictures were not used in the complained about books or movie, there was no cause of action under of New York Civil Rights Law sections 50 and 51).

64. 1 ERIC E. BENSEN, NEW YORK INTELLECTUAL PROPERTY LAW § 4 (2020).

65. CIV. RIGHTS § 51.

66. Warren & Brandeis, *supra* note 37.

67. *Id.* at 214–15; Koussevitzky v. Allen, Towne & Heath, Inc., 68 N.Y.S.2d 779, 783 (1947) ("The right of privacy statute does not apply to an unauthorized biography of a public figure unless the biography is fictional or novelized in character.").

68. *Koussevitzky*, 68 N.Y.S.2d at 783.

69. *Id.*

B. RIGHT OF PUBLICITY

Currently, twenty-four states have right of publicity statutes that protect various appropriations of a person's name, image, and likeness.[70] However, the existing right of publicity statutes do not protect life stories or fictional character portrayals.[71] The right of publicity protects a person's right to control the publicity and commercial opportunities that are occasioned by virtue of his or her well-known name or likeness.[72] While the cause of action protects a person's privacy to some extent, its primary function is to protect a person's economic interest in the use of his or her name or likeness.

1. California

California recognizes both a common law right of publicity and a statutory right of publicity.[73] The statutory cause of action and the common law action are alternative causes of action, so plaintiffs may bring a claim under both the statutory and common law approach for right of publicity.[74] Under the common law approach, the elements of a cause of action for an invasion of privacy by appropriation are: (1) the defendant's use of the plaintiff's name, likeness, or identity without the plaintiff's consent; (2) commercial or other advantage to the defendant; (3) resulting in injury to the plaintiff.[75] However, if consent is allegedly provided through a contract between the parties for the right to use an individual's character or likeness, traditional principles of contract interpretation apply.[76]

Similarly, California Civil Code section 3344 provides that anyone who knowingly uses another person's name, voice, signature, photograph, or likeness for purposes of advertising, selling, or soliciting, without first obtaining consent of that person, is liable for damages.[77] Under the common law, the interest, if not exercised during the lifetime of the personality, does not survive death.[78] However, California Civil Code section 3344.1 provides

70. Jonathan Faber, *A Brief History of the Right of Publicity*, RIGHT OF PUBLICITY (July 31, 2015), https://rightofpublicity.com/brief-history-of-rop [https://perma.cc/N77W-NXPY].

71. Stephanie J. Beach, *Fact & Fiction: Amending Right of Publicity Statutes to Include Life Story and Fictional Character Rights*, 42 SETON HALL LEGIS. J. 131, 135 (2017).

72. Lugosi v. Universal Pictures, 603 P.2d 425, 431 (Cal. 1979).

73. *See* CAL. CIV. CODE §§ 3344(g), 3344.1(m) (West 2010) (stating that statutory remedies are cumulative and in addition to any other remedies provided by law).

74. Eastwood v. Sup. Ct., 198 Cal. Rptr. 342, 352 (Ct. App. 1983) (holding that the plaintiff could state an actionable claim under common law as well as CIV. § 3344).

75. *Id.* at 347.

76. Local TV, LLC v. Sup. Ct., 206 Cal. Rptr. 3d 884, 886 (Ct. App. 2016) (holding that broad consent for the television station to use the plaintiff's name, likeness, and work product provided in a contract defeated the plaintiff's appropriation claim, even for uses made after the plaintiff's employment with station ended).

77. CIV. § 3344.

78. Lugosi v. Universal Pictures, 603 P.2d 425, 431 (Cal. 1979).

that the rights in a person's name or likeness are property rights that can be transferred before or after the death of the person.[79]

Both the common law and statutory right of publicity provide special protection to creative works in the entertainment industry. Film, television, and literary works are mediums protected by the constitutional guarantees of free expression. Therefore, protections granted by the First Amendment may preclude recovery for appropriation in cases regarding film, television, or books. If a creative work is clearly newsworthy, or within the public interest, the court may favor freedom of speech under the First Amendment over a plaintiff's right to his or her own name or likeness.[80] In California, individuals may bring an Anti-Strategic Lawsuit Against Public Participation (anti-SLAPP) motion to dismiss the plaintiff's complaint under California Civil Procedure Code section 425.16, which was "enacted to allow early dismissal of meritless First Amendment cases aimed at chilling expression through costly, time-consuming litigation."[81] For an anti-SLAPP defense to succeed, a defendant must show that the creative work was published "in furtherance of [the defendant's] right of petition or free speech under the United States . . . or the California Constitution in connection with a public issue."[82]

In addition, private plaintiffs may be precluded from claiming a right of publicity because they have not built up an economic value in their identity and therefore do not have any economic harm from the portrayal of their life story. In *Sarver v. Chartier*, an Army Sergeant, who was a private person and did not seek public attraction to himself, did not "make the investment required to produce a performance of interest to the public" or invest time and money to build up economic value in a marketable performance or identity.[83] Thus, he could not claim a violation of the right of publicity because he did not experience any economic harm to his reputation from the portrayal of his life story in a film.

2. New York

In New York, the right of publicity is encompassed under the Civil Rights Law as an aspect of the right of privacy, and there is no common law

79. CIV. § 3344.

80. Guglielmi v. Spelling-Goldberg Prods., 603 P.2d 454, 464 (Cal. 1979) (holding that the name and likeness of Rudolf Valentino in a television film presented as a fictionalized version of his life did not constitute an impermissible infringement on the plaintiff's alleged right of publicity because the film was protected by the constitutional guarantees of free expression).

81. Sarver v. Chartier, 813 F.3d 891, 896 (9th Cir. 2016); CAL. CIV. PROC. § 425.16 (West 2016).

82. M.G. v. Time Warner, Inc., 107 Cal. Rptr. 2d 504, 508 (Ct. App. 2001).

83. *Sarver*, 813 F.3d at 903–04 (quoting Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 573, 576 (1977)).

equivalent.[84] Although the original purpose of the Civil Rights Law section 50 was to protect an individual's "thoughts and feelings," the statute may also apply "in cases where the plaintiff generally seeks publicity, or uses [his or her] name, portrait, or picture, for commercial purposes but has not given written consent for a particular use."[85] The right of publicity is generally of value to those who have a well-developed public persona, such as celebrities, who seek recovery for economic injury.[86]

To state a claim under section 51 of the Civil Rights Law, a party must allege: (1) the use within the state of New York; (2) the use involved his or her name, portrait, picture, or voice; (3) for "advertising purposes or for the purposes of trade"; and (4) without written permission.[87] Unlike the California statutory right of publicity, the statutory right of privacy in New York does not survive death.[88] In addition, the plaintiff must be clearly represented and identifiable in the defendant's work and include the use of his or her name, portrait, picture, or voice.[89]

Like in California, the statute does not provide protection to an individual's right of publicity if the creative work was a report of newsworthy events or matters of public interest.[90] However, a fictionalized account of an individual's life, such as a fictionalized biography, can be an actionable invasion of the individual's right to publicity under section 50 and under some circumstances, may not be protected by the newsworthiness exception.[91] For instance, a work that "may be so infected with fiction, dramatization or embellishment . . . cannot be said to fulfill the purpose of the newsworthiness exception."[92]

Therefore, a plaintiff claiming that a character in a fictional creative work is based on the plaintiff's persona and likeness must show that the plaintiff is easily recognizable as the plaintiff, rather than showing just a few similarities that could have been coincidental. For example, a senior civil affairs officer of the Allied Military Government that worked in Sicily

84. Stephano v. News Grp. Publ'ns, 64 N.Y.2d 174, 183 (1984); 1 ERIC E. BENSEN, NEW YORK INTELLECTUAL PROPERTY LAW § 3 (2019).

85. *Stephano*, 64 N.Y.2d at 184.

86. *See* Robinson v. Paramount Pictures Corp., 491 N.Y.S.2d 694, 695 (App. Div. 1985).

87. N.Y. CIV. RIGHTS LAW § 51 (McKinney 2003); *see also* Messenger v. Gruner + Jahr Printing & Publ'g, 727 N.E.2d 549, 552 (N.Y. 2000) ("The statute is to be narrowly construed and strictly limited to nonconsensual commercial appropriations of the name, portrait or picture of a living person.").

88. Frosch v. Grosset & Dunlap, Inc., 427 N.Y.S.2d 828, 829 (App. Div. 1980) (holding that the protection of the right of free expression is so important that the court should not allow any right of publicity to stop the publication of a literary work about a deceased person).

89. Toscani v. Hersey, 65 N.Y.S.2d 814, 817–18 (App. Div. 1946).

90. *Messenger*, 727 N.E.2d at 553.

91. Porco v. Lifetime Entm't Servs., LLC, 47 N.Y.S.3d 769, 771–72 (App. Div. 2017)

92. *Id.* at 771.

claimed that a writer based his novel and play on the officer's life story and his time in Sicily.[93] The court concluded that the mere fact that the events and acts surrounding the character were similar to events surrounding the officer's life did not give the officer a cause of action under section 51. The character of the novel and play was not easily recognizable as the real-life plaintiff, so the plaintiff could not claim that the novel was based on his life story.

C. DEFAMATION

Defamation law "protects the interest of a person in his or her reputation, that is, in his or her 'good name.' "[94] Defamation involves an injury to one's reputation caused by a false statement of fact and includes both libel (defamation in written or fixed form) and slander (spoken defamation).[95] Truthful statements that harm another's reputation will not create liability for defamation.[96] Thus, one cannot defame another by telling the truth, no matter how harmful it is—only harmful lies will create liability.

California recognizes both common law defamation and statutory defamation. While a false light invasion of privacy claim under California law may seem similar to defamation claim, the elements of the two torts are distinct in that the statements supporting a false light claim need not be defamatory.[97] Additionally, while defamatory statements must lower a person's reputation, false light statements need only be offensive to a reasonable person.[98] However, in some cases, a false light invasion of privacy claim may be considered the same as a defamation claim.[99]

In order for a plaintiff to bring a defamation claim in both California and New York, the plaintiff must prove: (1) there was communication of the defamatory statement to a third party; (2) the defamatory statement referred to the plaintiff specifically; and (3) the publisher of the defamatory statement had intent, malice, or fault.[100] A plaintiff in a defamation action is required to prove actual malice if he or she is a public figure or public official, but need only find "fault" on behalf of the defendant if the plaintiff is a private

93. *Toscani*, 65 N.Y.S.2d at 816.
94. 4 WILL GLENNON, CALIFORNIA TORTS § 45.01.
95. *Id.*
96. *Id.*
97. CALIFORNIA TORTS, *supra* note 94, § 46.04.
98. *See* O'Hilderbrandt v. Columbia Broad. Sys., Inc.,114 Cal. Rptr. 826, 833 (Ct. App. 1974).
99. Alszeh v. Home Box Off., 80 Cal. Rptr. 2d 16, 20 (Ct. App. 1998) (holding that invasion of privacy claims are supported by the same facts as a claim for defamation, so they cannot be brought as separate claims if one of the claims fails as a matter of law).
100. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 327–32 (1974).

figure.[101] Actual malice can be found if a public figure brings clear evidence that the defendant knew that the public statement was false or had reckless disregard for the truth or falsity of the material published.[102] A public figure in a defamation case may be awarded punitive damages when there is "actual malice," which is extremely difficult to prove.[103] Under the Supreme Court's decision in *New York Times Co. v. Sullivan*, factual errors and defamatory content were insufficient to warrant punitive damages without a finding of actual malice.[104] In a concurring opinion, Justice Goldberg also reasoned that "the Constitution accords citizens and press an unconditional freedom to criticize official conduct," which will often outweigh any finding of defamation without proof of actual malice.[105]

In addition, a plaintiff may need to show special damages if the defamatory statement is not libelous on its face.[106] A defamatory statement is libelous on its face if it does not need additional explanatory information to prove that it is defamatory.[107] On the other hand, if a plaintiff requires further information to explain that the work is defamatory, then the plaintiff will need to show special damages in order to state a claim.[108] Special damages are damages that a plaintiff has suffered in respect to his or her "property, business, trade, profession, or occupation, including the amounts of money the plaintiff has expended as a result of the alleged libel."[109]

In both California and New York, plaintiffs may face challenges to bringing a defamation claim because they may not be able to prove the creative work is "of and concerning" them.[110] For example, in *Carter-Clark v. Random House, Inc.*, a site advisor for the of the New York Public Library Center for Reading and Writing failed to demonstrate that the description of a fictional character in a novel was so closely akin to her that a reader would have no difficulty recognizing her, and her claim for libel against author was

101. *Id.*

102. Bindrim v. Mitchell, 155 Cal. Rptr. 29, 35 (Ct. App. 1979) (holding that the plaintiff, who was a public figure, proved that the author acted with actual malice when he wrote a novel about the plaintiff and knowingly included false statements about the plaintiff).

103. *Id.*

104. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279–83 (1964).

105. *Id.* at 305 (Goldberg, J., concurring).

106. Lyons v. New Am. Libr., Inc., 432 N.Y.S.2d 536, 537 (App. Div. 1980) ("In an action for libel, it is well settled that in the absence of any allegations of special damages, the complaint will not be found to state a cause of action unless the words are libelous per se.").

107. CAL. CIV. CODE § 45(a) (West 2020) ("A libel which is defamatory of the plaintiff without the necessity of explanatory matter, such as an inducement, innuendo or other extrinsic fact, is said to be a libel on its face.")

108. *See Lyons*, 432 N.Y.S.2d at 538.

109. CIV. § 48(a).

110. Carter-Clark v. Random House, Inc., 793 N.Y.S.2d 394, 395 (App. Div. 2005) (citation omitted).

dismissed.[111]

Another challenge to suing for defamation is to show that the plaintiff was actually injured by the creative work. The defamatory work must actually harm the reputation of the plaintiff, as opposed to being merely insulting or offensive. For example, in *Sarver v. Chartier*, even though the plaintiff claimed that the defamatory statements "interfered with his employment prospects because it portrayed him as a bad father, bereft of compassion, fascinated with war and death, and disobedient," the plaintiff's claim for defamation was dismissed because a reasonable viewer of the film could conclude that the overall depiction of the character was a heroic figure.[112] A few unflattering depictions of the character did not support the conclusion that the film's overall depiction of the character defamed the plaintiff.[113] Thus, a plaintiff must face several obstacles before successfully winning a defamation claim, both in California and New York.

III. CASE SURVEY OF LIFE STORY RIGHTS LITIGATION

This case survey examines forty-nine federal and state cases in California and New York involving life story rights litigation over the past fifty years. Each case involves a claim based on the invasion of privacy, right of publicity, or defamation against a defendant who created a film, television series, or book containing the "life story" of the plaintiff. While life story rights cases can encompass several different types of legal claims, the most common theories that plaintiffs use to demand compensation for an unauthorized use of their life story in a creative work are invasion of privacy, right of publicity, and defamation.

Further, this Note focused not only on cases regarding works based entirely on the plaintiff's "life story," but also on cases in which the creative work involved a short period or specific event within the plaintiff's life. In some cases, the plaintiff was not the main character of the creative work, but merely a supporting character who was briefly referenced. This Note also included "life story" cases in which the creative works merely referenced the plaintiff's "likeness" because the plaintiff believed that the creator appropriated a valuable and important part of her or his life, despite how trivial it might have seemed to the creator or the audience.

Additionally, I observed several factors and their effects on the outcome of the case, including whether the plaintiff was a private or public figure, whether the creative work was considered fiction, nonfiction, or based on a

111. *Id.* at 395–96.
112. Sarver v. Chartier, 813 F.3d 891, 906 (9th Cir. 2016).
113. *Id.*

true story, and whether there was a life story rights agreement.[114] The results from the case survey overwhelmingly reveal that litigation regarding life story rights will almost always result in a dismissal of the plaintiff's claim or summary judgment for the defendant, regardless of whether the plaintiff is claiming a violation of invasion of privacy, right of publicity, or defamation. However, while this survey focuses on published opinions in life story rights litigation, a majority of cases likely settled before the court found in favor of either the plaintiff or the defendant.[115]

A. CASE SURVEY RESULTS

Table 1 provides a summary of the forty-nine cases in the survey, detailing the number of cases that were dismissed, granted summary judgment for the defendant, not fully adjudicated, or ruled in favor of the plaintiff.

TABLE 1. Outcomes of Life Story Rights Cases

Total Cases	*Dismissed or Summary Judgment for Defendant*	*Not Fully Adjudicated*	*Plaintiff Wins*
49	39	9	1

Thirty-nine of the cases were fully adjudicated, with the plaintiff winning only once. Clearly, the likelihood of success for the plaintiff is very low. In *Bindrim v. Mitchell*, a licensed clinical psychologist, famous for his "Nude Marathon" form of therapy, successfully sued an author for defaming him in a fictional book based on the psychologist.[116] The psychologist brought evidence that a reasonable person would recognize the fictional character in the novel as the psychologist in real life and that the author acted

114. For a detailed breakdown of the forty-nine cases surveyed, see the Appendix at the end of this Note. The cases included in the survey were found using Lexis's search and Shepardize tools. The results were filtered by searching "right of publicity," "invasion of privacy," and "defamation" along with terms such as "life story," "film," "book," "television," and other terms referencing creative works. I do not contend that this is a complete search of all life story litigation cases in the past fifty years.

115. One limitation in the search criteria was that many cases likely settled early in the litigation process and did not reach the point in which an opinion was written. The cases in the survey represent cases in which an opinion was published. The number of complaints filed between 1970 and 2020 is likely much higher than the number of cases with published opinions, but my search was limited by the search criteria for published opinions on Lexis.

116. Bindrim v. Mitchell, 155 Cal. Rptr. 29, 33 (Ct. App. 1979).

with actual malice, or reckless disregard for the truth.[117] While this case exemplifies a successful defamation claim, it also demonstrates that there are very narrow circumstances under which a plaintiff might win a life story rights litigation case. Of the remaining cases, the courts found summary judgment for the defendant thirteen times and dismissed the plaintiff's complaint twenty-six times, for a total of thirty-nine losses for the plaintiff. The courts were more likely to dismiss the plaintiff's claim for failure to state a claim, but often would go even further and grant summary judgment in favor of the defendant as a matter of law. The other nine cases were remanded back to the lower court and either ended in a settlement or was not published in a final opinion.

Table 2 provides the number of times in which the plaintiff claimed a violation of the invasion of privacy, right of publicity, or defamation. In many cases, plaintiffs brought more than one of these claims against the defendant:

TABLE 2. Claims Brought in Life Story Rights Cases[*]

Claims Brought by Plaintiff	*Number of Times Brought*	*Dismissed or Summary Judgment for Defendant*	*Plaintiff Wins*	*# of Cases Not Fully Adjudicated*
Right of Publicity	20	19	0	1
Invasion of Privacy	25	18	0	7
Defamation	30	25	1	4

Notes: [*]In many cases, plaintiffs raised more than one claim. The "Number of Times Brought" column indicates the total number of times each claim was raised by the plaintiff in the cases surveyed.

117. *Id.*

The plaintiff almost always lost under a right of publicity claim (95%)[118] with only one case that was not fully adjudicated.[119] Plaintiffs who claimed an invasion of privacy were very likely to lose (72%), but there were several cases that were remanded to the lower court seemingly in favor of the plaintiffs, allowing the plaintiffs to bring more facts to support their claim.[120] However, these cases were not fully adjudicated, and they most likely settled. Plaintiffs brought claims for defamation thirty times and had a higher chance of losing (83%), but the defamation claim was also the only successful claim in the case survey.

The court used several reasons for finding in favor of the defendant or dismissing the plaintiff's claim. Table 3 shows a summary of the reasons for dismissing the claim or granting summary judgment for the defendant and the number of times the court raised each reason.

TABLE 3. Reasons for Plaintiff's Failure*

Reason for Failure of Plaintiff's Claim	*Number of Times Raised*
First Amendment	14
Newsworthy	11
No Clear Identification of Plaintiff	12
Statements Not Defamatory	8
No Actual Malice	7
Merely Incidental to Plaintiff	3
No Special Damages	2
Barred by Release of Liability Agreement	2
Other (Statute of Limitations, Preempted by Copyright, No Gross Negligence, and So On)	4

Notes: *In some of the fully-adjudicated cases used to produce this data, the court decided against the plaintiff on multiple grounds. The "Number of Times Raised" column thus accounts for the total number of times each reason for failure was cited by a court.

118. These percentages were calculated by dividing the number of times the plaintiff lost by the number of times the claim was brought multiplied by one hundred. I rounded the percentages to the nearest whole number.

119. *See supra* Table 2. These statistics are based on a small sample size. Therefore, they are meant to serve only as rough estimates.

120. M.G. v. Time Warner, Inc., 107 Cal. Rptr. 2d 504, 514–15 (Ct. App. 2001) (holding that the invasion of privacy for public disclosure of private facts is sufficient to overcome defendants' SLAPP motion and remanded back to the lower court).

Overall, courts were most likely to favor freedom of speech and First Amendment defenses over plaintiffs' right of publicity or privacy. For right of publicity claims, courts employed a First Amendment defense fourteen times, claiming that the right to free speech and dissemination of information outweighed an individual's right to publicity. In California, courts often granted the defendant's anti-SLAPP motion in connection with the First Amendment defense and dismissed the case. The courts acknowledged the newsworthy defense against right of publicity claims and invasion of privacy claims eleven times because the content of the creative work was deemed to be within the public interest.

Plaintiffs lost defamation claims for a variety of reasons. Most significantly, plaintiffs lost twelve times because they could not prove that the character in a work of fiction referred directly to the plaintiff. In other defamation claims, the plaintiffs lost seven times because they were public figures that could not prove the defendant acted with actual malice. Courts also stated eight times that the defendant's statements within the creative work were not defamatory because they were not offensive or did not harm the plaintiff. In three defamation cases, the court reasoned that the creative work only minimally referred to the plaintiff and was not enough to state a claim of defamation. Plaintiffs lost twice because they could not prove special damages.

Furthermore, courts were highly unlikely to rule against the defendant if the plaintiff signed a life story rights agreement or a waiver. Table 4 shows the number of cases in which a plaintiff already had a life story rights agreement.

TABLE 4. Cases with Life Story Rights Agreements

Number of Cases with Life Story Rights Agreements	*Dismissed for Summary Judgment for Defendant*	*Not Fully Adjudicated*
3	2	1

Of the three cases in which a plaintiff had already signed a life story rights agreement, two of the cases were dismissed or granted in favor of the defendant. In these two cases, the courts upheld the existing agreement and claimed that the plaintiff was barred from bringing claims against the defendant. In the third case, the case was remanded to determine whether a waiver signed by the plaintiff was enforceable under the circumstances in

which the waiver was signed.[121]

Whether a plaintiff was a public figure or a private individual did not significantly change the plaintiff's likelihood of success. Table 5 shows the number of plaintiffs that were public figures or private individuals and their rate of success.

TABLE 5. Cases Filed by Private and Public Figures

Private Figure or Public Figure	*Number of Cases*	*Cases Dismissed or for Defendant*	*Cases Not Fully Adjudicated*	*Plaintiff Wins*
Private Figure	19	14	5	0
Public Figure	30	25	4	1

Only one public figure was successful in bringing a defamation claim. While more public figures brought life story claims than private figures, public figures were more likely to lose (83%) [122] than plaintiffs that were private figures (73%). Overall, however, the plaintiff's identity, whether a celebrity or not, did not severely impact the success rate of the plaintiff's case.

There was also not a drastic difference in the likelihood of success for claims regarding different styles of creative works. Table 6 shows a summary of the cases that involved a fiction work, nonfiction work, or a creative work based on a true story and the number of times the plaintiff lost.

TABLE 6. Genres of Works in Life Story Rights Cases

Fiction, Nonfiction, or Docudrama	*Number of Cases*	*Cases Dismissed or for Defendant*	*Cases Not Fully Adjudicated*	*Plaintiff Wins*
Fiction	13	10	2	1
Nonfiction	22	17	5	0
Docudrama / Based on a True Story	14	12	2	0

121. Kelly v. William Morrow & Co., 231 Cal. Rptr. 497, 503 (Ct. App. 1986).

122. These percentages were calculated by dividing the number of times the plaintiff lost by the number of times cases involved private or public figures, multiplied by one hundred. I rounded the percentages to the nearest whole number.

While cases involving works based on a true story were more likely to get dismissed (85.7%)[123] than works of nonfiction (77%) and fiction works (76.9%), it was only by a slight margin. Overall, the likelihood of the plaintiff winning was relatively low among all three types of creative works.

B. CASE SURVEY ANALYSIS

The results of the case survey demonstrate the incredible difficulty that a plaintiff has in winning against a producer or writer who used the plaintiff's life story in a creative work without the plaintiff's consent. There are only a narrow set of circumstances under which a plaintiff might win against a defendant, and even then, the chances are slim. The case survey reveals five important implications for the entertainment industry: (1) life story rights agreements can significantly deter subjects of creative works from bringing a lawsuit; (2) a plaintiff that can show clear evidence that a reasonable person would recognize the plaintiff in a fictional work can increase the likelihood of winning a defamation claim; (3) even if a producer is unable to procure life story rights, the First Amendment will almost always protect the producer from liability in right of publicity cases; (4) private plaintiffs may have a slightly higher chance of winning an invasion of privacy claim than public figures; and (5) a producer may not need to get life story rights in New York if the subject has a de minimus role in the expressive work. This Section addresses these five outcomes and suggests ways in which entertainment practitioners can utilize the information in practice.

1. Deterrent Effect of Life Story Rights Agreements

The case survey revealed that obtaining a life story rights agreement can deter subjects of creative works from filing lawsuits. Out of the forty-nine lawsuits in the case survey, only three of the cases involved plaintiffs who signed life story rights agreements that waived the defendant's liability. The large number of lawsuits filed by plaintiffs without life story rights agreements suggests that life story rights agreements may be an effective deterrent from meritless, yet costly lawsuits. It is likely that subjects who sign life story rights agreements feel bound by the agreement and are unwilling to challenge the validity of the agreement with a costly lawsuit. Even if the plaintiff brought a lawsuit after signing a life story rights agreement, it was highly likely to end in a dismissal of the case or summary judgment for the defendant.[124]

123. These percentages were calculated by dividing the number of the plaintiff times lost by the number of cases involving works of fiction, nonfiction, or based on a true story, multiplied by one hundred.

124. *See supra* Table 4; *see also* Marder v. Lopez, 450 F.3d 445, 449–50, 453 (9th Cir. 2006)

The deterrent effect may explain why even though plaintiffs are rarely successful in life story rights lawsuits, lawyers and entertainment practitioners continue to advise creators to obtain life story rights. Thus, if entertainment practitioners have the means and the ability to secure life story rights from the subject of their creative works, it will likely be a successful deterrent from future costly lawsuits. It may be a less expensive decision to pay for a subject's life story rights upfront rather than defend lawsuits down the road.

2. Defamation Claims

Although rare, the successful defamation claim found in my case survey can demonstrate the narrow circumstances for which a subject can actively protect his or her life story successfully. In *Bindrim v. Mitchell*, a licensed clinical psychologist, sued an author for publishing a fictional book based on the psychologist's "Nude Marathon" form of therapy.[125] The psychologist claimed that the book defamed him by creating an inaccurate portrayal of what actually happened during the therapy sessions and harming his professional reputation.[126] The court affirmed the judgment for the psychologist and found that there was clear and convincing evidence to support the defamation claim and the jury's finding of actual malice against the author.[127]

Often, the biggest obstacle for plaintiffs in defamation cases regarding fictional works is not being able to prove that the made-up character in the creative work is actually based on the plaintiff in real life.[128] Here, the author argued that because the book was a fictional novel, it barred any claim that the characters in the book were factual representations an actual person.[129] However, the psychologist prevailed because he provided clear and convincing third party evidence that the character in the book was "of and concerning" the psychologist in real life.[130] The court applied a test of whether a reasonable person reading the book would understand that the fictional character was, in actual fact, the plaintiff acting as described.[131] The psychologist provided evidence that three witnesses recognized the fictional

(recognizing that even though the price and terms of the agreement were unfair, the agreement barred the plaintiff's claims against the producer).

125. Bindrim v. Mitchell, 155 Cal. Rptr. 29, 33 (Ct. App. 1979).
126. *Id.* at 35.
127. *Id.*
128. *See supra* Table 3.
129. *Bindrim*, 155 Cal. Rptr. at 39.
130. *Id.* at 37.
131. *Id.* at 38.

character in the book as the psychologist in real life.[132] In addition, the psychologist provided recordings from his own session and demonstrated substantial similarities between the character's conduct in the book and the psychologist's actual conduct in the sessions.[133] The evidence was key to proving that the character in the novel and the psychologist were one and the same.[134]

In addition, the psychologist, a public figure, proved that the author acted with actual malice, and the court held that the award of punitive damages was proper.[135] Since the author had attended the "Nude Marathon" sessions and knew exactly what had transpired, the psychologist could prove that the author acted with "reckless disregard for the truth."[136] This one successful defamation case reveals that plaintiffs may increase their likelihood of success in life story rights litigation for fictional works if they have strong circumstantial evidence that the character represents the plaintiff and the defendant acted with actual malice.[137]

Therefore, producers, authors, or screenwriters who cannot obtain releases from unwilling or unavailable individuals are advised to craft characters and situations that are inspired by actual people and events, but where no individual is identifiable in the resulting work.[138] Another approach is to create a "composite" character, which represents a combination of various members of a particular life story, but cannot be identified as a specific individual.[139] This will help avoid the narrow circumstance in which the plaintiff is able to prove that the character in a fiction work is based on their life story and persona, and that the creative work defamed the plaintiff.

3. Right of Publicity Claims

The First Amendment will almost always bar a plaintiff's claim of right of publicity in life story rights litigation. Regardless of whether the plaintiff was a public figure or a private individual, or whether the creative work was

132. *Id.*
133. *Id.* at 37.
134. *See id.*
135. *Id.* at 36.
136. *Id.* at 35.
137. *See also* Geisler v. Petrocelli, 616 F.2d 636, 640 (2d Cir. 1980) (holding that the plaintiff, a private individual, could be identified in a fictional novel and was described in a defamatory manner, and that she should be allowed to present additional evidence to support her claims); Marcinkus v. NAL Publ'g, Inc., 522 N.Y.S.2d 1009, 1013 (Sup. Ct. 1987) (holding that even though this book was a novel and a work of fiction, its readers had no basis for believing that the story was real and there was no connection between the archbishop in the book and the archbishop himself; the motion to dismiss the complaint was denied, but the case was never fully adjudicated).
138. Krausz, *supra* note 9.
139. *Id.*

fiction or nonfiction, the court overwhelmingly supported the defendant's right to free speech and dissemination of information over the plaintiff's rights to his or her life story. There is also a very low threshold for determining whether the subject matter of a creative work is of public concern. A matter of public interest requires more than just "mere curiosity," but must be "something of concern to a substantial number of people."[140] For instance, in *Dora v. Frontline Video Inc.*, a well-known surfer could not bring a right of publicity claim against the producers for using his likeness in a documentary without consent because the documentary focused on surfing culture in California and his role within it, which was deemed a subject of public interest.[141] Thus, there is a low standard for defendants to show that the subject of their creative work is a matter of public concern, which is the first step towards dismissing a right of publicity claim.

Not only must the subject matter of the creative work be of public interest, but also the plaintiff's character or persona must be of public interest as well. For example, in *Sarver v. Chartier*, the court found that the Iraq War and the use of improvised explosive devices (IEDs) by insurgents was a matter of significant public interest.[142] Not only was the Iraq War of public interest, but the court concluded that the film's portrayal of the plaintiff's persona was an issue of public concern because of his role concerning IEDs during the war. Therefore, the film *The Hurt Locker* was protected by the First Amendment and the court dismissed the complaint under California's anti-SLAPP statute. The court reasoned that the First Amendment "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, be it articles, books, movies, or plays."[143] Therefore, if the right of publicity restricts the freedom of speech based upon its content, the court will favor freedom of speech over the right of publicity.

On the other hand, a defendant may be barred from bringing an anti-SLAPP motion if he cannot prove that an inclusion of the plaintiff's persona in the creative work is of public interest. In *Dyer v. Childress*, a plaintiff sued for defamation and invasion of privacy from his portrayal in the movie *Reality Bit*es, which focused on the issues facing Generation X at the start of the 1990s.[144] While the theme and purpose of the movie was of significant interest to the public, the plaintiff, a financial consultant living in Wisconsin

140. Sarver v. Chartier, 813 F.3d 891, 901–02 (9th Cir. 2016) (quoting Weinberg v. Feisel, 2 Cal. Rptr. 3d 385, 392 (Ct. App. 2003)).
141. Dora v. Frontline Video, Inc., 18 Cal. Rptr. 2d 790, 793–94 (Ct. App. 1993).
142. *Sarver*, 813 F.3d at 902.
143. *Id.* at 905.
144. Dyer v. Childress, 55 Cal. Rptr. 3d 544, 545 (Ct. App. 2007).

who happened to have gone to school with the screenwriter, was not connected to these issues in any way.[145] Therefore, the screenwriter could not dismiss the claim using an anti-SLAPP motion because the screenwriter could not show that the plaintiff's inclusion in the film was "in furtherance of [his] constitutional right of free speech in connection with a public issue or an issue of public interest."[146] However, this case was not fully adjudicated, and the parties likely settled.

Thus, a plaintiff bringing a right of publicity claim against a defendant who used the plaintiff's likeness in her or his creative work will almost always be barred by the First Amendment. The only instance in which a defendant may not be able to immediately dismiss the claim with an anti-SLAPP motion in California is if the defendant cannot prove the plaintiff's inclusion in the creative work was in the public interest. Therefore, producers or authors may want to ensure that the subject matter of the creative work meets the low threshold for "public interest" and that the characters in the creative work are also of public concern.

4. Invasion of Privacy Claims

Private individuals who bring an invasion of privacy claim may be slightly more successful than public figures who claim invasion of privacy, especially in nonfiction works. For instance, in *M.G. v. Time Warner, Inc.*, a television program used a photograph of a Little League team to illustrate a story about adult coaches who sexually assaulted youths playing on team sports.[147] The private plaintiffs who were exposed in the photograph had a viable invasion of privacy claim for both the disclosure of private facts and false light because the information that was revealed about the plaintiffs was private, not public information.[148] Although there was a highly publicized trial regarding the sexual assault of the Little League team, the plaintiffs' identities as coaches or players on that team were not revealed in any of the coverage of the case until the television program revealed the team photograph.[149] Also, the defendants could not claim that their identities were "newsworthy" because the intimate revelations had "only slight relevance to a topic of legitimate public concern," and it was not necessary to reveal the plaintiffs' identities for the purpose of the documentary.[150] However, even though the plaintiffs had a viable claim for invasion of privacy, the case was

145. *Id.* at 551.
146. *Id.*
147. M.G. v. Time Warner, Inc., 107 Cal. Rptr. 2d 504, 504 (Ct. App. 2001).
148. I*d.* at 510–11.
149. *Id.* at 511.
150. *Id.* at 513.

never fully adjudicated, and likely settled.

On the other hand, public figures may have a more difficult time arguing that the defendant's film or book revealed a private fact about them that was not already known. Even if they are able to show that private facts were revealed about a public figure, public figures will likely lose due to a newsworthy defense. For instance, in *Maheu v. CBS Inc.*, the plaintiff was considered a public figure because he was well-known for being Howard Hughes aide and helping Hughes maintain a prominent status in the public eye.[151] As a public figure, he was barred from bringing an invasion of privacy claim against the author of a best-selling biography about Howard Hughes because his involvement in the book was newsworthy and of public interest.[152] Given the social value of the facts published in the book and the fact that he voluntarily assumed and retained his status as a public figure, newsworthiness was clearly established and outweighed his right to privacy.[153] Thus, the right to privacy does not outweigh sharing newsworthy information with the public, especially for public figures.

Therefore, entertainment practitioners should be aware that private plaintiffs may have a slightly higher chance of winning an invasion of privacy claim than public figures. However, the case survey also reveals that private figures are less likely to bring a lawsuit than public figures.[154] While private figures brought eighteen cases, public figures brought twenty-eight cases. Even with a slightly higher chance of winning, private individuals may not have the means to bring a lawsuit, or determine that it is not worth the money to bring a time-consuming and costly lawsuit only to likely lose in court. On the other hand, public figures were more likely to bring a lawsuit because they likely had the resources to bring a lawsuit and wanted to defend their valuable name and reputation. Thus, entertainment practitioners should be wary of private figures that bring invasion of privacy claims, although they are less frequent than lawsuits by public figures.

5. De Minimus Defense in New York

Furthermore, in New York, it may not be necessary to obtain life story rights if a subject of a creative work is not central to the theme or main purpose of the work. The New York Civil Rights Law sections 50 and 51 do not apply if the plaintiff's portrayal in the work was merely incidental or de minimus. Whether a particular use of a plaintiff's name and likeness in a creative work is merely incidental is determined by assessing the relationship

151. Maheu v. CBS, Inc., 247 Cal. Rptr. 304, 311–12 (Ct. App. 1988).
152. *Id.*
153. *Id.* at 312.
154. *See supra* Table 5.

of the particular individual "to the main purpose and subject of the [work in issue]."[155] If the reason for including the plaintiff is not central or necessary to portray the main theme of the creative work, then the portrayal of the plaintiff is likely de minimus use and not actionable. For instance, in *Man v. Warner Bros.*, a professional musician was depicted for forty-five seconds in a documentary about the Woodstock Music Festival but could not recover damages because his appearance in the film was merely incidental to the purpose of the documentary.[156] Furthermore, in *Delan v. CBS Inc*., the court found that a mental hospital patient's four-second appearance in a documentary was fleeting and only a minor role to the central theme of the documentary, which focused on deinstitutionalization of mental hospital patients.[157] Finally, in *Ladany v. William Morrow & Co.*, a victim of a terrorist attack could not bring a claim under the New York Civil Rights Law because the book's references to the victim were fleeting and isolated.[158] Even though the book mentioned the victim's name on thirteen different pages and discussed his background and actions in some detail, they did not constitute a substantial amount in the 458-page book and were not central to the main purpose of the book.[159]

A "life story" can range from a broad scope of an individual's entire life story to a single event within a person's life that makes them interesting. However, in New York, courts are likely to find that a person whose "life story" only involves a small event that is used minimally in a creative work cannot bring a claim under the Civil Rights Law. Therefore, an entertainment practitioner in New York may not need to secure life story rights for every single subject in their creative work because they are likely to be protected by the de minimus rule.

IV. APPLYING THE CASE SURVEY RESULTS TO THE ENTERTAINMENT INDUSTRY

The survey results reveal that plaintiffs will only win life story rights cases under a limited set of circumstances. So, the original purpose for obtaining life story rights, which was to avoid a costly lawsuit and an injunction against a creative work, is not a major concern today.[160]

155. Delan v. CBS, Inc., 458 N.Y.S.2d 608, 614 (App. Div. 1983).
156. Man v. Warner Bros., 317 F. Supp. 50, 53 (S.D.N.Y. 1970).
157. *Delan*, 458 N.Y.S.2d at 614.
158. Ladany v. William Morrow & Co., 465 F. Supp. 870, 881 (S.D.N.Y. 1978).
159. *Id.* at 882.
160. Telephone Interview with Kavita Amar, Senior Vice President of Bus. & Legal Affs., New Line Cinema (Nov. 20, 2020) [hereinafter Telephone Interview with Kavita Amar] ("If someone wants to enjoin the film, it is a really hard level to meet, and even with defamation claims you would just give damages and not enjoin the film. It is such a high standard for a court enjoin a film based on someone's

Theoretically, the low likelihood of success for plaintiffs and the high chance that the case will be dismissed should allow producers and writers to forgo the costly and time-consuming practice of obtaining life story rights from the subjects of their creative works. However, obtaining life story rights still remains an industry-wide standard and main priority for creating works based on real people and real stories. Why have entertainment practitioners failed to recognize that the lawsuits are meritless and adjusted their practice? If life story rights are expensive, why do studios continue to spend the money without the threat of having their film or novel being enjoined?

This continuing practice to obtain life story rights can be explained by the deterrent effect of the agreement, as well as the unique benefits that arise from owning the exclusive rights to a subject's life story. These benefits, developed over the course of negotiating and contracting with the subjects of the creative work, have made it worthwhile for creators to continue the costly practice of purchasing life story rights, despite not having a major chance of losing in a lawsuit. "Life story rights" are now used by entertainment attorneys and executives to refer to a person's real experiences from which a "deal" may be fashioned to produce a creative work,[161] rather than a promise not to sue.[162] While it is still important to consider that obtaining a life story rights agreement drastically reduces the number of meritless lawsuits filed against the creator,[163] producers and filmmakers can consider a variety of other factors when negotiating to purchase life story rights.

One of the benefits of owning the rights to a life story includes exclusive and substantive information that enhances the project. Often, a story's appeal based on a real person or event is centered on a factually accurate portrayal, and the audience wants to hear a truthful retelling with an insider perspective of how an event unfolded.[164] Thus, it would be in the best interest of the creator to obtain exclusive access to private information directly from the subject in order to provide an intimate and truthful approach to the creative work.[165] To prevent the subject of a creative work from sharing information

portrayal of them in it.").

161. Lentzner, *supra* note 8, at 636.

162. 6 MELVILLE NIMMER, NIMMER ON COPYRIGHT § 23.07 (2020).

163. *See supra* Part III.

164. *See generally* MARK LITWAK, DEALMAKING IN THE FILM & TV INDUSTRY (3d ed. 2009) (discussing negotiations and contract strategies in the film and television industry).

165. 3 ENTERTAINMENT INDUSTRY CONTRACTS FORM 63-1 (2020). A purchaser may include a "Disclosure and Consultation" clause in which the subject must disclose

> all information in Owner's possession or under Owner's control including, without limitation, copies of any newspaper or magazine clippings, photographs, transcripts, notes, recordings, or other physical materials relating to Owner's story and all Owner's thoughts, observations, recollections, reactions and experiences surrounding, arising out of, and concerning all those events, circumstances, and activities, relating to Owner's story.

with others, the creator can make the information completely exclusive, "in perpetuity, worldwide, in every form of media, now known or hereafter known."[166] If the creator is focusing only on a specific event for the story, the agreement can be tailored so that it only covers a specific time period within the subject's life.[167]

In addition, while a creator may want the subject's exclusive cooperation in order to tell an accurate story, in other instances, the creator may want the freedom to exaggerate and dramatize the facts.[168] Contracting with the subject of the creative work gives the creator some leeway in fictionalizing the life story without being restrained by the accuracy of the facts.[169] The subject must agree to give the creator complete freedom to dramatize certain aspects of his or her life, and with the main subject on board, the creator can completely change the facts surrounding the event and supporting characters involved.[170] If the subject has concerns with the portrayal, the creator can include specific limitations into the agreement.[171] However, because the creator is taking all of the financial risk in purchasing the rights and financing a production or novel, the creator will often seek the greatest possible control over the creative work and insist on the final say on all creative decisions.[172]

Additionally, obtaining rights to a life story creates good publicity surrounding the work. For instance, most private individuals who have never been in the spotlight before will be excited to be approached by a filmmaker or writer who takes their story seriously and wants to portray it to the world[173] Once the creators get the subject's consent, they can hire the subject as a consultant, give the subject a sneak preview of the creative work, and

Id.

166. Telephone Interview with Kavita Amar, *supra* note 160.

167. *Id.*

168. *Id.*

169. Lentzner, *supra* note 8, at 636.

170. Telephone Interview with Kavita Amar, *supra* note 160 ("The main family (or character), we get their life story rights. But we can give them fake girlfriends or boyfriends, spouses maybe, give them fictional friends. But you really just want the main characters.").

171. *Id.* ("The subjects have very little creative freedom and they rarely get input on the actual pages. The director might meet with these people in the beginning of the process, just to get information or stories or tidbits and work it into the script. But most of the time we already know that this story is out there and we just want to portray them. They're not invested in reading the script, and they wouldn't even give them the script. But they get to see the preview and end titles, and we have never had anyone say they didn't like the movie.").

172. 3 ENTERTAINMENT INDUSTRY CONTRACTS FORM 63-1 (2020). For example, the life story rights agreement may state that the "purchaser shall have the right to include or cause to be included in any such [p]roduct such actual or fictional events, scenes, situations, dialogue and other materials as [p]urchaser may consider desirable or necessary in [p]urchaser's sole and absolute discretion." *Id.*

173. Telephone Interview with Kavita Amar, *supra* note 160.

invite the subject to the premiere.[174] Involving a subject from the beginning of the process and demonstrating to the public his or her clear support for the film, television series, or book adds legitimacy to the creative work.

Furthermore, obtaining the rights to a person's life story can significantly increase the authenticity of the work over other works about the same person. Although a life story rights agreement cannot prevent another creator from producing a similar work based on the same individual if the facts are already public, contracting with the subject of the story and getting his or her endorsement can raise the level of authenticity above any other work.[175] Gaining support from the main character of the creative work is like guaranteeing to the public that the creator and subject are working together to portray the best story. On the other hand, failing to obtain life story rights may risk bad publicity for the creative work. Without an agreement, the subject of the story could discredit the creative work by claiming the story is not true and that the producer did not have support or consent to create the work.[176]

Moreover, a life story rights agreement allows the creator to produce derivative works based on the subject's life story without having to renegotiate the terms of the deal in the future.[177] Derivative works may include remakes, sequels, television series, merchandising, novelization, or live-stage rights[178] Even if a creator merely wants to include a "flashback" to the life story in a future work, the creator would not have to renegotiate with the subject just to include a small segment.[179]

Finally, even if a creator decides not to go through with making the movie, the creator is protected and does not have an obligation to proceed under an option contract.[180] An option contract allows a producer to secure exclusive rights to the subject's life story while investigating the value and

174. *Id.*

175. *Id.*

176. Telephone Interview with Kavita Amar, *supra* note 160 ("It could be really bad publicity, someone discrediting the movie you just put millions of dollars into, bad interviews, or maybe another studio gets the life story rights of that person and then you're screwed because you wanted the exclusive and now they have the exclusive.")

177. *Id.*

178. LITWAK, *supra* note 164.

179. Telephone Interview with Kavita Amar, *supra* note 160.

180. *Id.* ("If you're not sure, you do an option purchase agreement. You can have an option period, such as [two] option periods, each one for twelve months. Or you two options for [eighteen] months each, giving you two to three years to really develop a movie before you pull the plug on it. After those periods are up, then you decide to pay the big purchase price because you think the movie is going somewhere and you don't want to lose it, or you can go back and ask them for another year, can we pay you another [fifty] grand for another year to develop this to see if we can get anywhere. They usually say yes because they are invested in it. Then you pay the big purchase price when you think you have something that's going to go forward.")

worth of creating a film or television series based on the subject's life.[181] A creator will typically want as much time as possible to decide whether or not to exercise the option to purchase the life story, but the subject will maintain the ability to sell his or her story to other buyers if the creator decides not to make the purchase.[182] Typically, the option fee can be as low as $500 or as much as $25,000, which is typically set at ten percent of the minimum purchase price that can range up to around $500,000, depending on the value of the story.[183]

After considering all of the benefits that come with owning the rights to a life story, it is often the obvious choice to purchase life story rights when creating a work based on a true story. Big name studios with deep pockets will almost always purchase life story rights if the subject agrees to the deal.[184] However, in some cases, producers may attempt to obtain life story rights from an individual, but they are unable to reach the individual to negotiate. Or, if they do get in touch with the individual, they may not agree on the terms of the deal, and the individual may simply refuse to sell. Most often, however, the biggest obstacle to purchasing life story rights is money.[185] The purchase price for an exclusive life story is usually incredibly high, depending on the notoriety of the subject or the high demand for the story. Not everyone has the deep pockets of a big studio available to purchase the life story rights when creating a film or book based on a true story.

As previously discussed, however, there are certain precautions that creators can take to protect themselves, even without a life story rights agreement. For example, producers of nonfiction works such as documentaries or biographies can make sure that the subject's life story is a matter of public concern. Thus, if the subject of a nonfiction work brings a lawsuit against the producers, the subject will likely lose in court based on a

181. Lentzner, *supra* note 8, at 632.

182. *Id*.

183. 3 ENTERTAINMENT INDUSTRY CONTRACTS FORM 63-1 (2020). Factors that influence the price of a life story may include: (1) whether the story that has been in newspaper headlines for several months, which will command a much higher option and purchase price than a little-known story; (2) the nature of the exploitation, in which a producer will pay more for a work which will be a network mini-series than for a short nontheatrical film; and (3) the length of the option, in which an eighteen-month option term is worth almost three times the value of a six-month option. "Option price is 10% of the purchase price, sometimes 30% in other deals. They might pay $50,000 for the option for each year, but then pay $500,000 for the purchase of the life story (this is an example for a big movie, not your run of the mill). So it's a significant difference if you don't end up making the movie in what you would pay." Telephone Interview with Kavita Amar, *supra* note 160.

184. Telephone Interview with Kavita Amar, *supra* note 160 ("Where I work, at a studio like Warner Bros. and New Line Cinema, with deep pockets, our standard is usually to just err on the side of getting [life story rights].").

185. *Id*.

newsworthy or First Amendment defense.[186] On the other hand, if a creator wants to produce a fictional novel or film based on a true story, then the creator should completely fictionalize the characters so that they are unrecognizable by the public.[187] This will help to defeat defamation claims and right of publicity claims if the plaintiff cannot prove that the work was actually based on the plaintiff's life story. This works best if the story is based on an individual who is not already in the public eye because it may be incredibly difficult to prove that the character is not based on his or her life.[188]

In sum, there are numerous benefits to obtaining life story rights agreements, which explains the continuing practice of purchasing life story rights despite the low likelihood of a plaintiff winning against a creator in court. However, producers and writers who cannot afford the high purchase price of a life story rights agreement may be able to publish a creative work without fear of liability, as long as they take certain precautions and protections.

CONCLUSION

Individuals who have their life story "stolen" and appropriated into a creative work have extremely limited remedies in California and New York. While many producers obtain life story rights to prevent the cost of future lawsuits, this case survey reveals that even without an agreement, it is incredibly difficult for a plaintiff to win a lawsuit against a producer who has used the plaintiff's life story in a creative work without consent. The plaintiff will almost always be barred from bringing a claim for right of publicity or invasion of privacy by the First Amendment, and private figures may have only a slightly better chance of success than public figures. This Note's case survey also reveals that producers need to be particularly careful with defamation claims in circumstances in which the plaintiff is able to prove a character in the fiction work is recognizable as the plaintiff.

However, despite the low likelihood that the plaintiff will win, there is an industry-wide practice in which producers and authors feel that obtaining life story rights is essential. Producers and writers continue to obtain life story rights not only to deter expensive and meritless lawsuits, but also for other benefits such as increased control over the creative work and a source

186. *See supra* Section III.B.

187. *See supra* Section III.B.2.

188. Telephone Interview with Kavita Amar, *supra* note 160 ("This works for people who aren't really in the public eye, but you can change their name and their look. Like a story in a newspaper, and you find it really interesting, but you change name and look, so they can't claim that this story is about them, even if it's the exact same story. You take away their claims.").

of accurate, exclusive information from the individual directly.[189] However, creators working on a limited budget may decide that they cannot afford to purchase life story rights, but they can continue creating the work after taking certain precautions because the likelihood of losing in life story rights cases is slim.[190]

Ultimately, despite the economic and legal challenges, obtaining life story rights from the subject of a creative work will likely lead to a happy ending for both the creator and the subject.

189. *See supra* Part IV.
190. *See supra* Section III.B.

APPENDIX[191]

TABLE A1. Analysis of Life Story Rights Legal Claims

Case	*State Law*	*Claims Brought*	*Genre*	*Private Figure or Public Figure*	*Life Story Rights Agreement?*	*Outcome*[192]	*Reason for Plaintiff Loss*
Aguilar v. Universal City Studios, Inc., 219 Cal. Rptr. 891 (Ct. App. 1985).	CA	Invasion of Privacy Defamation	Fiction	Private Figure	No	Summary Judgment for Defendants*	No Clear Identification of Plaintiff
Alszeh v. Home Box Off., 80 Cal. Rptr. 2d 16 (Ct. App. 1998).	CA	Defamation Invasion of Privacy	Nonfiction	Public Figure	No	Summary Judgment for Defendants *	No Clear Identification of Plaintiff
Bindrim v. Mitchell, 155 Cal. Rptr. 29 (Ct. App. 1979).	CA	Defamation	Fiction	Public Figure	No	Plaintiff wins*	N/A
Brown v. Showtime Networks, Inc., 394 F. Supp. 3d 418 (S.D.N.Y. 2019).	CA; GA	Right of Publicity	Nonfiction	Public Figure	No	Dismissed	First Amendment (CA) Newsworthy (GA)
De Havilland v. FX Networks, LLC, 230 Cal. Rptr. 3d 625 (Ct. App. 2018).	CA	Right of Publicity Invasion of Privacy–False Light	Docudrama	Public Figure	No	Dismissed**	First Amendment Not Defamatory Statement
Dora v. Frontline Video, Inc., 18 Cal. Rptr. 2d 790 (Ct. App. 1993).	CA	Right of Publicity	Nonfiction	Public Figure	No	Summary Judgment for Defendant*	Newsworthy
Dyer v. Childress, 55 Cal. Rptr. 3d 544 (Ct. App. 2007).	CA	Invasion of Privacy–False Light Defamation	Fiction	Private Figure	No	?	N/A
Ferlauto v. Hamsher, 88 Cal. Rptr. 2d 843 (Ct. App. 1999).	CA	Defamation	Nonfiction	Public Figure	No	Dismissed*	Not a Defamatory Statement
Forsher v. Bugliosi, 608 P.2d 716 (Cal. 1980).	CA	Invasion of Privacy–False Light	Nonfiction	Public Figure	No	Dismissed*	First Amendment

191. The entries marked with a question mark in the Appendix indicate that the relevant case was either settled out of court or that the final opinion was not published.

192. Each outcome listed is the final outcome. Those marked with "*" represent cases in which the court of appeals affirmed the trial court's judgment or verdict, and those final outcomes marked with "**" represent cases in which the court of appeals reversed the trial court's original judgment or verdict.

		Defamation					No Special Damages
							Not Defamatory Statement
Gates v. Discovery Commc'ns, Inc., 101 P.3d 552 (Cal. 2004).	CA	Invasion of Privacy	Nonfiction	Public Figure	No	Dismissed**	First Amendment
		Defamation					No Actual Malice
Idema v. Dreamworks, Inc., 162 F. Supp. 2d 1129 (C.D. Cal. September 10, 2001).	CA	Right of Publicity	Docudrama	Public Figure	No	Dismissed	Preempted by Copyright
Kelly v. William Morrow & Co., 231 Cal. Rptr. 497 (Ct. App. 1986).	CA	Invasion of Privacy	Nonfiction	Private Figure	Yes	?	N/A
		Defamation					
M.G. v. Time Warner, Inc., 107 Cal. Rptr. 2d 504 (Ct. App. 2001).	CA	Invasion of Privacy–Public Disclosure of Private Facts	Nonfiction	Private Figure	No	?	N/A
Maheu v. CBS, Inc., 247 Cal. Rptr. 304 (Ct. App. 1988).	CA	Invasion of Privacy–False Light	Nonfiction	Public Figure	No	Dismissed*	Newsworthy
		Right of Publicity					First Amendment
Marder v. Lopez, 450 F.3d 445 (9th Cir. 2006).	CA	Right of Publicity	Fiction	Public Figure	Yes	Dismissed*	Barred by Life Story Rights Agreement
O'Hilderbrandt v. Columbia Broad. Sys., Inc., 114 Cal. Rptr. 826 (Ct. App. 1974).	CA	Invasion of Privacy–False Light	Nonfiction	Public Figure	No	Dismissed*	First Amendment
							Newsworthy
Polydoros v. Twentieth Century Fox Film Corp., 79 Cal. Rptr.. 2d. 207 (Ct. App. 1997).	CA	Right of Publicity	Fiction	Private Figure	No	Summary Judgment for Defendant*	First Amendment
		Defamation					No Clear Identification of Plaintiff
Sarver v. Chartier, 813 F.3d 891 (9th Cir. 2016).	CA	Right of Publicity	Based on a True Story	Private Figure	No	Dismissed*	First Amendment
		Invasion of Privacy–False light					Not Defamatory Statement

		Defamation					
		Constructive Fraud/Negligent Misrepresentation					
Shulman v. Grp. W Prods., Inc., 955 P.2d 469 (Cal. 1998).	CA	Invasion of Privacy–Public Disclosure of Private Facts	Nonfiction	Private Figure	No	Summary judgment for defendant for invasion of privacy—Public Disclosure of private facts	Newsworthy First Amendment
Tamkin v. CBS Broad., Inc., 122 Cal. Rptr. 3d 264 (Ct. App. 2011).	CA	Invasion of Privacy–False Light	Fiction	Private Figure	No	Dismissed**	First Amendment
		Defamation					No Clear Identification of Plaintiff
William O'Neil & Co. v. Validea.com, Inc., 202 F. Supp. 2d 1113 (C.D. Cal. 2002).	CA	Right of Publicity	Nonfiction	Public Figure	No	Dismissed	First Amendment
Allen v. Gordon, 446 N.Y.S.2d 48 (App. Div. 1982).	NY	Right of publicity	Fiction	Private Figure	No	Dismissed*	No Clear Identification of Plaintiff
		Defamation					
Atkins v. Friedman, 374 N.Y.S.2d 11 (App. Div. 1975).	NY	Invasion of privacy	Fiction	Public Figure	No	Summary Judgment for Defendants**	Newsworthy
		Defamation					No Actual Malice
Cerasani v. Sony Corp., 991 F. Supp. 343 (S.D.N.Y. 1998).	NY	Defamation	Based on a True Story	Public Figure	No	Dismissed	No Clear Identification of Plaintiff
		Right of Publicity					Statements Not Defamatory
Cammaroto v. Anson, 416 N.Y.S.2d 824 (App. Div. 1979).	NY	Invasion of privacy	Based on a True Story	Public Figure	No	?	N/A
Carter-Clark v. Random House, Inc., 793 N.Y.S.2d 394 (App. Div. 2005).	NY	Defamation	Fiction	Private Figure	No	Dismissed*	No Clear Identification of Plaintiff
Cohn v. Nat'l Broad. Co., 414 N.Y.S.2d 906 (App. Div. 1979).	NY	Invasion of Privacy	Docudrama	Public Figure	No	Dismissed**	Statements Not Defamatory
		Defamation					

							No actual malice
							Newsworthy
Costanza v. Seinfeld, 719 N.Y.S.2d 29 (App. Div. 2001).	NY	Right of Publicity	Fiction	Private Figure	No	Dismissed*	No Clear Identification of Plaintiff
		Defamation					Statements Not Defamatory
Delan v. CBS, Inc., 458 N.Y.S.2d 608 (App. Div. 1983).	NY	Invasion of privacy	Nonfiction	Private Figure	No	Summary Judgment for Defendant**	Merely Incidental reference to Plaintiff
							Newsworthy
Duncan v. Universal Music Grp. Inc., No. 11-CV-5654, 2012 U.S. Dist. LEXIS 75998 (E.D.N.Y. May 30, 2012).	NY	Invasion of privacy	Fiction	Private Figure	No	Dismissed	No Clear Identification of Plaintiff
		Defamation					Statute of Limitations
Geisler v. Petrocelli, 616 F.2d 636 (2d Cir. 1980).	NY	Defamation	Fiction	Private Figure	No	?	N/A
		Invasion of Privacy					
Greene v. Paramount Pictures Corp., 813 F. App'x 728 (2d Cir. 2020).	NY	Invasion of Privacy	Docudrama	Public Figure	No	Summary Judgment for Defendant*	No Clear Identification of Plaintiff
		Defamation					No Actual Malice
Hicks v. Casablanca Records, 464 F. Supp. 426 (S.D.N.Y. 1978).	NY	Right of Publicity	Docudrama	Public Figure	No	Dismissed	First Amendment
Ladany v. William Morrow & Co., 465 F. Supp. 870 (S.D.N.Y. 1978).	NY	Defamation	Based on a True Story	Public Figure	No	Summary Judgment for Defendant	Statements Not Defamatory
		Invasion of Privacy					Merely Incidental reference to Plaintiff
Lyons v. New Am. Library, Inc., 432 N.Y.S.2d 536 (App. Div. 1980).	NY	Defamation	Docudrama	Private Figure	No	Dismissed**	No Special Damages

Man v. Warner Bros., Inc., 317 F. Supp. 50 (S.D.N.Y. 1970).	NY	Right of Publicity	Nonfiction	Public Figure	No	Dismissed	Newsworthy Merely Incidental reference to Plaintiff
Marcinkus v. NAL Pub., Inc., 522 N.Y.S.2d 1009 (Sup. Ct. 1987).	NY	Right of Publicity	Based on a True Story	Public Figure	No	?	N/A
Meeropol v. Louis Nizer, Doubleday & Co., 560 F.2d 1061 (2d Cir. 1977).	NY	Invasion of Privacy Defamation	Nonfiction	Public Figure	No	Summary Judgment for Defendant on Invasion of Privacy and Defamation Claims	No Actual Malice Newsworthy
Porco v. Lifetime Entm't Servs., LLC, 109 N.Y.S.3d 516 (App. Div. 2019).	NY	Right of Publicity	Docudrama	Public Figure	No	Dismissed	Plaintiff Had No Basis to Appeal
Rinaldi v. Holt, Rinehart & Winston, Inc., 366 N.E.2d 1299 (N.Y. 1977).	NY	Defamation	Nonfiction	Public Figure	No	Summary Judgment for Defendant**	No Actual Malice
Rosemont Enters., Inc. v. McGraw-Hill Book Co., 380 N.Y.S.2d 839 (Sup. Ct. 1975).	NY	Right of Publicity	Based on a True Story	Public Figure	No	Dismissed	First Amendment
Shapiro v. NFGTV, Inc., No. 16 Civ. 9152, 2018 U.S. Dist. LEXIS 22879 (S.D.N.Y. Feb. 8, 2018).	NY	Defamation	Nonfiction	Private Figure	Yes	Dismissed	Barred by Release of Liability Agreement
Sinatra v. Wilson, No. 76 Civ. 2023, 1977 U.S. Dist. LEXIS 18142 (S.D.N.Y. Feb. 24, 1977).	NY	Invasion of Privacy	Nonfiction	Public Figure	No	?	N/A
Smith v. Goro, 323 N.Y.S.2d 47 (Sup. Ct. 1970).	NY	Invasion of Privacy	Nonfiction	Private Figure	No	?	N/A
Springer v. Viking Press, 60 N.Y.2d 916 (1983).	NY	Defamation Invasion of Privacy	Fiction	Private Figure	No	Dismissed*	No Clear Identification of Plaintiff
Trump v. O'Brien, 29 A.3d 1090 (N.J. Super. Ct. App. Div. 2011).	NY	Defamation	Nonfiction	Public Figure	No	Summary Judgment for Defendants*	No Actual malice
Waters v. Moore, 334 N.Y.S.2d 428 (Sup. Ct. 1972).	NY	Right of publicity Defamation	Nonfiction	Public Figure	No	Right of Publicity claim dismissed ?	No Clear Identification of Plaintiff

Weber v. Multimedia Entm't, Inc., No. 97 Civ. 0682, 2000 U.S. Dist. LEXIS 5688 (S.D.N.Y. Apr. 29, 2000).	NY	Right of Publicity Defamation	Nonfiction	Private Figure	No	Summary Judgment for Defendant	Newsworthy No Gross Negligence