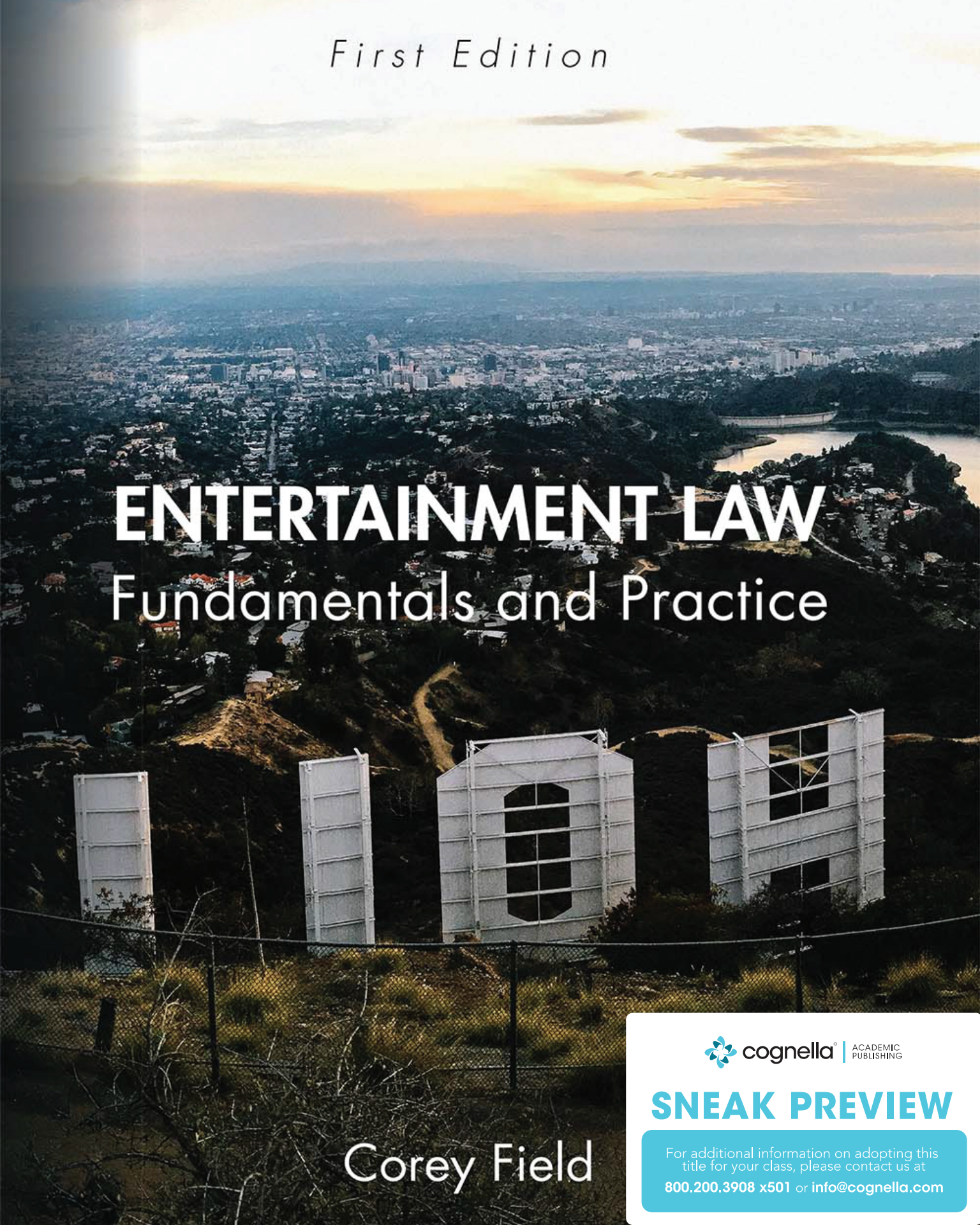
First Edition

ENTERTAINMENT LAW

Fundamentals and Practice



Corey Field

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ENTERTAINMENT LAW

Fundamentals and Practice

Corey Field

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Portions of this work were formerly available as a legal treatise under the title Entertainment Law: Forms and Analysis, published by Law Journal Press, a division of American Lawyer Media

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Entertainment Law Fundamentals and Practice is both a scholarly and a practical work. It is designed for comprehensive law school courses in all topics of entertainment law, and also as a practical "how to" guide for practicing lawyers. My enormous thanks to everyone at Cognella Academic Publishing for their expertise, professionalism, and enthusiasm in bringing this work to its readers.

Those readers include students in my entertainment law courses at USC Gould School of Law. "Be lawyers, think like lawyers" I tell them, and this book is designed to achieve that goal. They are the future of the entertainment industry and this book is for them.

This publication is eminently practical thanks to my clients and colleagues who have put their faith and trust in me as an attorney in a broad range of entertainment law and intellectual property fields. Prior to becoming a lawyer I was a music publisher by profession, and many of those entertainment industry colleagues showed me how it works in the real world, an ideal preparation for the law which has made all the difference.

For my wife Heather Anne Schmidt and the "crew" at home, thank you for the glowing and stellar aura of your love.

Law is a powerful and much needed force that protects and nurtures creativity, and the entertainment industry that depends on that divine spark. May this book help.

Corey Field

PREFACE

The definition of "entertainment law" expands in accordance with the needs of the companies and individuals that comprise the entertainment industry. "Entertainment law" can encompass vast areas of the law including contract law, corporate law, intellectual property, technology and regulatory law, and other areas that might intersect with an entertainment client's activities.

Chapter 1 discusses film, using the creative and business timeline for the film industry as the outline for a presentation of how projects are conceived, financed, produced, distributed, and accounted for, including the roles of talent and their representation. Also covered are legal issues encountered in productions ranging from depiction of characters and people in media, to financing.

Chapter 2 on television encompasses all the current business models, from traditional networks and affiliates, to cable and satellite Multichannel Video Program Distributors (MVPDs), to online and mobile "over the top" ("OTT") streaming apps and webisodes offering Subscription Video on Demand (SVOD).

Chapter 3 on book and magazine publishing includes a detailed description, along with the legal underpinnings, of publishing deal points and negotiation. The chapter also examines digital issues in the magazine and online database publishing industries.

Chapter 4 reviews all facets of the music industry, beginning with a presentation of copyright law as the "blueprint" of the music industry as an introduction to understanding the different creative aspects and business models such as recording, publishing, and live performance, licensing, royalties, digital and online formats, and the role of agents and managers. Music licensing, including performing rights, synchronization, mechanicals, and master licensing are all presented in detail.

Chapter 5 presents the major contractual, ownership, licensing and business models of live theatre, including the Broadway stage.

Chapter 6 discusses radio. The chapter provides a review of the regulatory background of the industry, the financial models, the complex world of Internet radio music licensing, and some of the leading issues regarding on-air formats and agreements with on-air personalities.

Chapter 7 on celebrity rights of publicity and privacy presents an in-depth history of the laws that affect celebrities, including the right of publicity, defamation, the right of privacy, and the so-called "anti paparazzi" laws, as well as negotiation points in celebrity endorsement agreements. It includes a summary of the leading case law on the myriad types of right of publicity cases, ranging from look-alike and sound-alike cases to computer games.

Chapter 8 reviews the evolving state of "cyber law," and the ways in which current high technology affects—and is affected by—the law, including summaries of domain name registration and litigation, trademark rights on the internet, open source software legal issues, and the Digital Millennium Copyright Act.

A varied collection of "real world" blank contract forms is available online from the publisher as a supplement to the text. The forms are essential for acquiring knowledge of potential deal points and business models, though the user is cautioned that as "real" contracts they may contain one-sided provisions and other customizations. Any adaptation of a form for practical use will require the practitioner's judgment, perspective, client needs, expertise, and edits, skills that will hopefully be greatly enhanced by this book.

ABOUT THE AUTHOR

COREY FIELD. Corey Field represents clients in all facets of the entertainment industry including film, television, music publishing, music recording, live concerts, book and magazine publishing, social media, internet and high technology, celebrity rights, agents, managers, and software. His clients range from some of the largest entities in the entertainment industry, to new and emerging companies, celebrities and athletes, the estates of novelists and public figures, high technology and software enterprises, nonprofit arts and cultural organizations, composers, writers, performing and dance groups, and entrepreneurs.

Prior to practicing law, Mr. Field was an executive in the international music publishing industry, and is a trained musician with a doctorate in music. He is active nationwide as a speaker, author, television commentator, and board member. From 2010 to 2012, he served as the President of The Copyright Society of the U.S.A. (New York); and currently serves on the board of leading nonprofit arts and entertainment industry organizations including as a Trustee of the BMI Foundation; a Trustee of the Kurt Weill Foundation for Music; a member of the Classical Radio KUSC Advisory Board; and is on the Grammy Foundation's Entertainment Law Initiative Advisory Committee. He formerly served as Treasurer of the American Music Center (New York), as a Governor of the Philadelphia Chapter of the Recording Academy, as a Trustee of the Marlboro Music School and Festival (Vermont), and as a board member of the Music Publishers' Association of the United States.

His writings on entertainment and copyright law have been published in scholarly journals including the *Journal of The Copyright Society of the U.S.A.; the UCLA Entertainment Law Review; The Delaware Journal of Corporate Law; the Journal of Intellectual Property Law; Entertainment and Sports Lawyer; and the Entertainment, Publishing, and the Arts Handbook.* Mr. Field is an Adjunct Professor at the USC Gould School of Law where he teaches Entertainment Law, Entertainment Law in Practice, and Music Law in Practice. He was formerly an instructor for UCLA Extension where he taught Copyright Law in the Entertainment Industry. He is a guest speaker and panelist for law schools, legal organizations, and entertainment industry associations nationwide, and recently conducted a course on film and copyright law in Beijing, China, for leading Chinese entertainment industry companies, on behalf of the USC School of Cinematic Arts. Mr. Field currently also serves as Outside Counsel for the Sundance Film Festival and Sundance Institute.

Mr. Field work as an attorney on behalf of his clients has been recognized by inclusion in *The Best Lawyers in America* in the field of entertainment and copyright law and as a Southern California Super Lawyer in the field of Entertainment and Sports Law. He is a member of the California, New York, and Pennsylvania bars and holds a B.A. in Music from the University of California at Santa Barbara; a Ph.D (D.Phil.) in Music Composition from the University of York, England, and a J.D. *cum laude* from Widener University School of Law where he attended while working full time in the music industry and was a staff member of the law review *The Delaware Journal of Corporate Law*. He is the author of several published and recorded musical compositions and articles on music, and is the editor of *The Musician's Guide to Symphonic Music*. Corey formerly practiced in the Los Angeles office of a national law firm, and is the founder of Corey Field Law Group, P.C., a boutique specializing in entertainment, media, copyright and trademark law (www.coreyfieldlaw.com).

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CHAPTER 1

FILM

§1.01 Introduction

As the Second Circuit has observed, "Filmmaking is a collaborative process typically involving artistic contributions from large numbers of people, including—in addition to producers, directors, and screen-writers—actors, designers, cinematographers, camera operators, and a host of skilled technical contributors."[1] Film is an enormously collaborative medium, more akin to a military general assembling and commanding an army than any other art form. Because filmmaking is a quasi-industrial endeavor, the creative vision of a few key people must be supported by a virtual army of technicians, craftspeople, marketers, financiers, and bookkeepers. An entertainment lawyer whose practice includes film may find a need to be conversant in several areas of the law, including:

- Intellectual Property Law: for the acquisition of underlying rights, and the protection of the IP embodied in the film, including copyright and trademarks;
- Business and Finance/Securities: for the successful acquisition of funding and investment for the project and the required accountings;
- Labor and Employment: for the personal services agreements for cast and crew, and for working with trade unions, guilds, and collective bargaining entities in the film industry;
- Agency: for dealing with the roles of agents and managers who represent actors, directors, and writers;
- Insurance: for advising on insurance coverage requirements in the film industry;
- Advertising: for advising on marketing and promotion, including celebrity rights of publicity, and product placement, tie-ins consisting of advertising the film in conjunction with other companies, and related advertising issues;
- Corporate Law: for dealing with formation of business entities;
- Contract Law: for reducing all of the above to operative agreements.

1 See *16 Casa Duse, LLC v. Merkin*, 791 F.3d 247, 258 (2d Cir. 2015).

This chapter will present a practical, chronological approach to the various tasks that an entertainment lawyer will likely encounter, from initial conception of a project to its completion, distribution, marketing, and financial accounting, both for motion pictures, and for television projects.

§1.02 The Life Cycle of a Film

[1]—Production

The life cycle of a film, from initial concept to completion and distribution, can span many years during which the producer will have many creative and business tasks to accomplish to complete a motion picture and achieve distribution to the public. A helpful visual aid describing the creative and business steps that must be climbed will be found as an Appendix to this Chapter (§1:15[1], "The Film Production Pyramid".

[a]—Development

The initial creative stages usually occur prior to obtaining a firm commitment for financing or production. During development, a writer will be commissioned to create the first draft of the screenplay. The project's producer will attempt to interest a lead actor and a director to "attach" themselves to the project. During this phase, the producer may obtain option rights on a preexisting story, and depending on how long development takes, may need to exercise those options in order to extend the period available to obtain either independent or studio financial backing. This phase will also include a draft budget for the project's finances, with a total amount represented by the "negative cost"[2] of the project.

Development may be underwritten by the studio that makes preliminary investments in the producer and the screenwriter. If the studio loses interest in the project, the project may go into "turnaround," whereby the studio allows the producer to shop the project to other studios. The original studio may retain certain rights in such turnaround scenarios, such as the right to be reimbursed for its prior development costs.

For a detailed insider's view of the development process, *Buchwald v. Paramount Pictures Corp*. recounts how an eight-page screen treatment took six years to be fully realized, in circumstances that ultimately led to a successful breach of contract lawsuit.[3] The case describes in detail the long process of development of the film "Coming to America" and merits examination.

In *Buchwald,* Art Buchwald, a successful political satirist, used the real-life occasion of a visit by the Shah of Iran to the United States as the basis for a comedy in which an African leader travels to America where he becomes stranded by a coup back home, and ultimately finds happiness living in a Washington D.C. ghetto. Buchwald had submitted an eight-page "treatment"[4] to Paramount Pictures. At the time, Paramount was looking for a movie for comedy star Eddie Murphy.

Buchwald's treatment was one of many potential projects considered by Murphy and by Paramount. As part of the development process that took several years, Paramount engaged a producer, Bernheim, and engaged a director, and assigned a writer the task of creating a screenplay from the

2 The "negative cost," or the cost of production, culminates in the fully completed film's photographic negative from which positive prints can be made and shipped to theaters.

3 See *Buchwald v. Paramount Pictures Corp.*, 1990 WL 357611 (Cal. Super. Jan. 31, 1990) ("Buchwald I") (Phase one of the proceedings found that Paramount breached its agreement with Buchwald. The court's finding on the unconscionability of the studio's net profit accountings was in the unpublished Phase Two opinion).

4 A treatment is a brief outline of the screenplay.

treatment. Paramount spent over $418,000 on screenwriting, option fees, and advances to the potential producer, director, and screenwriter.

Over the next three years, the studio extended its option to use the Buchwald treatment several times. By 1985, it appeared that the project would not happen. Paramount abandoned the treatment, and put it in "turnaround." Buchwald and Bernheim restarted the process at Warner Bros. Studios. In late 1987, Warner cancelled the project because it learned that Paramount was about to produce a film starring Eddie Murphy with a similar story line, titled "Coming to America." For Buchwald, six years had passed during which he received modest option extension fees from both Paramount and Warner, but to no avail.

When Paramount released "Coming to America" in 1988, Buchwald realized Paramount had, in essence, produced a film based on his original treatment. He and Bernheim successfully sued Paramount for Paramount's breach of its original agreement with Buchwald for a share of the film's net profits.[5]

[b]—Pre-Production

Once financing has been obtained and production is guaranteed, the project moves into the pre-production phase. During pre-production, the producers hire cast and crew and plan for production, which includes, for example, making arrangements for locations, soundstages, renting equipment, costumes, and music.

[c]—Principal Photography

Principal photography is the period during which the motion picture is shot, both on location and in the studio. Many last minute changes to the project can be made during the shoot, including changes to the script and even some of the cast members.

[d]— Post-Production

During post-production, the film's raw footage is edited, adding sound effects, special effects, and other technical matters, culminating with the completed final cut "negative." The film is now ready for the creation of prints for distribution to theaters for exhibition.

[e]—"Final Cut"

A studio-produced film will have a planned release date, which serves as incentive for the producer to deliver the final cut to the studio so preparations can be made for distribution and marketing. Given that studio films aim to create audience demand through widespread marketing campaigns, this "prints and advertising" expenditure[6] is typically enormous, sometimes approaching the entire cost of producing the film itself.

The project's financer, often the studio, reserves all rights to the finished and fully edited film, or "final cut" and can override the film's director with respect to editing, changes to the script, and

5 *Buchwald v. Paramount Pictures Corp.*, 13 U.S.P.Q.2d 1497 (Cal. Super. 1990) ("Buchwald II") (Phase two of the proceedings, unpublished). The Buchwald case also presents an accurate portrayal of the slow and uncertain path to production for many films, sometimes taking far more than the six years in the Buchwald case. It is also a good illustration of the "option", an important contractual mechanism. An option secures rights on a contingency basis, with the actual purchase of those rights postponed to a later time, triggered by events such as obtaining the financing to proceed with production. During the entire six-year saga of the Buchwald case, his only operative contract with the studio was an option agreement that netted Buchwald a few thousand dollars. Ultimately, Buchwald was awarded $150,000, and Bernheim received $750,000.

6 The campaigns often consist of shipments of multiple prints of the film to theaters nationwide, along with the advertising campaigns.

even casting of actors.[7] The financer can decide to reshoot scenes or even change the ending, all in an effort to create a financially successful project. Such practices can lead to enormous tensions between the creative and business sides.[8]

[f]—Prints and Advertising

"Prints and advertising" is not actually a "phase" of production, but a description of the process surrounding the theatrical release of the film. Formerly, the distributor would order the manufacture of prints, which consist of several reels of film, for shipment to theaters around the world for the opening weekend. That process has been replaced by digital projection technologies, including secure digital distribution of films to theaters by specialist digital distribution companies. Increasingly gone are the large metal film canisters and the projectors used to exhibit the film.[9]

It is at this point that the company plans the advertising campaign that will precede the release date. The initial publicity campaign can include television and radio ads, Internet ads, social networking, "grass roots" campaigns, print ads and billboards, interviews on talk shows, and tie-ins with other businesses. The advertising plans will start during post-production, if not earlier, and may include some marketing activities during principal photography.

Motion Picture Domestic Distribution Windows[10]

Distribution Medium	Month Availability Begins Following Release Date	Duration in Months for the Window
Theatrical	1 (Release date)	4
Hospitality Industry (Airlines, hotels)	3	2
Home Entertainment – Physical Delivery:		
DVD/Blue Ray Sell Through	4	No limit
DVD/Blue Ray Rental	4	No limit
Netflix via mail/Red Box Kiosks	4 or 5 (per studio policy)	6
Home Entertainment – Digital Delivery:		
Premium Subscription Video on Demand (SVOD)	2 or 3	1
Electronic Sell-through (EST)	3.5 to 4	No limit
Internet Video on Demand (iVOD)	4 to 4.5	No limit
Cable Video on Demand (cVOD)	4 to 4.5	No limit
Premium Pay TV	9 to 10 (formerly 12)	15-18
Ad Supported TV	28 to 30	72 - 84

7 See *Welch v. Metro-Goldwyn-Mayer Film Co.*, 207 Cal. App.3d 164, 254 Cal. Rptr. 645 (1988) (Actress Raquel Welch successfully sued studio that conspired to breach its contract with her by, *inter alia*, replacing her early in the production with no notice and fabricating claims that actress was uncooperative).

8 See also, *TriStar Pictures, Inc. v. Directors Guild of America, Inc.*, 160 F.3d 537 (9th Cir. 1998) (under collective bargaining agreement between DGA and studio, director who was unhappy with studio's cuts to the TV version of his film had the right to request that his name not be used in the credits, and to have the request decided by arbitration).

9 See, e.g. *Stinky Love, Inc. v. Lacy*, 2004 Cal. App. Unpub. LEXIS 7497 (Cal. App. 2d Dist. Aug. 13, 2004) (company formed for sole purpose of financing prints and advertising).

10 See Ziffren, "Domestic Distribution Windows as of 06/30/12," Beverly Hills Bar Ass'n (Aug. 15, 2012). See *Redbox Automated Retail LLC v. Universal City Studios LLLP*, 2009 U.S. Dist. LEXIS 72700 (D. Del. Aug. 17, 2009) (DVD rental kiosk alleging antitrust violations against studios that refused to provide DVDs for rental because release windows allowed other retailers to exclusively sell DVDs for twenty-eight days following release of DVD for consumer purchase). See also, *Warner Bros. Entertainment, Inc. v. WTV Systems, Inc.*, 824 F. Supp.2d 1003 (C.D. Cal. 2011) (discussion of distribution windows).

[2]—Marketing Windows

Marketing and advertising for films are designed to create maximum audience demand on the opening weekend. The ability to "open" a film successfully is the goal of every filmmaker. This intense marketing means that most films make approximately 85% of their entire revenue in the first twenty-eight days after release.

This pressure continues, with several subsequent release "windows" over the next several years following the theatrical release, all designed to gradually "sell" the same movie to the consumer in different formats.

The above "windows" and rights may also be divided into territories of the world.

Changes in the traditional "release windows" continually occur. For example, in order to maximize DVD sales, studios ordinarily release home video formats for sale at least twenty-eight days before the same title is offered for rental. However, some studios have entered into deals with DVD rental companies in which the DVD rental is available the same day as the home video DVD release. In this case, the studio receives a portion of the rental revenue to make up for potentially lost DVD sales.[11]

The timing of release windows for DVD rentals has been a source of contention, and is still of interest as illustrative of studio distribution techniques despite DVD rentals being gradually replaced by online streaming.[12] Redbox is a company that offers DVD rentals at self-serve kiosks. Redbox had been obtaining the DVDs it rented from large DVD distributors, who, in turn, had obtained the DVDs directly from the studios. The distributors supplied the DVDs to Redbox prior to the official "DVD rental" release window. In response, certain studios enforced contractual provisions in their distribution agreements to force the distributors to stop supplying DVDs to RedBox prior to the DVD rental release window. Redbox alleged that these activities constituted a violation of the Sherman Antitrust Act. Such cases illustrate the value of an exclusive distribution window regardless of which technology represents the battle for exclusivity.

New technologies are becoming increasingly important. Several companies (Netflix, Hulu, Amazon, AppleTV, and broadcast and cable networks such as HBO, CBS, etc.) offer online streaming of films on subscription or purchase terms. The success of these business models has allowed online companies to produce new motion pictures and series outside the traditional broadcast and cable models.

§1.03 Project Inception

[1]—Idea Submission

Every film begins with an idea. The idea may be to adapt an existing work such as a novel into a motion picture, or it may be just a concept, such as a film about a historical event. Often, the person with the idea for a film does not have the financial resources to bring it to fruition. Instead, they must begin the classic Hollywood process of "pitching" the idea to a producer or studio or a financier, the one with the resources to turn a mere idea into a motion picture.

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11 See Marcus, "Reasons Not to Shorten Theatrical Windows," The Hollywood Reporter (July 19, 2010) ("Windowed release patterns are brilliant. Release a movie to different outlets over time so it can be sold to the same person multiple times. First see it in the theater, then buy or rent it, then catch it on cable or TV. Shorten the window and risk losing the ability to sell the product multiple times.").

12 See *Redbox Automated Retail LLC v. Universal City Studios LLLP*, 2009 U.S. Dist. LEXIS 72700, 2009 WL 2588748 (D. Del. Aug. 17, 2009).

One of the most common client questions in the film industry is how to protect ideas as they begin the pitch process. Copyright law only protects the original creative expression of an underlying idea.[13] However, ideas *can* be protected under contract law, if the idea is disclosed in circumstances where there is an implied agreement that if the idea is used, the person disclosing the idea will be compensated.

[2]—Non-Disclosure Agreements and Releases Respecting Ideas

The ownership of "ideas" and alleged promises of compensation if those ideas are used as the basis of a film is a bitterly contested area of the industry. To protect themselves, production companies often will not accept unsolicited manuscripts or "take a meeting" with someone unfamiliar. Instead, they will only meet with prospective writers who are represented by a known and trusted agent or lawyer, and/or they will insist that prior to any meeting, the prospective writer sign a release or nondisclosure agreement ("NDA") that acknowledges there is no "deal" in place, no expectation of payment, and releases the producer from any future causes of action based on any allegations that the producer "stole" the idea.[14]

Legal claims resulting from an unauthorized disclosure of confidential information may arise under state law where (1) the plaintiff disclosed confidential and novel information, and (2) the defendant knew it was supposed to be kept confidential.[15]

[3]—Protection of Ideas via Contract: *Desny v. Wilder*

[a]—California

While California does not recognize a property claim in a mere idea, courts will enforce express or implied contracts for payment in exchange for the use of an idea. The leading case is *Desny v. Wilder*.[16] Desny, a screenwriter, contacted the secretary of director Billy Wilder and described his screenplay. After reducing the screenplay to a short treatment at the secretary's suggestion, the plaintiff stated that "if anybody used it they would have to pay for it," to which the secretary replied "if Billy Wilder of Paramount uses the story, naturally we will pay you for it."[17] The court held this to be a valid oral agreement, and also noted that a contract in an idea submission may be implied when the recipient voluntarily accepts the idea, knowing that it is being tendered for a price.[18] The recipient's promise to pay may be made after the idea is submitted, the promise being supported by moral consideration.[19] Furthermore, because California idea submission claims are contract—as opposed to property—claims, the idea need not be novel to be protected.[20]

Although the practice of idea submission is common in the entertainment industry, California law will not recognize an implied contract solely on the assumption that the payment is expected.[21] The mere hope or expectation of payment does not create an inference that a defendant shared

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13 17 U.S.C. §102(b).

14 Submission of unsolicited scripts is an issue for talent agencies as well. See *Gable v. National Broadcasting Co.*, 727 F. Supp.2d 815 (C.D. Cal. 2010) (claims that "My Name is Earl" infringed work originally allegedly submitted via a talent agent, whose policy was not to accept unsolicited scripts). If the writer can get a meeting with a producer, the best he or she may be able to accomplish to protect his or her rights would be to verbally state that if the idea is actually used, he or she looks forward to discussing appropriate compensation terms. An example of such a Release and Covenant, and an NDA, is included in the forms accompanying this treatise.

15 *Montz v. Pilgrim Films & Television*, 649 F.3d 975, 981 (9th Cir. 2011) (citing *Entertainment Research Group, Inc. v. Genesis Creative Group, Inc.*, 122 F.3d 1211, 1227 (9th Cir. 1997)).

16 See *Desny v. Wilder*, 46 Cal.2d 715, 299 P.2d 257 (1956).

17 *Id.*, 299 P.2d at 261.

18 *Id.*, 299 P.2d at 267.

19 *Id.*, 299 P.2d at 269.

20 See *Donahue v. Ziv Television Programs, Inc.*, 245 Cal. App.2d 593, 54 Cal. Rptr. 130, 142 (1966) (implied contract for payment for idea for television series was enforceable, even though the idea was not novel).

21 See *Faris v. Enberg*, 97 Cal. App.3d 309, 158 Cal. Rptr. 704, 709 (1979) (where no intention to pay for a game show idea was established, "an obligation to pay could not be inferred from the mere fact of submission").

that expectation.[22] Further, the relationship of the parties must be considered when determining if an implied contract exists.[23]

Under the *Desny* rule, to show an implied-in-fact contract, the plaintiff must show that he or she "prepared the work, disclosed the work to the offeree for sale, and did so under the circumstances from which it could be concluded that the offeree voluntarily accepted the disclosure knowing the conditions on which it was tendered and the reasonable value of the work."[24] Note also, that the defense of independent creation may be asserted.[25]

Often, there is overlap between unauthorized use based on copyright infringement principles, and implied contract claims based on an implied promise to pay for an idea if used. Because copyright is governed by federal law, it would typically preempt state law claims where the state law rights are "equivalent to any of the exclusive rights within the general scope of copyright.[26] However, the Ninth Circuit held that a *Desny* claim for breach of implied contract is not pre-empted by the Copyright Act, because a *Desny* claim is based not upon rights under copyright, but "upon the implied promise to pay the reasonable value of the materials disclosed."[27]

In 2011, the Ninth Circuit followed the preemption analysis of *Grosso*, holding in *Montz v. Pilgrim Film & Television, Inc*. that a *Desny* claim was not preempted by copyright law.[28] In the wake of *Grosso* and *Montz*, plaintiffs may theoretically bring claims based both on copyright and on a *Desny* "implied contract to pay" theory.[29]

[b]—New York

New York has two theories under which a claim in an idea submission case may be brought: (1) a contract claim, or (2) a property claim of misappropriation. New York courts have established that a novel idea can be protected as contract consideration.[30] However, the idea only needs to be novel to the recipient in order to give it the requisite value to constitute consideration.[31] Thus, New York contract-based idea submission claims require a fact-specific inquiry focusing on the perspective of the buyer.

Alternatively, an idea may be treated as property under a claim of misappropriation. Misappropriation claims arise when an idea is disclosed in confidence and then used in a manner that

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22 See *A Slice of Pie Productions, LLC v. Wayans Bros. Entertainment*, 487 F. Supp.2d 41 (D. Conn. 2007) (following *Desny* and *Grosso*). See also, *Benay v. Warner Bros. Entertainment, Inc.*, 607 F.3d 620 (9th Cir. 2010).

23 See *Blaustein v. Burton*, 9 Cal. App.3d 161, 88 Cal. Rptr. 319 (1970) (close relationship between parties, including sharing an attorney and constant invitations by defendant for plaintiff to disclose his idea, created a "joint venture," indicating an implied contract).

24 See *Desny v. Wilder at* 270 (stating "...if the idea purveyor has clearly conditioned his offer to convey the idea upon an obligation to pay for it if it is used by the offeree and the offeree, knowing the condition before he knows the idea, voluntarily accepts its disclosure (necessarily on the specified basis) and finds it valuable and uses it, the law will ... hold the parties have made an express (sometimes called implied-in-fact) contract, or under those circumstances, as some writers view it, the law itself, to prevent fraud and unjust enrichment, will imply a promise to compensate"). Desny also cautions the "idea man" from "blurting out" a pitch which would not imply any contract (the so-called "elevator pitch"): "The idea man who blurts out his idea without having first made his bargain has no one but himself to blame for the loss of his bargaining power." *Id.* at 269. See also the statement of the Desny rule quoted in the text in *Grosso v. Miramax*, 383 F.3d 965, 967 (9th Cir. 2004).

25 See *Hollywood Screentest of America, Inc. v. NBC Universal, Inc.*, 151 Cal. App.4th 631, 60 Cal. Rptr.3d 279 (2007) (Plaintiffs claimed their concept entitled "Hollywood Screentest" was infringed by defendant's reality show "Next Action Star." Summary judgment granted for defendant based partly on uncontroverted evidence of independent creation). See also, *Spinner v. American Broadcasting Companies, Inc.*, 215 Cal. App.4th 172, 155 Cal. Rptr.3d 32 (2013) (successful independent-creation defense to implied-in-fact contract claim over show "Lost").

26 See 17 U.S.C. § 301. See also, *Del Madera Properties v. Rhodes & Gardner, Inc.*, 820 F.2d 973, 976 (9th Cir. 1987).

27 See *Grosso v. Miramax*, 383 F.3d 965, 968 (9th Cir. 2004).

28 *Montz v. Pilgrim Films & Television, Inc.*, 649 F.3d 975 (9th Cir. 2011).

29 See *Benay v. Warner Bros. Entertainment, Inc.*, 607 F.3d 620 (9th Cir. 2010) ("The Last Samurai").

30 See *Murray v. National Broadcasting Co.*, 844 F.2d 988, 994 (2d Cir. 1988) (the idea of a non-stereotypical black family was not sufficiently novel to give rise to a breach of implied contract claim).

31 See *Nadel v. Play-By-Play Toys & Novelties, Inc.*, 208 F.3d 368, 376 (2d Cir. 2000) (abrogating *Murray* by holding that novelty to the buyer of the idea alone is sufficient to create contract consideration).

breaches that confidence.[32] The idea need not amount to a trade secret in order to be protected under the doctrine of misappropriation. Misappropriation claims require originality and novelty of the idea in absolute terms, because property law does not protect against the use of existing knowledge, which is free and available to everyone.[33]

In *Forest Park Pictures, Inc. v. Universal Television Network, Inc.*, the Second Circuit considered an idea submission/implied contact case, and by allowing the implied contract claim to survive preemption under copyright law, reached a result similar to that of the Ninth Circuit in *Montz v. Pilgrim Films*.[34] In *Forest Park*, the plaintiffs (the actor Hayden Christensen and his brother) alleged they pitched an idea to a television network for a series about a concierge doctor for the residents of a wealthy community that was later developed by the defendant into a successful show, "Royal Pains." The Second Circuit held that the clear "promise to pay" in the pleadings was an extra element that avoided preemption under the Copyright Act. In applying California law to the breach of implied contact analysis, the Second Circuit noted that under California law, an implied-in-fact contract can have an open price term to be filled in by industry standards, while under New York law, price is an essential element of a contract.[35]

[4]—Projects Based on Preexisting Material: Book Option Agreements

Option agreements play a central role at the beginning stages of many film projects, because they put an exclusive "hold" on the rights to a novel or other property, sometimes for a relatively modest sum, for a specified period of time. Any subsequent actual purchase of the rights to the property, the exercise of the option, is deferred until such time as the holder of the option is ready to proceed. In many cases, an ambitious filmmaker may negotiate an option agreement, but never obtain financing, in which case the option is never exercised and all rights return to the owner of the property in question. Any option payments previously received are retained by the property owner. An option agreement must also specify the eventual purchase price in the event the option is exercised. The purchase price will be subject to negotiation, but is usually many multiples of the option fee.

For the filmmaker, a signed book option provides the ability to shop the project to potential financers or studios, and to attract commitments from actors, screenwriters, and directors.

Where a freelance producer options a book, the author may not have any control over the process or where it may lead, and the author may find that the copyrighted book becomes a mere "idea" for a film, pitched to studios as an "idea" instead of a book adaptation. In *Portman v. New Line Cinema Corp.*, a producer optioned the book "Party Crasher's Handbook," including not only the copyrighted book but also the right to develop a film based on the concept of the book. After unsuccessfully approaching a studio and a talent agency to package the film, the producer sued when the hit film "The Wedding Crashers" was released, allegedly based on his pitch and concept. The studio prevailed on statute of limitations grounds, but the decision is unclear as to whether the author of the book was a party to the suit or would have shared in any recovery. The suit was not based on any copyright principles.[36]

In cases where a novel may be a best seller and sought after, the agreement may be styled as a "purchase agreement" where the right to adapt the book is immediately conveyed, and not subject to exercise

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32 See *Lehman v. Dow Jones & Co.*, 783 F.2d 285, 299 (2d Cir. 1986).

33 See *AEB & Associates Design Group, Inc. v. Tonka Corp.*, 853 F. Supp. 724 (S.D.N.Y. 1994) (design for children's airbrush toy was not sufficiently novel to be protected because it was just an adaptation of commercial airbrushes).

34 *Forest Park Pictures v. Universal Television Network, Inc.*, 683 F.3d 424 (2d Cir. 2012).

35 *Id.*, at 435.

36 *Portman v. New Line Cinema Corp.*, 2013 Cal. App. Unpub. LEXIS 1641, 2013 WL 820586 (Cal. App.2d Dist. March 6, 2013).

of options, while still qualifying for additional payments in the event a motion picture is ultimately produced and released.[37]

Premium properties carry with them premium option prices. For example, in *Siegel v. Warner Bros. Entertainment*, the court ruled on whether DC Comics had licensed the film rights to Superman to Warner Bros. at full market rates and conducted a survey of prices paid for high-value option agreements.[38]

Many option agreements are based on less well-known properties, and may be for more modest amounts. The producer pays for an option immediately, but the exercise of the option will not occur until and unless the producer obtains financing for the film. Thus, many producers who negotiate for options are very cautious about the initial option payment price, because the amount is paid directly by them. But when it comes to the purchase price, which would only be exercised in the event funding is obtained, any potential future purchase funds would come from the future investors in the film, not from the producer.

An option agreement contains all the terms and provisions that would be in effect should the option be exercised. Therefore, negotiation of an option agreement is also the negotiation of the full and final deal itself.[39] Some comments on the leading deal points are provided below:

- Property: Defines the work that is being optioned.
- Grant of Option: usually an initial option period of one year (or eighteen months), followed by an Extended Option Period for a similar amount of time, often for a greater amount. Given that options tie up the property and may not be for a large sum, most owners prefer to keep the time period as brief as possible as encouragement to move things along. The initial option fee is applicable against the purchase price (i.e., is an advance against the purchase price). The extended option fee is not applicable, in order to try and incentivize the Purchaser to move quickly.

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37 See *Terry T. Gerritsen v. Warner Bros. Entertainment, Inc.*, 112 F. Supp. 3d 1011 (C.D. Cal. 2015) (purchase agreement for film rights to novel "Gravity" sold for $1 million, with $500,000 production bonus, in suit over whether Warner Bros. hit film "Gravity" was subject to the purchase agreement. Because purchase agreement was not with Warner Bros., defendants' motion to dismiss granted).

38 See *Siegel v. Warner Bros. Entertainment, Inc.*, 2009 U.S. Dist. LEXIS 66115, 2009 WL 2014164 (C.D. Cal. July 8, 2009). The court relied on evidence of option and purchase prices for similar characters. For premium comic book character properties, the court noted that an agreement between Marvel Comics and Twentieth Century Fox for the "X-Men" characters was for an initial option payment of $150,000 against a purchase price of $1.5 million. *Id.*, 2009 U.S. Dist. LEXIS 66115 at *21. The terms for "Tarzan" were a two-year initial option period for $250,000 that could be extended for three years for another $750,000, with a purchase price of $1.75 million, for which the earlier option payments were made applicable. For "Iron Man", there was an eighteen-month option for $250,000, which could be extended one year for another payment of $650,000, with no purchase price payable upon exercise. However, there was also contingent compensation of 1.5% of first dollar gross escalating to 5% and a favorable merchandising component.

In another case opinion discussing the 1993 agreement between Twentieth Century Fox and Marvel Comics for film rights to the "X-Men" comic book series, the purchase price was determined to be $1.6 million, allocated as follows: $150,000 for the initial option period; $100,000 for subsequent extensions of the option period; $1,350,000 to exercise the option. See *Twentieth Century Fox Film Corp. v. Marvel Enterprises, Inc.*, 155 F. Supp.2d 1 (S.D.N.Y. 2001) (studio that had acquired motion picture rights to X-men franchise sued licensor over scope of rights vis-à-vis licensor's television exploitation).

These highly valued options and purchase prices are by way of example, and they apply to comic book characters. Best-selling novels may command greater prices, because their stories and characters are more defined and there may be greater audience anticipation in seeing a best selling story on the screen. Thus, the *Siegel* court's fact finding revealed that regarding the actual purchase prices, best sellers could command enormous sums. Clive Cussler's novel *Sahara* had a purchase price of $20 million plus 10% of producer's gross; Thomas Harris's *Hannibal* received $10 million with 10% of first dollar gross; the musical Annie had a purchase price of $9.5 million and 10% of first dollar gross escalating to 11.5%; and the Tom Clancy works *Rainbow Six* and *Red Rabbit* have a purchase price of $6 million and $7 million respectively and a profit participation of 10% of gross. *Siegel v. Warner Bros. Entertainment, Inc., id.*, 2009 WL 2014164, at *9. See also, *Weisberg v. Smith*, 401 F. Supp.2d 359 (S.D.N.Y. 2005) (case involving dispute between novelist and agent over agent's commission where novelist Gregory John Smith received approximately $1 million from Warner Brothers for film rights to novel entitled "Shantaram.").

39 A Literary Option/Purchase Agreement is included in the forms accompanying this treatise.

- Authorized Pre-Production Activities: Purchaser has the right during the option period to create treatments, screenplays, etc. adapted from the Property, and to own them, whether or not option is exercised. Purchaser may not actually use those materials if the option expires without being exercised.
- Purchase Price/Contingent Compensation: Applies if the option is exercised. Often based on a percentage of the "going in" budget of the film, for example 2% of the approved budget, which shall not be less than $100,000 or more than $350,000.[40] The budget should be discussed, and the percentage and high/low numbers are part of the negotiation. Contingent compensation for a modest book option may be in the range of 3% to 5% of "producer's net profits" or "net proceeds" or some other defined term, often characterized as being no less advantageous than that calculation as used for Producer and all other profit participants. It may be difficult or impossible for someone with little "clout" to get a percentage based on some other more favorable definition of profits than "net profits," but it is a negotiating point.[41] The common understanding is that net profit participation only rarely results in receipt of funds, thus a higher option payment or guaranteed purchase price is sought.
- Bonuses: If possible, negotiate for a "Set up" bonus that pays a flat sum if the film is set up at a studio. Other possible bonuses that are more difficult to get may include a bonus based on gross box office.
- Rights Granted: This will be a comprehensive and extensive list of rights granted. Typically, financers want to see all rights to remakes, sequels, prequels, games, merchandise, television series, worldwide, etc.[42] Unless the book owner has negotiation leverage, it's difficult to limit the rights granted in connection with the film. However, there can be a negotiation for considerable compensation in connection with any sequels, prequels, or television adaptations.
- Rights Reserved: The print publication rights for the book are not conveyed, only the right to adapt the book for film. Other rights that may be expressly reserved include radio, live theater, and musical stage adaptation.[43]
- Reversion: In the event the option is exercised but the film is never completed or distributed, then all rights revert back to the original owner after a set number of years. The Purchaser may attempt to condition such a reversion on reimbursement of all their expenses. The right to produce any sequels or prequels or television adaptations can also be limited in time in order to incentivize the producer to move forward with those projects.[44]
- Credit: Separate card in main titles. Specify the specific language, for example "Based on the book _____ by _____." Specify inclusion in advertising of book title and author name.

[5]—Life Story Rights and Depiction of Real Persons

Many films are based on real events. Individuals depicted in such films fall into two broad legal categories: (1) public figures whose lives and actions are legitimate subjects for public discourse, including films; and (2) private figures who have a reasonable expectation of privacy, an expectation that could be infringed by

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40 This assumes a budget in the range of $5 million to $15 million.

41 For a fuller discussion of contingent compensation and profit participation, see § 1.04[4] *infra*.

42 See, e.g., *Jonesfilm v. Lion Gate International*, 299 F.3d 134 (2d Cir. 2002) (dispute over prequel/sequel rights to film "9½ Weeks" where holder of trademark in motion picture had reserved those rights).

43 See *Paramount Pictures Corp. v. Puzo*, 2012 WL 4465574 (S.D.N.Y. Sept. 26, 2012) (dispute over whether author's estate retained rights to create new prequel/sequel novels based on "The Godfather").

44 In *Siegel v. Warner Bros. Entertainment, Inc.*, the court conducted an analysis of various motion picture agreements in order to determine if the agreement between Warner Bros. and DC Comics was an arm's length transaction. In that opinion, the court focused heavily on reversion clauses as imparting important rights to the grantor because they gave the grantee an incentive to monetize the property as quickly as possible, and ensured that the grantor could reclaim the rights in the event the grantee did not deliver as promised. See *Siegel v. Warner Bros. Entertainment, Inc.*, 2009 WL 2014164, at *19 (C.D. Cal. July 8, 2009). See also, *Beatty v. Tribune Media Services, Inc.*, 2005 WL 6132339 (C.D. Cal. Aug. 10, 2005) (dispute over reversion of film rights for Dick Tracy character).

an unauthorized depiction in a film.[45] The torts that may be asserted by a private individual who finds themselves the subject of a film include defamation, libel, invasion of privacy, public disclosure of private facts, false light, and right of publicity.[46] In addition, plaintiffs who claim that an unauthorized depiction may also invoke the Lanham Act in connection with false endorsement or false advertising, and torts such as intentional infliction of emotional distress.[47]

However, assuming that the subject of a film is likely to be someone who is either a legitimate public figure, or at least someone whose story is a matter of legitimate public interest, and assuming that a film project does not defame the subject with damaging falsehoods, there may be few situations where "life rights" are a legal necessity. In *Sarver v. Chartier*, a former soldier whose story formed part of the basis for the lead character in the film *The Hurt Locker*, sued the filmmakers for defamation, false light, and intentional infliction of emotional distress.[48]

In affirming dismissal primarily under First Amendment principles, the Ninth Circuit noted that the film's protagonist, though only partly based on Sarver's own story, was sympathetic, the portrayal was not "highly offensive," and there was nothing outrageous or extreme in the way the character was depicted, stating "it is not outrageous that [a journalist's] factual account then led to a fictionalized screenplay and film."

Despite the holding in *Sarver* arguably making life rights unnecessary to obtain, , film and television producers will in many cases continue to seek releases from actual persons discussed or depicted in their productions, or will attempt to avoid potential claims by transforming actual persons into composite or fictional characters. However, given the broad protection of the First Amendment, there may also be many situations where such releases and consents are not in fact required, especially where the person depicted is a public figure or has been involved in matters of public interest.

There are however strong creative and commercial incentives for entering into agreements for life story rights, even where the subject is a public figure and thus consent is not required. The principal incentive falls into two categories: first, obtaining exclusive cooperation from the subject or his or her family allows the producer to market the film as the sole and exclusive "authorized" version of the person's story. Second, such agreements typically give the producer unique access to materials that are not otherwise available to the public or to competing filmmakers, including interviews with family and friends, and access to documents, diaries, photographs, and other materials and information not otherwise accessible.

In one recent case, the family of a deceased musician litigated against a documentary filmmaker because they alleged the filmmaker, whose rights were confined to a motion picture, improperly used their confidential materials for preparation of a book. In holding that the book did not use any substantial amount of the materials provided for the film, the court noted some of the exclusive cooperation provided by the musician's family as part of their agreement:

> "In reliance on the Margolis-Rhoads agreement, the Rhoads family contends it contributed access to Randy's musical equipment that had been in storage for 30

45 See, e.g., *Seale v. Gramercy Pictures*, 949 F. Supp. 331 (E.D. Pa. 1996) (former leader of Black Panther party who was portrayed in historically accurate and partially fictionalized docudrama, "Panther," was a well-known public and historical figure. On summary judgment, the court dismissed plaintiff's claims including defamation, tortuous invasion upon private seclusion, right of publicity, and Lanham Act claims connected with the advertising of the film, while allowing Plaintiff's false light claim to go forward based upon one scene in the film that was wholly fabricated and involved assent to criminal acts.).

46 See Chapter 7 *infra* for an in-depth discussion of celebrity rights of publicity and privacy.

47 See generally, Chapter 7 *infra*.

48 See *Sarver v. Chartier*, 813 F. 3d 891 (9th Cir. 2016).

years; personal, private photographs of Randy and other members of the family; personal photographs and film footage of Randy obtained from Rhoads family friends and neighbors; access to Delores's home, access to Randy's automobile, costumes, jewelry and shoes; access to Delores's music school (now operated by Kelle); access to Randy's gravesite (including opening of the bars to the tomb); access to Randy's church and the 'meditation garden' dedicated to his memory; original music and a music school performance; photographs of Randy's deceased body; the autopsy report and introductions to Randy's family and friends, including Osbourne, his wife Sharon and Alice Cooper."[49]

[a]—Appearances by Actual Persons

Actual persons who are not actors may appear in a film under various circumstances.

[i]—Documentary Films, Including Hidden Cameras

By their very nature, documentary films do not hire actors, using real people and events instead, often under the protection of First Amendment principles applicable to news reporting.[50] In some situations where the subject of a documentary film is being investigated, there is clearly no opportunity or likelihood of obtaining any consents or releases. Out of an abundance of caution, documentary filmmakers depicting a "friendly" subject may attempt to obtain consents and releases. While documentary films and television news reporting enjoy strong First Amendment protections, such a practice helps ensure that commercial distribution of the film can proceed with a reasonable expectation that those who appear in the film have provided releases and are therefore unlikely to come forward later with claims based on invasion of privacy or defamation.

Hidden camera techniques used in documentaries and investigative reporting on television, by definition, do not allow for a release or consent to be signed prior to filming. In theory, it is possible to obtain a consent and release after completion. However, assuming such consent is not obtained, hidden camera filming can violate a plaintiff's rights under several legal theories, including invasion of privacy (also known as the tort of intrusion), as well as under criminal "eavesdropping" statutes that prohibit the recording of confidential conversations.[51]

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49 See *Rhoads v. Margolis*, 2015 Cal. App. Unpub. LEXIS 585 (Cal. App.2d Dist. Jan. 26, 2015).

50 See *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964) (reporting on public figures protected by First Amendment). See also: *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 108 S.Ct. 876, 99 L.Ed.2d 41 (1988) (standard of *New York Times Co. v. Sullivan* applies to claims of intentional infliction of emotional distress allegedly caused by parody advertisement ridiculing public figure); *Gertz v. Welch*, 418 U.S. 323, 94 S.Ct. 2997, 11 L.Ed.2d 789 (1974).

51 See *Candelaria v. Spurlock*, 2008 U.S. Dist. LEXIS 51595 (E.D.N.Y. July 3, 2008) (hidden camera in public restaurant did not violate plaintiff's privacy rights under New York Civil Rights Law § 51). In *Candelaria v. Spurlock*, the plaintiff was an employee at McDonald's whom the defendant, using a hidden camera, briefly depicted in the documentary film, "Supersize Me." The plaintiff sued the filmmaker under New York Civil Rights Law § 51 for the allegedly unlawful use of her image. In holding that the newsworthiness exception applied, the court noted:

> "plaintiff was not filmed in her home or any other location in which she could reasonably expect not to be filmed. She was at the counter of a McDonald's, meeting dozens if not hundred of members of the public in the course of her shift every day. She had no reasonable expectation of privacy while doing so."

Id., 2008 U.S. Dist. LEXIS 51595, at *16. Compare, J.P. *Turnbull v. American Broadcasting Cos., Inc.*, 2004 WL 2924590 (C.D. Cal. Aug. 19, 2004) (denying summary judgment to defendant "20/20" television producers on claims including invasion of privacy and intrusion where program surreptitiously recorded plaintiffs' casual conversations as part of hidden camera investigative report, where there was a reasonable expectation that such office conversation would not be covertly taped).

See also: *Sanders v. American Broadcasting Cos., Inc.*, 20 Cal.4th 907, 85 Cal. Rptr.2d 909, 978 P.2d 67 (1999) (covert video taping in workplace by television reporter was an intrusion because employees had an expectation of privacy); *Shulman v. Group W Productions Inc.*, 18 Cal.4th 200, 234-235,